



Circular Letter SEA 1/08 & NPWS 1/08

15 February, 2008

Appropriate Assessment of Land Use Plans.

A chara,

I have been asked by the Minister for the Environment, Heritage and Local Government, to refer to the recent ruling against Ireland in Case 418/04 EC Commission v Ireland. The ruling relates to Ireland's transposition and implementation of the Birds Directive 79/409/EEC, as well as its implementation of relevant articles of the Habitats Directive 92/43/EEC.¹

Overview of Court findings

The findings of the Court in its lengthy judgment have major implications for the way in which Ireland protects areas important for birds, both designated and undesignated, and by implication, habitats requiring protection under EU law.

In broad terms, the ruling is expected to require legislative change to complete the transposition of the Directives. Additional designations, or re-designations, of areas as Special Protection Areas for birds are also required: this work is already underway.

The ruling also indicates that Ireland must take all reasonable targeted measures in striving to prevent deterioration of areas important to birds.

Finally the ruling also requires a more robust and thorough application by all consent authorities, including planning authorities, of the requirement to do an appropriate assessment of the ecological implications of any plan or project, whether within or outside a designated site, which does not directly relate to the management of the site but may impact upon its conservation objectives.

Appropriate assessment of land use plans

The ruling among other things clarifies that Ireland has not correctly transposed Article 6(3) and (4) of the Habitats Directive 92/43/EEC by not providing explicitly for appropriate assessment of land use plans, as opposed to projects (paras 222 to 234 of the ruling). The implications of the ruling are as follows.

Screening for possible impacts

Any draft land use plan (development plans, local area plans, regional planning guidelines, schemes for strategic development zones) or amendment/variation to it proposed under the

¹ A link to the judgement is available at: <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-418/04&datefs=&datefe>

Planning and Development Act 2000 (as amended) must be screened for any potential impact on areas designated as Natura 2000 sites (normally called Special Areas of Conservation (SACs) or Special Protection Areas (SPAs)).

This screening should be based on any ecological information available to the authority and an adequate description of the plan and its likely environmental impacts. This should take into account any policies that will set the terms for future development. Up to date maps of Natura 2000 sites, or areas proposed for designation, are available on www.npws.ie. The results of the screening should be recorded and made available to the public.

In any case where, following screening, it is found that the draft plan or amendment may have an impact on the conservation objectives of a Natura 2000 site or that such an impact cannot be ruled out, adopting a precautionary approach-

- an appropriate assessment of the plan must be carried out and
- in any case where a strategic environmental assessment (SEA) would not otherwise be required, it must also be carried out.

What is an appropriate assessment?

An appropriate assessment means an assessment, based on best scientific knowledge, by a person with ecological expertise, of the potential impacts of the plan on the conservation objectives of any Natura 2000 site (including Natura 2000 sites not situated in the area encompassed by the draft plan or scheme) and the development, where necessary, of mitigation or avoidance measures to preclude negative effects. The impacts assessed must include the indirect and cumulative impacts of approving the plan, considered with any current or proposed activities, developments or policies impacting on the site. The potential impacts of policies outside Natura 2000 sites but potentially impacting upon them (known as 'ex situ' impacts) must also be included in the assessment.

In order to meet the requirement of the Court that determinations are based on best scientific knowledge, planning authorities should ensure that those carrying out the assessment have sufficient expertise and experience in relation to the ecological or other (e.g. hydrological) issues concerned and disclose an appropriate regard for the latest and most appropriate scientific methodology and assessment procedures.

Role of the Department

The National Parks and Wildlife Service (NPWS) of the Department has a formal consultation role (through the Development Applications Unit (DAU)) as part of the screening and assessment process. It will endeavour as far as possible to indicate areas of potential concern and possible mitigation or avoidance measures. It should be noted however that consulting the Department during the screening process or referring a draft plan or amendment to the Department does not amount to an appropriate assessment.

Co-ordination with Strategic Environmental Assessment

The appropriate assessment should be published concurrently/jointly with the SEA of the plan or amendment but should be clearly distinguishable from it. It is probable that some of the information contained in the SEA will be repeated in the appropriate assessment.

The SEA should also look at wider biodiversity issues arising from its proposed implementation, including impacts on other areas of importance for nature, including (proposed) Natural Heritage Areas and Nature Reserves and undesignated habitats of EU importance and areas important for birds. For example, appropriate policies should be included to ensure the mitigation of the potential impacts of windfarm developments on upland areas, which may be important for certain species of birds. These biodiversity issues should already have been identified, along with any necessary mitigation measures, when undertaking the accompanying appropriate assessment.

Incorporation of outcomes of appropriate assessment.

Any mitigation measures or measures proposed to avoid impacts on Natura 2000 sites should be incorporated into the policy or detail of the draft plan before finalisation.

Implications of a negative or inconclusive assessment

Notwithstanding the proposed mitigation measures or other proposals to avoid impacts contained in the appropriate assessment, the assessment based on best scientific knowledge may be that there continues to be the potential for a significant adverse impact on the integrity of a Natura 2000 site, or reasonable doubt about the potential for such an impact, having regard to its conservation objectives, if the plan as drafted is implemented.

In that event, a decision giving approval to that part of the plan cannot be given², unless a series of steps are carried out. These are:

- The examination of alternative solutions, including the option of not adopting that policy or other part of the plan. While the Directive suggests this step here, planning authorities are advised to examine alternative solutions and record their conclusions at the earlier stage of carrying out the assessment, so as to ensure that delays do not arise later.
- If it is determined that no alternative solution is preferable, for example, because any other solution would have more significant impacts on a Natura 2000 site, it will be necessary to establish that there are imperative reasons of overriding public interest, including those of a social or economic nature, if the plan or amendment is to be approved. Where a plan or amendment would impact on a habitat of “priority” importance in a Natura 2000 site designated for it (such habitats are indicated in the Annex I of the Habitats Directive with an asterisk), approval can only be granted for reasons of human health and public safety.
- In certain cases the provision of compensatory sites may also be proposed. Compensatory measures (normally improving or recreating habitat outside a Natura 2000 site) are a last resort and may be considered only when a decision has been taken to proceed with a plan or amendment despite its negative impact on the site and having regard to every proposed mitigating measure. This can happen only in the very exceptional circumstances set out in Art 6(4) of the Habitats Directive. The NPWS must be consulted in any case where such compensatory measures are considered.

It should be noted that the European Commission must be informed of any instance where compensatory measures are applied, and in certain circumstances, must approve their application. The Department should therefore be advised in writing (through the Development Applications Unit) of any instance where it is proposed to apply compensatory measures.

These steps must be followed in advance of a decision being taken to adopt the part of the plan about which the assessment is negative or inconclusive. In the event that this approach is followed, it is critical to record every decision taken, and the basis for it in detail.

Transitional measures

Planning authorities should apply the above procedure in advance of adopting any draft plan or amendment published after the date of this circular.

While it may not be possible to carry out a full appropriate assessment in the case of any draft plan or amendment published prior to the issue of this circular but not yet adopted, planning authorities should review the policies and provisions of such a draft plan or amendment and where necessary not adopt any part of such a plan where a significant impact on a Natura 2000 site is likely. Planning authorities must take particular care to avoid zoning for development any

² i.e. the plan or amendment can be authorised only to the extent that the authority is satisfied it will not adversely affect the integrity of the area.

area where the types of development permitted under the zoning could have a significant effect on the conservation objectives of a Natura 2000 site.

Furthermore, when considering any variation to an existing plan which appears to contain elements that are non-compliant with the required process, planning authorities should use the opportunity of the variations to address overall compliance throughout the plan.

Further Guidance

The implications of the ECJ ruling for current planning legislation will require further consideration by the Department. Following that, more detailed guidance will issue on the implementation of appropriate assessment in respect of plans and projects. In the meantime planning authorities may find guidance published by the European Commission of assistance. It may be obtained at:

- Guidance document on Article 6(4) of the Habitats Directive 92/43/EEC (01/2007)
http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/guidance_art6_4_en.pdf
- Guidance document on Article 6(4) of the Habitats Directive 92/43/EEC (11/2001)
http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/natura_2000_assess_en.pdf

Specific guidance on compliance conditions in respect of developments requiring EIA or having potential impacts on Natura 2000 sites has been given in Circular Letter PD 2/07 & NPWS 1/07.

Further information may be sought -

- on Strategic Environmental Assessment policy from Brian O'Neill (Tel: 01-888 2592, Brian.O'Neill@environ.ie)
- on Habitats Directive policy from the undersigned (Tel: 01-888 3220, Peter.Carvill@environ.ie)
- on the appropriate assessment of a plan or amendment from the appropriate Divisional Ecologist of the National Parks and Wildlife Service for your area –
 - Southern Division: Jervis.Good@environ.ie
 - Western Division: Julie.Fossitt@environ.ie
 - Eastern Division: Linda.Patton@environ.ie
 - Northern Division: William.Cormacan@environ.ie

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Assistant Principal.**

To all County and City Managers, Directors of Services for Planning, Town Clerks