

TOWN AND COUNTRY PLANNING ACT 1990

APPLICATIONS BY LONDON ASHFORD AIRPORT LIMITED

SITE AT LYDD AIRPORT, LYDD, ROMNEY MARSH, KENT

NATURAL ENGLAND'S
LEGAL SUBMISSIONS

Introduction

1. These written legal submissions are provided by Natural England (NE) in accordance with the Inspector's direction contained in the email from the programme officer dated 24 May 2011. They do not repeat the legal matters canvassed in NE's statement of case dated September 2010.¹ Submissions on the application of the law to the facts in this case will be made in closing submissions in due course.

Statutory duties upon the Secretary of State

2. In relation to the SSSI, the Secretary of State in determining these applications would be subject to the obligations contained in sections 28G and 28I of the Wildlife and Countryside Act 1981 (WCA 1981) [CD 5.12]. The duty in s28G applies in this case as the Secretary of State would be exercising his functions in a way which is likely to affect the flora, fauna or geological or physiographical features by reason of which the SSSI in this case is of special interest. The s28G duty is to take reasonable steps, consistent with the proper exercise of his functions, to further the conservation and enhancement of the

¹ And the Addendum dated 8 March 2011 and NE's opening statement.

flora, fauna or geological or physiographical features by reason of which the SSSI in this case is of special interest. For the ornithological features, granting permission would not be consistent with this duty. For other features, the duty would necessitate the imposition of the conditions and s106 obligations proposed by NE in relation to other special interest features of the SSSI.

3. The duty in s28I to which the Secretary of State would be subject applies because the planning permissions in this case are needed before operations may be carried out (the operation of the expanded airport, and especially those arising from the runway extension) and because those operations are likely to damage the flora, fauna or geological or physiographical features by reason of which the SSSI in this case is of special interest, namely the ornithological features.
4. Section 28I(5) requires the Secretary of State to take into account advice received from NE both in deciding whether or not to permit the proposed operations and in deciding what conditions are to be attached to the permission. That advice would be contained in the totality of NE's evidence and submissions to the inquiry.
5. The Secretary of State in determining these applications would also be subject to the duties in s40 of the Natural Environment and Rural Communities Act 2006 [CD 5.13] to have regard to the purpose of conserving biodiversity and to the 1992 UN Convention on Biological Diversity.
6. The Secretary of State would also be subject to the statutory duty in Regulation 9(5) of the Conservation of Habitats and Species Regulations 2010 [CD 5.15] to have regard to the requirements of the Habitats Directive.
7. Other duties in relation to protected habitats are considered below.

Status of and duties on LAA

8. Under the 2010 Regulations LAA is a competent authority. Regulation 7 provides that a competent authority includes any statutory undertaker. Regulation 3 defines statutory undertaker by reference to Part XI of the Town and Country Planning Act 1990. Section 262 of the 1990 Act defines a statutory undertaker as including a relevant airport operator within the meaning of Part V of the Airports Act 1986.² LAA confirms in CD 4.1 that it is a relevant airport operator and a statutory undertaker [para 2.7]. LAA is a competent authority in the same way, for example, that Wightlink Limited, the ferry operator, was in the *Akester* case [CD 9.13, paras 85-86].
9. LAA is therefore subject to the duties in Regulations 9(5) (duty to have regard to the requirements of the Habitats Directive) and 61 (appropriate assessment) of the 2010 Regulations.
10. Further, as a statutory undertaker, LAA is also a s28G authority under s28G(3) of the WCA 1981. It would therefore be subject to the duties in s28G (duty to exercise functions to further conservation and enhancement), s28H (duty in relation to carrying out operations) and s28I (duty in relation to authorising operations).
11. These duties place legal constraints on the way in which LAA may operate Lydd Airport and in particular place constraints on what may be done in relation to the claimed fallback.

European Directives

12. NE's statement of case identified the European legislative framework which applies in relation to the applications.

² This is dealt with in s57 of the 1986 Act.

13. The foundation for the particular directives engaged in this case is the Treaty on the Functioning of the European Union (TFEU). Article 191 TFEU provides that Union policy on the environment shall contribute to preserving, protecting and improving the quality of the environment. Article 191(2) provides:

“policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken...”

14. These principles are relevant when interpreting and applying the provisions of the Directives engaged in this case and the domestic implementing legislation.

15. In the Birds Directive 2009/147/EC [CD 5.3], Article 4(1) provides that special conservation measures shall be taken for the habitats of Annex I species to ensure their survival and reproduction. Article 4(2) relates to migratory species and provides that similar measures must be taken for migratory species as regards their breeding, moulting and wintering areas, and staging posts along their migration routes.

16. Article 4(4) of the Birds Directive provides that Member States must take steps to avoid pollution or deterioration of habitats or any disturbance affecting the birds, in so far as those effects would be significant. Article 4(4) also provides that outside the SPAs, Member States must strive to avoid pollution or deterioration of habitats.

17. It is apparent therefore that the Birds Directive is intended to protect the habitats of birds, in particular in relation to breeding, wintering and migration, and to avoid significant effects from the deterioration of habitats and disturbance affecting birds.

18. Article 7 of the Habitats Directive 1992/43/EEC [CD 5.2] applies the obligations in Articles 6(2) to 6(4) of the Habitats Directive to SPAs established under the Birds Directive.
19. Article 6(2) of the Habitats Directive requires Member States to take appropriate steps to avoid the deterioration of natural habitats and the habitats of species, as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of the Directive.
20. It has been held that the Habitats Directive must be interpreted and applied by reference to the provisions of the TFEU, including the precautionary principle, which reflects the high level of protection pursued by European policy on the environment,³ and in the light of its broad objective, namely a high level of protection of the environment.⁴
21. Article 6(3) of the Habitats Directive provides:
- a. any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives;
 - b. in the light of the conclusions of the assessment of the implications for the site, the competent national authority shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned.
22. It is not contended by LAA that the proposals are directly connected with or necessary to the management of the European sites, and nor could it be. Moreover, LAA has not relied on Article 6(4) in this case.

³ See *Akester* at para 15(1).

⁴ *Akester* at para 74.

23. Government policy is that pSPAs and Ramsar sites should receive the same protection and be considered in the same way as designated SPAs and SACs.⁵ The Government's most recently stated position, in the July 2011 DCLG impact assessment accompanying the consultation draft National Planning Policy Framework, is that it considers that pRamsars should be treated in the same way. This accords with the advice given by NE in its statement of case.⁶ Government policy is also that the duty to review planning permissions which may affect a European site should also apply to Ramsar sites.⁷
24. In relation to the effects of the proposals on the ornithological interests in the SPA, pSPA and pRamsar (and SSSI), no avoidance, mitigation or compensation measures have been incorporated into the proposals by LAA.

Habitats Regulations 2010

25. In determining the applications before this inquiry, the Secretary of State would be the competent authority under Regulation 61. Before giving permission, therefore, the Secretary of State must consider whether the scheme is likely to have a significant effect on a European site and, if so, then he must make an appropriate assessment of the proposals' implications for the site in view of its conservation objectives [Reg 61(1)].
26. The Secretary of State must for the purposes of carrying out that assessment consult NE and have regard to the representations made by NE [Reg 61(3)]. It is accepted that NE would effectively have been consulted in this particular case via the Inspector, through its active participation in the inquiry and the provision of evidence and submissions to the Inspector.

⁵ PPS9 at para 6 [CD 6.5] and C.06/05 at para 5 [CD 5.23].

⁶ At para 3.12.

⁷ C.06/05 at para 34.

27. It is the Secretary of State who must make the appropriate assessment in this case, although it is usually in practice the Inspector, on behalf of the Secretary of State, who would prepare the appropriate assessment in the first instance. In this case there is no appropriate assessment before the inquiry which may simply be adopted by the Secretary of State. There is no appropriate assessment in existence which properly takes into account the evidence provided at the inquiry. It will be necessary for the Secretary of State to make such an assessment in the light of all the material before the inquiry.
28. The Secretary of State is only able lawfully to grant permission for the proposals if he is able to ascertain that they will not adversely affect the integrity of the European site [Reg 61(5)].

Likely to have a significant effect

29. It was established in *Waddenzee* [CD 9.1] that the trigger of the appropriate assessment mechanism in Article 6(3) of the Habitats Directive is a mere probability of a significant effect on a site – a probability or a risk is enough [paras 41, 44⁸]. Likely in this context means possible. A risk is sufficient.⁹ It was also established that such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned [para 44]. The decision should be made on a precautionary basis.¹⁰
30. There must be an appropriate assessment unless, on the basis of objective information, it can be excluded that the plan or project will have a significant effect on the site, either individually or in combination with other plans or projects [*Waddenzee*, para 45].

⁸ See also *Commission v UK* Case C-6/04 at para 54 [CD 9.7].

⁹ *R (Boggis) v Natural England* [2009] EWCA Civ 1061 at para 36. See also *Morge* in the Court of Appeal at para 80 [CD 9.2] and *Hart DC* at paras 77-78 [CD 9.10]. (And contrary to what was suggested in *Hargreaves v SSCLG* [2011] EWHC 1999 (Admin)).

¹⁰ C.06/05, para 13 [CD 5.23].

31. NE submits that there is such a likelihood of a significant effect in this case on the SPA, the pSPA and pRamsar in relation to ornithological interests that an appropriate assessment is required.¹¹ NE also submits that it cannot be excluded on the basis of objective information that the applications in this case will have a significant effect on the sites, either individually or in combination with other plans or projects.
32. In particular, where a plan or project risks undermining the site's conservation objectives, it must necessarily be considered likely to have a significant effect on the site [*Waddenzee*, para 49¹²]. NE submits that such a risk exists in this case.

Appropriate assessment

33. An appropriate assessment is intended to secure the main objective of the Habitats Directive, namely ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora.¹³ In undertaking an appropriate assessment, all the aspects of the plan or project must be identified in the light of the best scientific knowledge in the field [*Waddenzee* at paras 54, 61]. This would include all aspects of the operation of the expanded airport.
34. For the assessment, the parameters of all aspects of the plan or project must be set out based on sufficient information, so that all aspects can be identified and assessed,¹⁴ either by setting out what is to be done or by setting maximum

¹¹ This is also the position of SDC: SDC/02 at para 16(1). In relation to the SAC, an appropriate assessment would be required in relation to the vegetated shingle. It is accepted in the air quality statement of common ground (CD 4.9) that the impacts would be within acceptable levels subject to the addition of the agreed monitoring and remedial measures, so that the result of an appropriate assessment should be that there would be no adverse effect on the integrity of the SAC. For the avoidance of doubt, NE does not object to the applications in relation to air quality. Its position is as set out in CD 4.9.

¹² See also the AG's opinion in *Waddenzee* at para 86.

¹³ *Waddenzee* at para 44.

¹⁴ See for example *Smith v SSETR* [2003] Env LR 32 at para 25 [CD 9.6]. The same point would apply to the consideration of likely significant effects at the preceding stage.

parameters for what is to be done.¹⁵ In relation to bird control and related activities, the applications, and in particular the BCMP, do neither.

35. It was said by the Judge in *Akester* that, given NE's role as the Government's statutory adviser on nature conservation, a competent authority is bound to accord its advice considerable weight when undertaking an appropriate assessment and has to have cogent and compelling reasons for departing from it [para 112].¹⁶

Adverse effect on the integrity of the site

36. Under the Habitats Directive and the 2010 Regulations, the Secretary of State is only able lawfully to grant planning permission for the proposals after having ascertained that they will not adversely affect the integrity of the sites concerned.

37. As to the substantive test, it is established following *Waddenzee* that:

- a. permission can be granted for the scheme only after the Secretary of State has made sure that it will not adversely affect the integrity of the site [para 55];
- b. the Secretary of State must have made certain that the scheme will not adversely affect the integrity of the site [paras 59, 61];
- c. the Secretary of State must be convinced that the scheme will not adversely affect the integrity of the site [para 56];
- d. there can be no reasonable scientific doubt remaining as to the absence of adverse effects on the integrity of the site [paras 59, 61];

¹⁵ See for example *R v Rochdale MBC, ex p Milne* (2001) 81 P&CR 27 at para 93.

¹⁶ The role of Natural England in relation to the Habitats Directive was also recognised by the Supreme Court in *Morge* at paras 29-30 [CD 9.2a].

e. where doubt remains in the Secretary of State's mind, permission must be refused [para 57].¹⁷

38. Any reasonable scientific doubt as to the absence of adverse effects on the integrity of the site must be removed before the scheme is permitted [CD 5.11, p4].

39. NE submits that the Secretary of State cannot be sure (or certain or convinced), based on all the evidence before the inquiry, that the proposals will not adversely affect the integrity of the SPA, the pSPA and pRamsar. At the least, reasonable scientific doubt remains.

40. NE submits that there is not sufficient evidence produced by LAA which clearly contradicts the evidence relied on by NE and that, in such circumstances, the inescapable conclusion is that there is a reasonable scientific doubt.

41. Planning permission cannot be granted in this case as it cannot be ascertained that the proposals will not have an adverse effect on the integrity on the SPA, pSPA and pRamsar sites, because those effects are uncertain. In relation to the SPA, it would be unlawful to grant planning permission. In relation to the pSPA and pRamsar, planning permission must not be granted as a matter of Government policy.

42. The case law demonstrates that the Habitats Directive sets a very high threshold for a scheme to pass. If it is accepted that an appropriate assessment is required under Article 6(3), then, given the provisions of that Article as explained in *Waddenzee*, there is in effect a presumption that the scheme should not be approved which is only overcome where it is positively and certainly established that there will not in fact be an adverse effect on the integrity of the European site.

¹⁷ See also *Akester* at para 15(4). Where doubts remain, Article 6(3) is not complied with (see eg CD 5.11 at p4).

43. As to the integrity test itself, the European and national guidance on the application of the integrity test is considered in the evidence of Jo Dear on behalf of NE.¹⁸
44. The relevance of impacts outside the designated sites on functionally-linked, supporting habitat is illustrated by the Dibden Bay decision.¹⁹ It was confirmed in *Akester* that indirect as well as direct adverse effects on a European site must be assessed [para 77].
45. It was held in *Commission v Portugal* [CD 9.8] that a project causing disturbance and/or the fragmentation of the habitat of SPA birds inevitably meant that there would be an adverse effect on the SPA's integrity [paras 21-23].
46. In *Waddenzee* the ECJ equated a conclusion that there was a lack of an effect on integrity under Article 6(3) with a conclusion that there would not be deterioration or significant disturbances within the meaning of Article 6(2) [para 36]. This clearly indicates that the ECJ considers that deterioration or significant disturbances within the meaning of Article 6(2) would also equate to an adverse impact on integrity.
47. It is also notable that in the Advocate General's opinion in *Waddenzee* it was said that in principle any adverse effect on the conservation objectives of a European site must be regarded as a significant adverse effect on the integrity of the site concerned [para 85].
48. Given the law and guidance summarised above, it would be wrong to adopt an approach of considering integrity by way of the proportion of the designated

¹⁸ See in particular NE/3/A at paras 175-177, 202-210. For the guidance itself, see CDs 5.9, 5.10, 5.11, NE/3/B Appendices 6 and 7, and NE/3E Appendix 3 (relating to indirect impacts and impact interactions).

¹⁹ Dibden Bay Inspector's Report [CD 9.3] at paras 36.208-209 (p659). See also *Managing Natura 2000* [CD 5.10] p34.

site as a whole which is affected or by asking whether the proportion affected is so great as to affect the whole site as such.²⁰

Fallback and appropriate assessment

49. Under Article 6(3) of the Habitats Directive, it is the plan or project which must be assessed for its effects, either individually or in combination with other plans or projects. It is clear from the terms of Article 6(3) that the plan or project is that for which consent is sought. This is also reflected in the wording of Regulation 61 of the 2010 Regulations.

50. What must be subjected to appropriate assessment therefore is the plan or project for which consent is sought,²¹ in this case the proposals comprised in the two applications. It was held in *Waddenzee* that all the aspects of the plan or project must be assessed [para 61]. This would include all aspects of the operation of the expanded airport, including bird control and related activity (eg the BCMP), the application of the safeguarding regime to the expanded airport, the effects of aircraft movements, and the like.

51. There is nothing in the legislation or case-law which suggests that something less than the plan or project is to be assessed, or that some aspects of the plan or project or some effects of it can be exempted or discounted from assessment, or that only the effects of the plan or project which are additional or alternative to another scheme are to be assessed.

52. It would be unlawful to assess not the plan or project but a cut-down version of the plan or project based on a fallback. Such an approach would undermine the purpose of the Habitats Directive and the objectives of European environmental law generally. The approach adopted in LAA's own statements

²⁰ There are numerous examples from decided cases of adverse effects on integrity of the site where only small proportions are affected. See for example the EN report 'How the scale of effects on internationally designated nature conservation sites in Britain has been considered in decision making: A review of authoritative decisions' (2006) in CD 2.9.

²¹ See *Hart DC* at para 55.

to inform the appropriate assessment was to compare the proposals to the existing position (current baseline) and not against the claimed fallback.²²

53. Moreover, given the continuing duty under Article 6(2) to take steps to avoid adverse effects on European sites, a relevant authority cannot simply resign itself to the existence of a fallback which would adversely affect such a site.²³

54. Further, although in this case it may be that no further planning permission is required for the fallback, the fallback would have to satisfy the legal requirements set by the 2010 Regulations and the WCA 1981 before it could come into effect. It cannot be taken for granted that the fallback can simply (lawfully) occur.

55. Appropriate assessment of any common elements or impacts as between the proposals and any fallback cannot be avoided at this stage, as they have not previously been subject to appropriate assessment at all. Indeed, no planning permission relied on for the operation of the airport has been subject to appropriate assessment or review in accordance with the obligation under Article 6(2) of the Habitats Directive since the designation of the SPA.

56. An approach which disregarded the effects which could arise from an existing planning permission said to be the basis for a fallback when conducting an appropriate assessment of a plan or project would be inconsistent with the provisions of Regulation 63 of the 2010 Regulations, which obliges an authority which granted permission before the date on which a European site is designated to review the permission and then affirm, modify or revoke it.

57. In any event, the cumulative effect of the applications together with the effects of any earlier permissions would have to be considered. So, such effects are not to be ignored but rather must be taken into account in the appropriate assessment. If the cumulative or combined effect of the applications together

²² See CD 1.25C, p9, at 2.2.3.

²³ See *Waddenzee* at para 37 and the Advocate General's Opinion at paras 57-60. See also *Managing Natura 2000* [CD 5.10] at section 3.2. The principle of preventative action is contained in Art 191(2) TFEU.

with any earlier permissions would not pass the integrity test, then the applications must still be refused permission.

58. Finally, the claimed fallback in this case does not represent a fallback and so it cannot properly be taken into account, even if that were permissible in principle (which it is not). Submissions on this point are made below.

59. The relevance of a fallback in appropriate assessment was raised in a recent case involving the Thames Basin Heaths SPA [CD 8.28]. The Inspector and the Secretary of State both concluded that, according to the Habitats Directive and Habitats Regulations, a fallback was not a consideration in assessing the effect of the proposal on the protected site.²⁴ The Secretary of State accepted the reasoning set out in the Opinions from David Elvin QC. NE adopts but does not repeat the same reasoning for that conclusion in these submissions.²⁵

60. The Secretary of State took the same view when the question of appropriate assessment was raised in a High Court case recently.²⁶ The issue in that case did not concern a fallback as such, but rather the question of what was the appropriate baseline comparator in a ground (a) appeal against an enforcement notice, which required a retrospective appropriate assessment.²⁷ The issue was *obiter* as it did not arise for consideration in the case, was dealt with only by way of written representations,²⁸ and the Judge offered only a tentative expression of view.²⁹ The appellant in the case argued that the comparison should be between the “plan or project world” and the “actual real world” before the initiation of the plan or project. The Judge said he was inclined to agree with the appellant, in circumstances where there was an existing lawful use which might have a much greater impact on nature conservation interests in the protected site.³⁰

²⁴ See para 19 of the decision letter dated 20 August 2009 (p48).

²⁵ As contained in the Opinions in CDs 8.28(a)-(c), (e).

²⁶ *Britannia Assets v SSCLG* [2011] EWHC 1908 (Admin) at para 85.

²⁷ See para 86.

²⁸ See para 83.

²⁹ See para 85.

³⁰ At para 87.

61. When undertaking the appropriate assessment in the instant case, the proposals must be judged for their impacts against the established position at the airport. The appropriate comparator should be the established baseline. It should not take into account recent activities which may or may not prove to be part of the normal operation of the airport, and nor should it take into account activities which are temporary or short-term. Without good evidence that such matters will continue and will therefore form part of the normal operation of the airport, it cannot be said that they are properly part of the existing baseline conditions.

Legal constraints on realising the fallback

62. In order for the fallback to be realised, it would have to satisfy the legal requirements set by the 2010 Regulations and the WCA 1981.

63. Under Regulation 61 of the 2010 Habitats Regulations, LAA, as a competent authority, before deciding to undertake a plan or project which is likely to have a significant effect on a European site, must undertake an appropriate assessment. In so doing, it must consult NE and have regard to any representations made by NE [Reg 61(3)].

64. Under Regulation 61(5), LAA is not able lawfully to agree to the plan or project without having properly undertaken an appropriate assessment and having ascertained that the plan or project will not adversely affect the integrity of the site.

65. The EC Guidance on the provisions of Article 6, Managing Natura 2000 [CD 5.10], explains that the phrase “any plan or project” has a broad meaning, and gives the example that a significant intensification of agriculture could be a project.³¹

³¹ Section 4.3, pp30-31.

66. In the *Friends of the Earth* case it was acknowledged that under European law it was necessary to give the words plan or project a broad interpretation, consistent with the underlying purpose of the Habitats Directive to protect European sites.³² It was confirmed in *Akester* that the terms should be given a wide interpretation [para 72]. *Akester* also drew attention to the importance of considering whether an action could potentially have an impact on the environment or on a European site when considering whether it could be a plan or project [para 76].

67. There are a number of cases which provide factual parallels to illustrate that the realisation of the fallback would be a plan or project within the meaning of the Habitats Directive:

- a. in *Stadt Papenburg v Bundesrepublik Deutschland* [2010] Env LR 19, it was held by the ECJ that intermittent, on-going maintenance works (dredging a river channel) would be a project [paras 39-40];
- b. in *Waddenzee* it was held by the ECJ that mechanical cockle fishing activities would be a project [paras 25, 27, 29]; and
- c. in *Akester* the introduction of a new type of ferry which had the potential indirectly to interfere with the natural surroundings, and risk adverse effects on the protected site, was held to be a project [paras 77, 81].

68. In this case, LAA's claimed fallback scheme,³³ a change in the way that the airport is operated, a concerted ramping-up of bird control measures, a new bird control plan, and a safeguarding policy, would all qualify as a plan or project within the meaning of Regulation 61.

³² *R (Friends of the Earth) v Environment Agency & Able UK* [2003] EWHC 3193 (Admin) at para 60.

³³ Including the plans to attract considerably more business jets, freight and MRO flights.

69. As there has not been appropriate assessment of these things, as would be required by Regulation 61, the fallback (and various elements said to be part of it) could not lawfully occur.

70. The provisions of the WCA 1981 would also apply in relation to the SSSI and the BCMP.³⁴ For example:

- a. Under s28E, for land in the SSSI, LAA cannot carry out, or cause or permit to be carried out, certain operations without consent from NE.
- b. Under s28H, LAA would have to give notice to NE before carrying out operations likely to damage any of the features by reason of which the SSSI is of special interest, even if the operations would not take place on land within the SSSI. NE is then able to refuse to assent to the operations or to impose conditions on them. If the operations nonetheless go ahead, various other statutory restrictions apply.³⁵

71. Government policy is that all s28G authorities such as LAA should apply strict tests when carrying out any functions within or affecting a SSSI, to ensure that they avoid or at least minimise adverse effects.³⁶

72. As there has not been compliance with these provisions of the WCA 1981, the BCMP could not lawfully be implemented as matters stand.

73. As to the planning position, permitted development rights are effectively subject to a prior approval process where the development is likely significantly to affect a European site.³⁷ Approval can only be given where it is ascertained that the development will not adversely affect the integrity of the site.³⁸

³⁴ Sections 28G and 28I would apply generally to LAA as well.

³⁵ See s28H(4)-(6).

³⁶ C.06/50, para 61 [CD 5.23].

³⁷ See Article 3(1) of the GPDO 1995 and Regulations 73-76 of the 2010 Regulations.

³⁸ Regulation 75(7) of the 2010 Regulations.

Fallback as a planning consideration

74. For a fallback to be capable of being taken into account as a material consideration there must be a real prospect of it actually occurring.³⁹
75. LAA contends that the effects of the operation of the expanded airport on ornithological interests would be the same as in the fallback.⁴⁰ This is not therefore a case in which it can be said that the fallback is so harmful when compared to the proposals that the fallback should be taken into account even if there is only a slight chance of it occurring.
76. NE submits that there is not a real prospect of the fallback occurring, given both the facts and the legal constraints; it is only hypothetical. The fallback is not therefore to be regarded as a relevant material consideration.
77. Alternatively, if the fallback is a material consideration, it is not a weighty material consideration due to the limited prospects of it occurring, and/or because, on LAA's case, the effects of the fallback on ornithological interests would be the same as, instead of worse than, those with the expanded airport.

Environmental impact assessment and appropriate assessment

78. The relevant aspects of the legal position in relation to EIA on which NE relies were set out at paragraphs 3.23 and 3.24 of its statement of case. In relation to the ornithological impacts of the development, there has not been substantial compliance with the EIA Directive and Regulations. Not only is inadequate information provided on ornithological matters,⁴¹ but the approach to the ornithological impacts, and the bird control and related activities in particular, leaves over issues relating to the significance of the impacts of the proposals

³⁹ *Brentwood BC v SSE* [1996] JPL 939. See also *Samuel Smith v Secretary of State for Communities & Local Government* [2009] EWCA Civ 333.

⁴⁰ See paras 17-18 and 32-33 of LAA's opening statement.

⁴¹ See NE's statement of cases at paras 6.17-6.20. See also Regulation 61(2) of the 2010 Regulations.

and the mitigation (if any) which is to be applied.⁴² These points apply in relation to the Habitats Directive as they apply in relation to the EIA Directive.

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9 September 2011

⁴² See eg *Smith v SSETR* [2003] Env LR 32 at paras 27 and 33 [CD 9.6]. This point applies to the Habitats Directive and appropriate assessment as well as to EIA.