APPENDIX 8

Further information relating to Question 26

1. Relevant case law makes it clear that in applying the relevant tests of the Habitats Regulations, there is a need for certainty, both regarding the nature and extent of predicted effects on integrity and in relation to the effectiveness of any preventative measures relied upon. Enshrined within the Habitats Directive and Regulations (though not explicitly set out in either), based upon article 191 of the Treaty on the Functioning of the European Union, is the need to apply the Precautionary Principle when assessing the risks posed to the integrity of the site/s. If a risk of significant effect to the integrity of a site cannot be excluded on the basis of objective information, then application of the precautionary principle requires no consent to be given for such a plan or project.

2. The Precautionary Principle is not however without limits. It cannot be based on a purely hypothetical approach founded simply on conjecture. A preventive measure, may be taken only if the risk appears to be adequately backed up by scientific data available at the time the measure is taken.

3. The document titled “Communication from the Commission on the Precautionary Principle” (2000) provides useful guidance in relation to the application of the Precautionary Principle in relation to European sites issues. Paragraph 6, sets out the six key matters for consideration when applying the Precautionary Principle. Paragraph 6 states:

   “Where action is deemed necessary [emphasis added], measures based on the precautionary principle should be, inter alia:
   - proportional to the chosen level of protection,
   - non-discriminatory in their application,
   - consistent with similar measures already taken,
   - based on an examination of the potential benefits and costs of action or lack of action (including, where appropriate and feasible, an economic cost/benefit analysis),
   - subject to review, in the light of new scientific data, and
   - capable of assigning responsibility for producing the scientific evidence necessary for a more comprehensive risk assessment.”

4. Under these bulleted points, the guidance gives specific definitions in relation to each of the above at pages 4 and 5, with further detail provided within section 6.

5. In accordance with the Communication from the Commission it is clear that when they are deemed necessary, risk reduction measures should be proportionate and must not aim at zero risk. It is stated at section 6.3.1 of the Communication from the Commission that:

   “The measures envisaged must make it possible to achieve the appropriate level of protection. Measures based on the precautionary principle must not be disproportionate to the desired level of protection and must not aim at zero risk, something which rarely exists. However, in certain cases, an incomplete assessment of the risk may considerably limit the number of options available to the risk managers.”

   [emphasis added]
6. With reference to not aiming “at zero risk” in applying the precautionary principle, the judgement of the Appeal Court in the case of Morge vs Hampshire County Council [2010] EWCA Civ 608 is relevant. Lord Justice Ward considered what the level of disturbance was required in the Article 12(1)(b) and at paragraph 35 he described the level or risk of threatened habitat and species stating that:

“... It must be certain, that is to say, identifiable. It must be real, not fanciful.”

7. This is understood to mean that for the level of risk to be real and identifiable, it must be based upon objective evidence to substantiate the risk. Ecology Solutions does of course note the legal tests as set out within the case law described above and the need for certainty as to the absence of effects (for example). However, as part of the assessment process, in considering the available scientific information it is necessary to assess real (identifiable) risks as opposed to those of a hypothetical nature with no scientific grounding.

8. It is acknowledged by Ecology Solutions that this case went before the Supreme Court [2011] UKSC 2 where Lord Brown was not in agreement with all parts of Lord Justice Wards' judgement, but nevertheless did not expressly disagree with paragraph 35.