
APPENDIX 1
SUBMISSION ON THE HABITATS DIRECTIVE AND HOW IT APPLIES TO THIS SCHEME

1. Reason for the submission

- 1.1. I am concerned that the Habitats Directive is not being properly applied from discussion with other objectors, reading some of the submissions (listed at paragraph 2.3) and attendance at the Inquiry. The primary purpose of the Habitats Directive is to prevent the loss of existing priority habitat sites whenever possible by requiring alternative solutions to be adopted. I do not intend to go through the evidence that has been presented to this Inquiry but merely to make a few observations and comment on relevant case law (copies of cases mentioned have been supplied).

2. Background
The Habitat Directive CD/5.9 (summary)¹

- 2.1. The Habitats Directive was adopted in 1992. Its aim is to protect the most seriously threatened habitats and species across Europe, and it complements the EC Directive on Wild Birds (79/409/EEC) (the 'Birds Directive') adopted in 1979. These Directives established the European framework for the conservation of wild birds and natural habitats and provide the regulatory framework of the 'Natura 2000' network of protected sites.
- 2.2. Sites designated under the Habitats Directive are labelled Special Areas of Conservation (SAC). Article 6 both imposes general obligations with regard to the conservation of, and avoidance of deterioration to SAC, and provides a form of development regime, stipulating when and on what basis 'plans and projects' with negative effects on the site may or may not be permitted by a 'competent authority'. The Conservation of Habitats and Species Regulations 2010 came into force on 1 April 2010. These Regulations consolidate the Habitats Directive (92/43/EEC) on the conservation of natural habitats and of wild fauna and flora into national law.
- 2.3. Documents considered:
- CRCL/P/10/E CRCL update in relation to Natural England (NE) OBJ/246/3
 - CRCL/INQ/60 The Conservation of Habitats and Species Regulations 2010, as applied to the Order Application
 - OBJ/246/1 Statement of Case of NE
 - OBJ/246/2 Letter to the Inspector, notifying that NE do not wish to be present at the Inquiry but wish to continue to assist the Inquiry
 - OBJ/246/3 Written Submission
 - OBJ/246/4 Advice on the Bat Mitigation Plan (version 2)
 - OBJ/246/5 Update in relation to CRCL/P/10/E
 - OBJ/246/6 Update in relation to CRCL/INQ/48, CRCL/INQ/60, CRCL/INQ/61
 - CRCL/INQ/72 Summary of information provided for habitats regulations assessment in relation to Oxford Meadows SAC
 - CRCL/INQ/73 CRCL's position statement on NE's objection in relation to bats in their natural range
 - CRCL/INQ/74 CRCL's position statement on NE's objection in relation to the effects of air emissions on SSSI

¹ Taken from the Judgement of Mr Justice Owen, in the *Akesta and others v Defra and others* case discussed in paragraph 4, and the explanatory note to The Conservation of Habitats and Species Regulations 2010

- 2.4. In brief, Natural England (NE), in its capacity as a non-departmental Government body, statutory consultee and advisor on biodiversity, was consulted by the Department for Transport.² In NE's Statement of Case, NE states that the proposals as submitted by Chiltern Railways (CRCL) do not contain enough information on the likely effects on the SAC, either alone or in combination with other plans or projects. Concerns include the increase in trains next to the SAC and the number and speed of trains through Wolvercote Tunnel.³
- 2.5. On 30 September, NE wrote to the Inspector to say that it would not attend the Inquiry but wished to continue to assist the Inquiry as far as possible.⁴
- 2.6. In OBJ/246/3, NE expresses surprise and disappointment that CRCL has withdrawn its monitoring and mitigation plan that had previously been agreed "as necessary and appropriate as part of a precautionary approach" and "due to the unpredictability of the effects of increasing NO_x deposition".⁵ NE remains concerned about hibernating bats and potential collisions with trains and that populations of great crested newts will become fragmented by the increase in train numbers.⁶
- 2.7. In OBJ/246/4, NE continues to show concern and asserts that as there is a lack of baseline survey evidence it is difficult to appraise the impacts. 40 mph is also quoted as the point at which mortality to bats is likely to increase.⁷
- 2.8. In OBJ/246/5, NE continues to maintain its objection to the impact on air quality and states that further information is required "to inform any appropriate assessment on Oxford Meadows SAC" although NE, after consultation (presumably with a third party), recognises that the increase in air pollution is unlikely to have a significant effect on *Apium Repens*.⁸
- 2.9. In OBJ/246/6, NE continues to maintain its objections that there is not enough information to allow a screening assessment for likely significant effect or a full Appropriate Assessment and warns that the lack of information may cause a licence application to fail.
- 2.10. CRCL has made various representations and presented various further modelling and predictions. From the evidence currently before this Inquiry, no actual measurements of air quality have been made.

3. Can Chiltern Railways act as the 'competent authority'?

The Conservation of Habitats and Species Regulations 2010 (CD/5.30).

- 3.1. Much of Straker QC's discussion in CRCL/INQ/60 is about Part 6 of the above Regulations which is provided below in italics below together with my comments (not in italics):

Assessment of implications for European sites and European offshore marine sites
61.—(1) *A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—*

² OBJ/246/1, paragraph 3.1

³ OBJ/246/1, paragraph 5.3

⁴ OBJ/246/2

⁵ Paragraph 2.3 and 2.9, also see CRCL/P/10/E, paragraph 2.4

⁶ Paragraphs 3.1 and 3.2

⁷ Paragraphs 1.2 and 5.1

⁸ Paragraphs 4.1, 6.1 and 2.1

(a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and
(b) is not directly connected with or necessary to the management of that site,
must make an appropriate assessment of the implications for that site in view of that site's conservation objectives.

- 3.2. To understand this section, we must determine what is meant by the 'competent authority'. Straker QC has interpreted this at 2.20(c) as the Secretary of State. Part 1 (Introductory and general provisions), Regulation 7 (Competent authorities) defines the "competent authority" broadly as including

7(1)(a) "any Minister of the Crown (as defined in the Ministers of the Crown Act 1975), government department, statutory undertaker, public body of any description or person holding a public office".

"Public body" is further defined in 7(3)(a) to include

"any local authority, joint board, joint committee or National Park authority"

(2) A person applying for any such consent, permission or other authorisation must provide such information as the competent authority may reasonably require for the purposes of the assessment or to enable them to determine whether an appropriate assessment is required.

- 3.3. The Department for Transport consulted NE which has throughout the Inquiry maintained that not enough information has been provided to allow the 'competent authority' to determine whether an appropriate assessment is required.

(3) The competent authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority specify.

- 3.4. In CRCL/INQ/75, CRCL asserts that NE should exercise its regulatory role and licensing role "impartially and without prior determination" and to say that a licence application on the evidence submitted to the Inquiry is likely to fail carries a suggestion of pre-judgement or pre-determination. CRCL go on to assert that "the views of Natural England are to be given less weight than would be the case if officers of Natural England appeared and exposed their views to cross-examination. Natural England choose to deny the Inspector and the Secretary of State the benefit of having their views tested."⁹

- 3.5. The above assertion could be interpreted that Chiltern sees itself in the role of the 'competent authority'.

- 3.6. As Defra is the central government department responsible for ensuring that the UK's obligations under the Habitats Directive are fulfilled perhaps CRCL might have considered also consulting with Defra. CD/1.16, Chapter 8, paragraph 8.2.1 lists the bodies that were consulted and Defra, Oxford City Council and Oxfordshire County Council are not on the list.

(4) They must also, if they consider it appropriate, take the opinion of the general public, and if they do so, they must take such steps for that purpose as they consider appropriate.

- 3.7. It is also up to the competent authority to decide if the general public need to be consulted.

(5) In the light of the conclusions of the assessment, and subject to regulation 62 (considerations of overriding public interest), the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be).

⁹ Paragraph 2 and 3

- 3.8. If Chiltern Railways is the ‘competent authority’ then it is under a duty, under Section 9(5), to “have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions”.

(6) In considering whether a plan or project will adversely affect the integrity of the site, the authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which they propose that the consent, permission or other authorisation should be given.

4. *Akester and Melanaphy v Defra, Wightlink Ltd and others* [2010] EWHC 232 (Admin)

- 4.1. The *Akester* case challenged the legality of a decision by Wightlink Ltd, a ferry operator between England and the Isle of Wight, to introduce a new class of ferries. In this case, Wightlink Ltd acted as the ‘competent authority’ and it was found to be in breach of its duties as competent authority under Article 6(3) of the Habitat Directive and Habitats Regulations. In particular:
- (a) Wightlink could not reasonably have arrived at the decisions it did in the face of the formal advice from Natural England, the Wednesbury reasonableness argument¹⁰; and
 - (b) the decision was driven by a commercial imperative.
- 4.2. Whilst Wightlink was not obliged to follow the advice given by NE, it was under a duty to consider it. As NE’s role is as the appropriate national conservation body, considerable weight should be given to its advice and there need to be “cogent and compelling reasons for departing from it”.¹¹ Without these, doubt remains as to whether introduction of the new ferry services would have adverse effects on the protected sites. The decision needs to be considered in context and in the case of Wightlink Ltd, the decision was driven by commercial considerations.¹²
- 4.3. If CRCL is acting as the ‘competent authority’, it is driven by commercial considerations; the profit it asserts it will make and that the Department for Transport has extended its franchise to the full 20 years on the basis of the investment in the Order Scheme. Therefore close scrutiny would be needed of CRCL decisions to make certain that it was not in breach of its duties as competent authority.

5. *Morge (FC) v Hampshire County Council* [2011] UKSC 2

- 5.1. This case is about Hampshire County Council’s plans for a bus way along the path of an old railway line which was last used in 1991. Along the route there are a number of designated conservation sites and the railway line itself is thickly overgrown and provides an ecological corridor for various flora and fauna. NE objected to the scheme due to the impact on bats.
- 5.2. Bats are European Protected species falling within Annex IV(a) of the Habitats Directive. No bat roosts were found along the route although some trees could have provided roosts. The primary importance of the route was for foraging. Lord Brown considered that the European Habitats Directive¹³ as protecting species not specimens of these species. Therefore the impact was deemed not significant enough to stop the bus route.

¹⁰ The usual example given is if a teacher is dismissed solely on the grounds of having red hair

¹¹ Paragraph 112

¹² Paragraph 121

¹³ Article 12(1)

- 5.3. However, the decision probably would have been different if a colony of bats had existed along the route. Lord Kerr, who would have allowed the appeal and quashed the planning permission, recognised the adverse effects of light and noise on bats. He recognised that the Directive:

“is designed to protect species (not specimens of species) and its focus is on the protection of species rather than habitats, although, naturally, if major intrusions on habitats is involved, that may have an impact on the protection of the species. Not every disturbance will constitute a breach of the article. The nature and extent of the disturbance must be assessed on a case by case basis.”¹⁴

6. *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Case C-127/02*

- 6.1. The *Waddenzee* case set the benchmark for interpretation of the Precautionary Principle when considering protected sites under the Habitats Directive. It was held that approval for a plan or project could be given only where the authorities were certain that the integrity of the site would not be adversely affected. This stage could only be reached where no reasonable scientific doubt remains that such effects would occur.¹⁵
- 6.2. The *Waddenzee* was designated a national natural site in 1993 with the objective of sustainable protection and development of that sea as a natural site, in particular, feeding, nesting and resting for birds frequenting the site. The case concerned shellfish fishing and the restrictions on cockle fishing. There was a plan to expand cockle fishing and as the license was renewed each year, it became subject to appropriate assessment under Article 6 of the Habitats Directive. Clarification was required as to whether there was a distinction between Article 6(2) which relates to existing use and Article 6(3) which applies to new plans or projects. It was decided that even though something has been done for many years, if there is the trigger for an assessment (an issue of a new licence), then an assessment of the plan or project falls within the meaning of Article 6(3) of the Habitats Directive. This establishes:

“a procedure intended to ensure, by means of a preliminary examination, that a plan or project which is not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site, while Article 6(2) of that directive establishes an obligation of general protection consisting in avoiding deterioration and disturbances which could have significant effects in the light of the Directive’s objectives, and cannot be applicable concomitantly with Article 6(3)”¹⁶

- 6.3. National authorities are only meant to authorise a plan or project if they have made certain that it will not adversely affect the integrity of that site and if there remains no reasonable scientific doubt as to the absence of such effects. This would not be the case if the plan or project was authorised in the face of uncertainty as to the possibility of adverse effects for the site concerned.
- 6.4. In *CRCL/INQ/75*, Chiltern asserts that no licence is required for the running of trains.¹⁷ This is not a decision that Chiltern can make unilaterally. In any event, Chiltern claims that the “necessary monitoring has not identified any suggestion that the running of trains through tunnels adversely affects bats”. Again, it is not for Chiltern to conclude this from the (lack of) evidence.

¹⁴ Paragraph 77

¹⁵ Paragraph 10, 44, 45 and 57

¹⁶ Operative part of the judgement, paragraph 2

¹⁷ Paragraphs 21 and 23

7. Conclusions

- 7.1. Chiltern Railways may be acting as the 'competent authority'. As its actions may be driven by commercial considerations, it is not the appropriate body to assess whether or not there will be an adverse impact on either bats in Wolvercote Tunnel or the flora and fauna in Oxford Meadows.
- 7.2. The competent authority needs to have sufficient information to make a screening assessment as to the possible impact of the Order Scheme on any site offered protection by the Habitats Directive.
- 7.3. The evidence from Natural England should not be given less weight merely because it did not appear at the Inquiry. It is not clear if any formal request was made for its appearance.
- 7.4. As a government body, the Department for Transport, who have cleared many aspects of the Order Scheme, has also not attended the Inquiry to answer objectors concerns.
- 7.5. Any effect of the Order Scheme needs to be considered in relation to the impacts of other plans or projects, which will also include any plans or projects that involve the railway line of the Order Scheme as well as the Great Western line.
- 7.6. **CRCL has not provided enough evidence for an assessment to be made of the impact of the Order Scheme, either on its own, or in combination with other plans and projects.**