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LEGAL SUBMISSIONS ON RECENT CASE LAW RELATING TO APPROPRIATE ASSESSMENT UNDER HABITAT REGULATIONS ASSESSMENT

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List of Abbreviations

AA	Appropriate Assessment
AR HMA	Arable Reversion Habitat Management Area
CEMP	Construction Environment Management Plan
CHSP	Cleve Hill Solar Park
CJEU	Court of Justice of the European Union (or ECJ)
DCO	Development Consent Order
ExA	Examining Authority
ExQs	The written questions issued by the ExA on 7 June 2019
Ha	Hectares
HMA	Habitat Management Area
HMSG	Habitat Management Steering Group
HRA	Habitat Regulations Assessment
Outline LBMP	Outline Landscape and Biodiversity Management Plan
RIAA	Report to Inform Appropriate Assessment
RR	Relevant Representations
SPA	Special Protection Area

1. INTRODUCTION

- 1.1 The Applicant has noted some of the ExQs and some of the RR touch on key legal principles, and recent case law, relating to the approach to HRA. In order to assist the ExA and other Interested Parties in consideration of biodiversity matters, including the AR HMA, this Legal Submission addresses the relevance (or otherwise) of that recent case law in the context of CHSP.
- 1.2 This submission should be read in conjunction with the Applicant's response to the ExQs, relating to the DCO application for CHSP and the RIAA [**APP-026 and APP-027**]. In particular, paragraphs 26 – 29 in section 3 of the RIAA [**APP-026**] outline the legal framework and the four potential "stages" of HRA, and for brevity the process is not repeated here.
- 1.3 This is not a comprehensive summary of each and every issue raised by Interested Parties, and the fact a particular point is not expressly responded to should not be construed as any form of acceptance of particular points made.

2. RELEVANCE OF PEOPLE OVER WIND (POW)

- 2.1 The Applicant has noted that Additional Submission [**AS-013**] of Anne Salmon of the Local Labour Party refers to 'People over Wind', taken to mean the recent decision in *People of Wind v Coillte Teoranta C-323/17* (commonly referred to as "**POW**").
- 2.2 POW is cited by Ms Salmon in support of her submission that the need for CHSP needs to be explored and it is suggested or inferred that POW is authority for the proposition that "*...there should be over-riding public interest in pursuing the project where it would damage sites including functionally linked land adjacent to RAMSAR sites or Special Areas of Conservation*".
- 2.3 It is important to recognise that the POW case did not directly address, and did not establish any new or different legal principles relating to, when it is necessary to consider if a project is justified by imperative reasons of overriding public interest (**IROPI**). As set out in section

3 of the RIAA [APP-026], an obligation to consider if IROPI exist only arises at "Stage 4" of the HRA process, if the prior conclusion to the AA at "Stage 2" of the HRA process is that there would be an adverse effect on the integrity (**AEOI**) of a relevant European site, or that this risk cannot be excluded beyond reasonable scientific doubt.

- 2.4 In this regard, the Applicant stands by the conclusions evidenced in its RIAA, namely that there would be no AEOI in respect of the Swale SPA/Ramsar site. Accordingly, Stages 3 & 4 are not engaged and, without prejudice to the Applicant's position on IROPI, it is not necessary to consider that point. While certain issues remain under discussion with Natural England, the Applicant notes there is no suggestion by Natural England at this stage that it is necessary in this case to consider Stages 3 (alternatives) and 4 (IROPI and compensation) of the HRA process.
- 2.5 In the interests of clarity, it should also be noted that the approach to be taken where a project is on 'functionally linked land' adjacent or near to, but not within, a European site was not at issue in POW. The need to consider 'functionally linked land' has been considered in other cases, such as *Holohan and others v An Bord Pleanala* C-461/17, and this is addressed in section 4 below).
- 2.6 The issue in POW was whether, and in what circumstances, mitigation measures can be considered when carrying out 'screening' (Stage 1) to determine if an AA is necessary and what the scope of the AA should be. In POW, the CJEU held that mitigation measures cannot be relied upon at Stage 1 in order to avoid undertaking an AA or to limit the scope of AA.
- 2.7 The Applicant has been mindful of the POW case throughout, as reflected in the approach adopted in the RIAA, which refers to and notes the implications of POW at various points (see for example paragraph 19, on p5). As the Applicant does not seek to rely on mitigation to avoid or limit the scope of AA, it is not considered that anything turns on the POW case.

3. AA: GENERAL PRINCIPLES AS TO LEVEL OF CERTAINTY REQUIRED

- 3.1 The most recent CJEU cases of *Grace and Sweetman v An Bord Pleanala* and *Holohan and others v An Bord Pleanala* are addressed in section 4 below, but to a greater or lesser extent, both involve the re-statement and/or application of key principles of the HRA process established in earlier cases, in particular on the required level of evidence and certainty when undertaking AA.
- 3.2 The approach to HRA and in particular Stages 1 and 2 (screening and AA) has been considered in a number of cases at European and domestic level, which have established the parameters of the exercise and evidential requirements. The key cases and principles derived therefrom was recently, and very usefully summarised in *R (Mynydd & Gwynn Ltd) v Secretary of State for Business, energy, & Industrial Strategy* [2018]¹. Drawing on that, and other cases, the key principles relevant here are as follows:
- 3.2.1 The need for AA is triggered where the plan or project is likely to have a significant effect on the site's conservation objectives².
- 3.2.2 In the light of the precautionary principle, a project is likely to have a significant effect so as to require an AA if the risk cannot be excluded on the basis of objective information³.

¹ EWCA Civ 231, see paragraphs 8 and 9.

² Waddenzee, C-127/02 at [42].

³ Waddenzee at [44]

- 3.2.3 As to the AA, "appropriate" indicates no more than that the assessment should be appropriate to the task in hand, that task being to satisfy the responsible authority that the project will not adversely affect the integrity of the site concerned. It requires a high standard of investigation, but the issue ultimately rests on the judgement of the authority⁴.
- 3.2.4 The question for the authority (in simple terms) is: "*What will happen to the site if this plan or project goes ahead; and is that consistent with maintaining or restoring the favourable conservation status of the habitats or species concerned?*"⁵
- 3.2.5 Following assessment, the project in question may only be approved (at Stage 2) if the authority is convinced that it will not adversely affect the integrity of the site concerned, or if the requirements of Stages 3 & 4 are met. Where doubt remains at Stage 2, authorisation would have to be refused (subject to Stages 3 & 4)⁶.
- 3.2.6 Absolute certainty is not required. If no certainty can be established, having exhausted scientific means and sources it will be necessary to work with probabilities and estimates, which must be identified and reasoned⁷.
- 3.2.7 A party who alleges that there was a risk which should have been considered by the authorising authority so that it could decide whether that risk could be excluded on the basis of objective information must produce credible evidence that there was a real, rather than a hypothetical, risk which should have been considered⁸.
- 3.2.8 The decision-maker must consider secured mitigation and evidence about its effectiveness⁹.
- 3.3 Drawing matters together, the courts recognise that a degree of uncertainty is inherent to any assessment process as it necessarily involves prediction and modelling in an effort to assess what is likely to happen in the real world. In a prior assessment, there is never, or rarely, absolute certainty, which leading case law on the HRA process accepts is "*almost impossible to attain*"¹⁰.
- 3.4 For that reason, the assessment should be informed by expert assessment, but it necessarily involves the exercise of judgment¹¹. The competent authority must be "certain" there would be no AEOI, but in practice that means there should not be "reasonable scientific doubt"¹². Doubts must be reasonable and scientific (i.e. evidence-based). In essence, the competent authority is carrying out a risk based assessment and must exercise judgement¹³. In the real world, the best available evidence is often imperfect and it is necessary to rely on prediction, taking a precautionary approach where evidence is limited.

⁴ R (Champion) v North Norfolk District Council [2015] UKSC 52, Carnwath at [41].

⁵ Sweetman v An Bord Pleanala Case C-258/11, Advocate General at [50].

⁶ Waddenzee at [56 - 57]

⁷ Waddenzee, Advocate General at [107] and [97], endorsed in Champion and in Smyth v Secretary of State [2015] EWCA Civ 174.

⁸ Sullivan LJ, at paragraph 37, R (Boggis and Anor) v Natural England, [2009] EWCA Civ 1061

⁹ Commission v Germany C-142/16, at [38]

¹⁰ Waddenzee C-127/02, at para 107.

¹¹ Smyth v SSCLG [2015] P.T.S.R. 1417, at [83]

¹² Waddenzee, at paragraph 61.

¹³ R (Champion) v North Norfolk District Council [2015] UKSC 52 at para 41:

4. GRACE-SWEETMAN, HOLOHAN & CASES INVOLVING 'FUNCTIONALLY LINKED LAND'

- 4.1 In *Holohan and others v An Bord Pleanala* C-461/17 (Holohan), the CJEU was asked to clarify various questions relating to the scope of an AA, including the extent to which habitats and species located outside a European site need to be considered.
- 4.2 The CJEU confirmed, in short, that the implications of a given project for habitat types and species located outside the boundaries of a European site should be considered, provided that those implications are liable to affect the conservation objectives of the site in question.
- 4.3 The need to consider the implication of impacts on habitat and species outside an SPA but used by qualifying species of that SPA is recognised by the Applicant and has been accounted for throughout the RIAA (see paragraphs 77 – 83, for example). *Holohan* does not give rise to any new principle or issue that has not been appropriately accounted for in the RIAA, and that case is not considered to have any material implications for the approach taken in, and the conclusions of, the RIAA.
- 4.4 In *Grace and Sweetman v An Bord Pleanala* (Case C164/17) (**Grace/Sweetman**), the CJEU considered the legal distinction between 'mitigation' and 'compensation' for HRA purposes. This case does not establish any new legal principle - the CJEU essentially followed its previous rulings that only mitigation measures can be considered in the assessment under Article 6(3). But the case provides some helpful guidelines as to the factors which guide what is permissible as mitigation, and what is likely to be regarded as compensatory measures.
- 4.5 Drawing on its previous rulings (see section 3 above) that an AA must contain complete, precise and definitive findings and conclusions capable of removing reasonable scientific doubt as to effects on the protected area, the CJEU noted that an inherent feature of compensation is that the positive effects of compensation are 'highly difficult to forecast with any degree of certainty and, in any event, will only be visible several years into the future'¹⁴. In short, compensatory measures tend to be highly uncertain.
- 4.6 In contrast, mitigation measures are expected to be effective, in the sense that the decision-maker should be certain beyond reasonable scientific doubt as to the efficacy of the measure. For the reasons set out in section 3 above, that does not mean absolute certainty, rather an evaluative judgement is required based on evidence or, where there are gaps, using reasoned probabilities and estimates, which must be identified.
- 4.7 The Applicant submits that the evidence it has presented, in particular the RIAA, the Outline LBMP [APP-203] and its responses to ExQs 1.1.27 and 1.1.29, provides the necessary level of certainty, taking account of the scope for further measures via the HMSG, that the AR HMA would be effective.
- 4.8 Additionally, it is important to have in mind the essential context of *Grace/Sweetman*, which is that it related to construction of a wind farm and ancillary development within the boundary of an SPA, resulting in the permanent direct loss of 9 Ha of habitat within the SPA, and the unavailability of a further 162.7 Ha of habitat within the SPA due to displacement effects of the turbines.
- 4.9 In the circumstances of *Grace/Sweetman*, the CJEU identified that mitigation is typically aimed at avoiding or reducing effects. In *Grace/Sweetman*, the proposed species and Habitat Management Plan were considered through this lens, and it had to be acknowledged that

¹⁴ C-164/17, Advocate General Opinion.

none of the measures would avoid or reduce the direct effects on the SPA itself, given the location of that project within the boundary of the SPA in question.

- 4.10 It is submitted that this is a fundamental differentiating factor with CHSP, which albeit on 'functionally linked land', is not within the Swale SPA / RAMSAR site, and would not result in any direct loss of habitat which forms part of that SPA. Habitats outside an SPA are not part of the SPA and the conservation objectives of the SPA are not directed at the maintenance or restoration of those habitats per se.



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