OPINION

1. In this matter I am instructed by Lydd Airport Action Group ("LAAG") by direct public access.

2. Lydd Airport ("Lydd") is a small airport from which there is a limited number of business and scheduled passenger flights. In addition it provides for recreational flying and flying instruction.

3. Lydd is located in a sensitive location within Romney Marsh in Kent; it is bounded on one side by a designated Special Area of Conservation ("SAC") (the Dungeness SAC) and on another by a Special Protection Area ("SPA") (the Dungeness to Pett Level SPA).

4. SACs are established pursuant to European Directive 92/43/EEC ("the Habitats Directive") as an "*ecological network*" of different types of natural habitats listed in the Annex I and II of the Directive.

5. SPAs are established for the protection of wild birds pursuant to Directive 79/409/EEC ("the Birds Directive").

6. Pursuant to Article 3(1) of the Habitats Directive, SACs and SPAs are known as the "Natura 2000" network.

7. The airport is surrounded also by an extensive area of special scientific interest ("SSSI"), a further site of Nature Conservation Interest ("SNCI"); and a National Nature Reserve, with the possibility that a Ramsar site may be designated in due course. In addition, to the south east, the land is the subject of a protective landscape designation (Special Landscape Area).

8. In December 2006, Lydd's owner submitted two related applications for planning permission (being revisions of two earlier more ambitious proposals) to enlarge the airport by extending the runway and increasing the size of the terminal building. At present the level of passenger flights is limited to 300,000 passengers per annum ("ppa"). As I understand it, the present number of passengers on scheduled flights is less than the permitted level. The applications seek to increase the permitted level to 500,000 ppa.

9. The applications were accompanied by an Environmental Impact Assessment prepared pursuant to a Scoping Opinion issued by Shepway District Council ("SDC"), the local planning authority charged with determining the applications.

10. By letter dated 2nd May 2007, SDC's "Major Applications & Projects Manager", Mr Ellames, informed Lydd's planning consultants, Indigo Planning Ltd ("Indigo"), that "*appropriate assessments*" were required under the Habitats Regulations in respect of both the SAC and the SPA. He stated in the letter that SDC agreed with Natural England which had advised "*that in order to satisfy the in-combination requirements all aspects of the development (i.e. both applications together) must be considered as one*".

11. By contrast, Bond Pearce LLP, a firm of solicitors instructed by LAAG, wrote to SDC on 27th April 2007 contending that such assessment should be on the basis of two million passengers per annum (being the target figure for passenger throughput in the Master Plan for the airport prepared on behalf of the owner of the airport).

12. Two million passengers per annum would involve in excess of 20,000 air traffic movements ("ATMS") per annum and the regular movement of large planes such as the Boeing 737 and Airbus A319. Currently the majority of movements at Lydd Airport comprise light aircraft and Lydd Air's 18 seat Trislander which is responsible for the airport's passenger throughput of less than 3,000 per annum. This implies the airport is running at -1% of existing capacity.

13. It is manifest therefore that, compared to the existing situation, the potential for environmental harm would be increased hugely were the airport's usage to match the proposed increase in capacity to 500,000ppa let alone to two million.

14. Bond Pearce based its contention upon the proposition that the Lydd Airport Master Plan is a "*plan*" within the meaning of that word in Article 6 of the Habitats Directive and should "*therefore be considered in combination with both the submitted planning applications*". In so contending, Bond Pearce acknowledged that an Airport Master Plan is not a statutory plan and therefore in determining the planning applications, it is at best a "*material consideration*" under Section 38(6) of the Planning Act and Compensation Act 2004.

15. SDC's Corporate Director, Mr Wignall, responded to Bond Pearce, by letter dated 20th February 2008, rejecting the contention advanced. Mr Wignall expressed the opinion that, for the purpose of Article 6, the two applications for expansion to 500,000ppa were the relevant "*plan or project*" and any expansion above that was "*aspirational, dependent on the success of the Airport's current plans and could only be achieved through further development which would require new permissions*". He emphasised also that SDC was not being asked to approve the Master Plan.

16. I do not have copies of any part of the two applications but it is my understanding that originally they were to be for:

    (i) Detailed planning permission for a "*runway extension and phase 1 of the terminal building*" (Phase 1 being to accommodate 500,000ppa); and

    (ii) Outline planning permission for phase 2 of the terminal building (being for the accommodation of a further 1,500,000ppa).

17. The applications have been revised to exclude Phase 2 of the terminal building, but the runway extension has not been reduced and would be able to provide for the level of use associated with a throughput of 2,000,000ppa in total, even though the revised proposal is limited to 500,000ppa. That dichotomy is consistent with the airport owner's continuing ambition being to achieve two million ppa.

18. It would appear that the reason for revising the applications was that in the Scoping Opinion, prepared for SDC in December 2005, the view was expressed that the Environmental Impact Assessment ("EIA") should assess the impact of Phase 1 and Phase 2 combined and that the baseline for that assessment should be the current level of use. Such an assessment would have involved therefore assessing in the EIA the impact of usage by two million ppa.

19. In revising the applications in order to avoid an EIA on that basis, it appears that the airport's owner was employing what is sometimes described as "*salami tactics*", meaning the severing of a proposal into two or more parts in order to avoid or reduce the impact of regulatory control.

20. That salami tactics are being employed is consistent with the decision of the Airport's owner to submit to the Department for Transport a Master Plan which envisages the growth of traffic to two million ppa. Such a level of traffic would involve ATMs of 20,000 per annum. The Government's White Paper in 2003 entitled "The Future of Air Transport" encourages the preparation of a master plan if development of an airport is envisaged to that level. Furthermore, although in the White Paper no such increase is identified as such for Lydd, it identifies (see paragraphs 11.98 and 11.99) Lydd as an airport which not only "*could play a valuable role in meeting local demand*" but "*could contribute to regional economic development*". Consequently, it is stated that such development would be supported "*subject to relevant environmental considerations*".

21. It is manifest given the existing airport site's own surviving characteristics from its condition prior to its original development in the 1950s, coupled with the extremely sensitive nature of its present surroundings, that environmental considerations require extremely careful attention before permitting any further development. At present, however, the applicant and SDC have agreed to limit that consideration to the impact of the development formally proposed in the two applications.

22. If environmental considerations are a potential constraint, it would appear desirable to assess them comprehensively as soon as possible. In relation to the present applications, it is accepted by the applicant and SDC that their impact must be so assessed. The question is whether a more comprehensive assessment than that can be required.

23. Given the avowed ambition to increase usage to two million ppa, there is, in my opinion, a strong argument in principle for assessing that impact at this stage, since to delay it until after an increase to 500,000ppa will not only alter but in all probability will weaken the ecological baseline for such an assessment whilst being likely to strengthen the countervailing economic and need case. Such an approach would accord with the "*precautionary principle*" which the European Court of Justice ("ECJ") has described as "*one of the foundations of the high level of protection pursued by community policy on the environment, in accordance with the first subparagraph of Article 174(2) [of the European Community ["EC"] Treaty]*" (see paragraph 44 of the *Wadenzee* decision (case C-127/02 reported at 2005 Env. LR 14)). The ECJ described the precautionary principle as a principle "*by reference to which the Habitats Directive must be interpreted*".

24. Although the applicant and SDC seek to resist this approach, it seems to me that it is hard to resist given that the applicant was not obliged to produce any Master Plan, let alone one for development up to two million ppa; but, having done so, it must accept that the Government regards such a plan as providing "*a clear statement of intent on the part of an airport operator that will enable future development of the airport to be given due consideration in local and regional planning processes*" (see DfT "Guidance on Preparation of Airport Master Plans" July 2004, at paragraph 7). In my opinion, the development control process is part of the "*local planning process*". Indeed, at paragraph 9 of the Guidance it is stated that master plans "*will help airport operators to make clear at an early stage the key milestones of their development project such as the submission of a planning application...*" and at paragraph 24 are set out the "*core*" areas which master plans should "*address*" in order to increase their value for various purposes including "*supportive prospective planning applications*".

25. In my opinion, the principle which I have adumbrated (see paragraph 23 above) is reflected also in the Master Plan Guidance which provides that such plans "*will enable airport operators and others to assess local social and environmental impacts...*" (see paragraph 9) and "*will be an important reference source in the planning and development process for individual airports*" (see paragraph 12). In paragraph 24, one of the "*core areas*" identified to be addressed in a master plan is "*impact on... the natural environment*".

26. Given the foregoing terms of the DfT's guidance on the preparation of a master plan, the applicant has been suspiciously coy about publicising its plan (despite having sent it to the DfT), claiming apparently that its disclosure to others (for

example, under the Freedom of Information Act) would be prejudicial to commercial interests (see e-mail DfT (Mr Latham) to LAAG, 8th August 2008). Furthermore, I am unclear about the extent to which, in preparing the plan, the DfT guidance (at paragraphs 53 to 57) has been followed. In those paragraphs the emphasis is on involving "*stakeholders*" and the "*public*" at various stages. That involvement would be consistent with the precept in paragraph 11 of the guidance that there should be an "*evidence-based and open approach to airport planning*".

27. Despite the foregoing analysis, ultimately whether the Master Plan must be included in the appropriate assessment process agreed to be required in relation to the two applications made in the context of the Master Plan, will depend on whether, on the true construction of Article 6 of the Habitats Directive and the domestic regulations by which the Directive has been transposed into English law, such a requirement arises. Since European law requires such transposition to "*guarantee the full application of the directive in a sufficiently clear and precise manner*" (see Commission v UK Case -6/04, 20th October 2005 at paragraph 21), it is the meaning of the wording of the Directive which is critical, although in any event, I do not consider there to be a material difference in the wording of the Regulations. Furthermore, I consider the question of construction to be one which must be decided ultimately by the European Court.

28. In construing the Directive, it is necessary to have regard to the principles of construction in European law rather than English law, since the ECJ is the ultimate arbiter of its meaning. I consider that such a construction will have regard to the following broad principles:

(i) Due attention must be paid to the context relevant to the task of construction. In my opinion, in the present case, the context is that described by the ECJ in *The Commission v UK* (Case C-6/04) at paragraph 25, namely that "*threatened habitats and species form part of the European Community's natural heritage... so that the adoption of conservation measures is a common responsibility of all Member States*". Consequently, I would expect the ECJ to be sympathetic to LAAG's concerns about the threat posed to conservation by the Master Plan, even if such a plan is a peculiarly English type of plan (whether it is or not I do not know).

(ii) It follows that whilst the ECJ will consider the meaning of the words used in the provision being construed, it is more willing than an English court to depart from the literal meaning of the words in order to provide an interpretation which accords with the general scheme of the instrument.

(iii) Policy as well as context may influence the court in this respect, resulting in a "*teleological*" approach to interpretation which seeks to develop the law by reference to a judicial view of the direction it should take.

(iv) Policy will have regard to the Community's environmental priorities as set out in Article 174.2 of the EC Treaty. These include not only the precautionary principle (cf. paragraph 23 above) but the principles of "*preventative action*", "*rectification of damage at source*" and "*the polluter pays*".

29. (i) In construing Article 6, the ECJ will have regard also to the guidance issued by the Environmental Directorate General of the European Commission in 2000, entitled "*Managing Natura 2000 Sites – the provision of Article 6 of the 'Habitats' Directive 92/43/CEE*"; although it will not treat the guidance as binding. In the Foreword to the guidance reference is made to the preparation of "*more scientific, methodological guidance on the assessment of plans and projects under Article 6(3) and 6(4)*". It would be helpful to be provided with that guidance which I understand to have been issued and to be entitled "*Assessment of Plans and Projects Significantly Affecting Natura 2000 Sites*".

(ii) The guidance includes the following propositions:

- Article 6 "*plays a crucial role in the management*" of Natura 2000 sites (see Foreword to the guidance).

- That part of the Directive in Articles 3 to 11 is concerned with the "*conservation of natural habitats and habitats of species*" and is "*the most ambitious and far-reaching challenge of the directive*" (see paragraph 1.1).

- Article 6 is "*one of the most important of the 24 articles of the directive, being the one which determines the relationship between conservation and land use*" (ibid).

- By virtue of Article 7 of the Habitats Directive, Article 6 of it applies to SPAs under the Birds Directive as well as the SACs under the Habitats Directive (ibid).

- The "*starting point*" of Article 6(2) is the "*prevention principle*" (cf. paragraph 28(iv) above). In other words, the emphasis is on "*the anticipatory nature of the measures to be taken. It is not acceptable to await until deterioration or disturbance occur...*" (see paragraph 3.2).

- The expression "*plan or project*" in Article 6(3) is not defined in the Directive but in interpreting it "*due consideration must be given to ... the principle that individual provision of Community law must be interpreted on the basis of its wording and of its purpose and the context in which it occurs*" (see paragraph 4.3).

- The word "*project*" should be given a broad definition covering both works of construction and "*other interventions in the natural environment*" (e.g. a significant intensification of agriculture) (see paragraph 4.3.1).

- The word "*plan*" should be given a broad meaning also extending to land-use plans having both direct and indirect effects. Examples given of the latter are "*regional*" plans which "*form the basis for more detailed plans*" and "*spatial plans*" which "*serve as a*

framework for development consents which then have direct legal effects" (see paragraph 4.3.2).

- The requirement to consider the effect of a plan or project both "*individually*" and "*in combination with other plans or projects*" is said to be "*to take account of cumulative impacts*" (see paragraph 4.4.3).

- It is recognised that cumulative impact "*will often only occur over time*" (ibid);

- In assessing cumulative impact, consideration should be confined "*on grounds of legal certainty*" to "*other plans or projects which have been actually proposed*" (ibid).

30. The meaning of the phrase "*plan on project*" has been considered in the English High Court in the case of R (o/a Friends of the Earth) v Environment Agency [2004] Env. LR 31 in which Sullivan J (as he then was) held (see paragraph 60) that it should be given a broad interpretation consistent with the underlying purpose of the Directive of protecting the Natura 2000 Network. At paragraph 61 he applied that approach also to "*plan*" and "*project*" individually. In so doing, he drew support from the Advocate General's opinion in Commission of the European Communities v French Republic (C-256/98) [2000] ECR p.1-02487 to the effect that "*[i]n the context of Article 6(3), the term plan must... be interpreted extensively*".

31. In my opinion the question on which I have to advise is difficult to answer with confidence. On balance, however, I consider that, on the facts of the present case, the Master Plan should be the subject of appropriate assessment as part of the process to be followed prior to determining the current planning applications. In summary, my reasons are as follows:

(i) The works and level of use proposed in the current applications are a "*project*" within the meaning of the Directive. Since they are formulated also in a form which has plans and explanatory text, I consider that they are also a "*plan*" within the meaning of the Directive.

(ii) As a matter of fact, the "*project*" or "*plan*" in the current set of applications, were devised in the context of a more ambitious "*plan or project*", namely the Master Plan, and are acknowledged to be the first phase of that more ambitious plan or project.

(iii) It is correct that the second phase of development envisaged within the Master Plan is intended to take place sequentially rather than contemporaneously and therefore it is not within the same timescale as the first phase. Even if (which is far from certain in my opinion) that would justify not assessing that phase in combination with the first phase, such an approach would be based on a misunderstanding of the nature of a Master Plan; such a plan encompasses both phases and therefore the first phase is not an isolated proposal separable from the second, but is part of the overarching project in the Master Plan.

(iv) That being the case, in my opinion the Directive and the Regulations made thereunder require that the current applications be assessed in combination with the Master Plan.

29 January 2009

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Applications for the Expansion of Lydd Airport

Requirements pursuant to the Conservation (Natural Habitats, etc) Regulations 1994 and The Habitats Directive (92/43/EEC)

OPINION

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