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Case No: CO/3598/2012

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 20<sup>th</sup> June 2013

**Before :**

**MR. JUSTICE EDWARDS-STUART**

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**Between:**

**Forest of Dean Friends of the Earth**

**Claimant**

**- and -**

**Forest of Dean District Council**

**Defendant**

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**Ian Dove Esq, QC**

(instructed by **Richard Buxton Environmental and Public Law**) for the **Claimant**

**James Pereira Esq**

(instructed by **Forest of Dean District Council**) for the **Defendant**

Hearing dates: 14<sup>th</sup> and 15<sup>th</sup> May 2013

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**Approved Judgment**

**Mr. Justice Edwards-Stuart:**

**Introduction**

1. In the Wye Valley and the Forest of Dean there are ten sites which have been designated European Special Areas of Conservation (“SACs”) because they are the habitats of the protected Lesser Horseshoe bat (“LHB”). They are part of what are known as the Natura 2000 sites. These particular sites range from large underground former mines to buildings. They are home to several species of bats, but the LHB constitute over 25% of the UK population of this species.
2. The ten sites lie within a 12-15 km radius of the small town of Cinderford. The Defendant (“the Council”) is the local authority for this area.
3. This claim is made way of challenge under section 113 of the Planning and Compulsory Purchase Act 2004 to the adoption of two development plan documents (“DPDs”) by the Council on 23 February 2012. They are the Forest of Dean Core Strategy (“the CS”) and the Cinderford Northern Quarter Area Action Plan (“the CAAP”). This area of law is riddled with acronyms and so a table is provided at the end of this judgment for ease of reference.
4. The Claimants are members of a small charity that concerns itself with the protection of the flora, fauna and landscape of the Forest of Dean, including the bats. Its members have brought these proceedings at considerable personal financial risk because they feel so strongly about environmental issues such as the preservation of these LHB.
5. The CS described itself as “... the principal document of the local development framework and sets the vision, spatial strategy and policies for development in the District for the period up to 2026”. Amongst other things, it identified Cinderford as a location for additional employment and housing development, and proposed that it should have a major change at its centre and a new “Northern Quarter”. It was said that the CAAP was the plan for the area where most change would take place.
6. A feature of the proposed development of the Northern Quarter was the construction of a spine road that would provide access to the new areas of development. One suggested proposal was that this spine road would pass alongside a former industrial area known as the Northern United Enterprise Park, the site of the former Northern United Colliery, which closed in 1965. Only part of this compound was occupied and other parts that have deteriorated to a poor state of repair have become the summer roosts of a substantial colony of bats, many of which are LHB.
7. Although the Northern United compound has not been designated a SAC, the designation of an area as a SAC protects the population of the species using the site and not just the site itself. It is said by the Claimants, and not I think disputed, that the presence of the Northern United colony is of importance to the well-being and survival of the bats in the nearby SACs.
8. Put very shortly, the issue raised by this action is whether the Council complied with its obligations under the Conservation of Habitats and Species Regulations 2010 in relation to the Wye Valley and Forest of Dean SACs when preparing the CS and

CAAP. The Claimants say that the Council did not make a proper assessment of the impact of its proposals on the integrity and preservation of the SACs, either when preparing the CS and prior to preparing the CAAP, or when preparing the latter.

### **The Habitats Directive and the 2010 Regulations**

9. In order to make sense of what follows in this judgment, it is convenient to begin by considering the legislative framework. Article 6(3) of the Habitats Directive (Council Directive 92/43/EEC) contains the following provisions:

“2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and of the habitats of species as well as disturbance of the species for which the areas have been designated, insofar as such disturbance could be significant in relation to the objectives of this Directive.

3. 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 for projects, shall be subject to appropriate assessment of its implications for the site in view of the site’s conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.”

10. Regulation 102 of the Habitats Regulations 2010 gives effect to article 6(3) of the Habitats Directive in the context of land use plans. It provides materially as follows:

#### **“Assessment of implications for European sites and European offshore marine sites**

102. (1) Where a land use plan -

(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 the site,

the plan-making authority for that plan must, before the plan is given effect, make an

appropriate assessment of the implications for the site in view of that site's conservation objectives.

- (2) The plan-making 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) 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.
- (4) In the light of the conclusions of the assessment, and subject to regulation 103 (considerations of overriding public interest), the plan-making authority or, in the case of a regional strategy, the Secretary of State must give effect to the land use plan 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).
- (5) A plan-making authority must provide such information as the appropriate authority may reasonably require for the purposes of the discharge of the obligations of the appropriate authority under this Chapter.

...”

11. There is no dispute that a Core Strategy and an Area Action Plan are land use plans for the purposes of regulation 102: see regulation 107(1)(c).
12. There is also no dispute that, once a plan is in existence, regulation 102 envisages a two stage process. First, the plan-making authority must undertake an initial screening decision to decide whether a plan is likely to have a significant effect on the European site. This is often called a Habitats Regulations Assessment (HRA) or screening assessment. Second, if a negative answer is given (i.e. effects are seen to be likely) at the first stage, then the plan making authority must go on to carry out an appropriate assessment of the plan's implications for the protected site. The competent authority can only agree to the plan if it concludes that it will not adversely affect the integrity of the European site, unless there exist interests of overriding public importance under regulation 62: but that is not relevant in this case.
13. It is relevant to note that the regulation caters for the possibility that more than one plan acting in combination may have a significant effect, in which case it is the joint impact of the plans that should be considered.

14. The Council, acting as planning authority, was the “plan-making authority” for the purposes of its decision to adopt the CS and CAAP. The obligation to comply with regulation 102 of the 2010 Regulations and article 6(3) of the European Directive fell upon the Council, not upon the Secretary of State or his Inspector.

#### **A brief outline of the facts**

15. The Council began work on a new core strategy in 2005 or 2006. In a letter of 21 April 2006, English Nature (as it was then known) pointed out that, since the proposals set out in the CS would be covered by more detailed DPDs which might also require an Appropriate Assessment (“AA”), it would seem logical to examine whether these proposals were likely to have a significant effect on a European site when the more detailed documents are produced.
16. So English Nature’s view at that stage was that the CS did not require an AA. In October 2010 the Council asked English Nature, by then known as Natural England, whether it still believed that the CS, in itself, did not require an AA. At this stage the Council was preparing both the CS and the CAAP in tandem. Work on the AA had not begun.
17. Natural England replied by saying that as a significant time had elapsed since the earlier opinion, they would have to ask the Council to produce a revised scoping report before confirming that their advice would remain unchanged. Following further changes to the draft CS and an updated screening report, Natural England’s advice in respect of the publication draft CS, which was published for consultation prior to any examination by the Inspector, was that it was not likely to have adverse effects on European sites.
18. Natural England’s view did not remain entirely consistent because, by a letter dated 1 February 2011, it raised its concerns with regard to the HRA overall, which was that it was reliant upon lower tier (either AAP or planning application) assessments in order to ensure that the higher tier strategy would not have an adverse effect on any of the European sites. However, the letter ended by saying that Natural England had concluded that in this case the lower tier plans could be delivered without adverse effects and so it had no objection to the draft CS.
19. The feature of the plans which was of most concern to the Claimants was the proposal to build the new spine road. It was necessary to have a spine road to provide access to the proposed new development, and it was also intended that it should be a bus route. During the course of 2009 various options for the spine road were the subject of discussion. One proposal was that the road should run almost due north through woodland to the north of Cinderford. If there had to be such a road, this was a solution favoured by the Claimants. However, the problem from the Council’s point of view was that this would take the road along a route where there was no development, and hence no new frontagers who could be expected to contribute towards the cost of the road.
20. This proposal would have meant that the spine road was significantly to the east of the Northern United site. However, the Council subsequently decided to move the line of the northern section of the spine road to the west so that it followed the line of a forest road that formed the eastern boundary of the Northern United site. A plan showing

the final alignment of the spine road is attached to this judgment as Appendix A. The forest road can be seen on the plan running north-south immediately to the east of the Northern United site. Just to the north east of the Northern United site, the Forest road joined the A4136, a main road which formed part of the northern boundary of the Northern Quarter. The final alignment for the spine road showed it meeting the A4136 at the same point.

21. The difficulty presented by this proposal was that the LHB which roost in some of the buildings on the Northern United site had flight paths, or flyways, to and from their roosts which ran across the forest road. LHB fly slowly and, generally, fly low - typically less than 1.5 m above the ground - so that they could be vulnerable to impact from vehicles if crossing a road. Usually the bats prefer to cross an obstacle such as a road by flying through the canopies of roadside trees, if there are any, and then dropping back down to ground level after crossing the obstacle. The problem, from the bats' point of view, is that their relatively low speed of flight makes them vulnerable to predators, such as owls, unless they have the protection of cover such as trees or hedges. They detest light and will not leave the roost until light levels are sufficiently low for them to feel safe. Thus an additional problem presented by an adjacent road is the high level of ambient light, not only from street lighting but also from the headlights of cars.
22. On 14 March 2011, following a site meeting that was held on 28 February 2011, Natural England wrote to the Council expressing its concern about the "lack of survey data overall" and raising in particular the effect of the proposals on the LHB colony in the Northern United site. It queried the route that involved following the line of the forest road immediately to the east of the Northern United site, and suggested that the other proposed route, to the south of the vehicle yard and residential buildings, would have several advantages for the bats and little or no disadvantages in respect of other factors. The letter concluded by making it clear that all further development of the CAAP and any subsequent detailed planning applications would have to be based on the findings of an intensive survey of the numbers and habits of the colony of LHB.
23. In May 2011 the Claimants produced a long submission in response to the pre-publication draft of the CS. This document made a large number of points, but amongst them it emphasised the importance of the biodiversity of the area and the need to protect the various protected species, including the LHB.
24. The bat survey that was subsequently carried out between June and September 2011 showed (or confirmed) that LHB roosted in two of the buildings on the Northern United site: the old Office Building and the former Bath House. When leaving these, the bats flew due east via one of three key flyways across the forest road. The survey showed also that there were two further key flyways in this area. One crossed the forest road to the north of the other flyways at a point shortly before it met the A4136, and this was used principally by bats flying to and from an artificial roost which had been built to the east of the Northern United site. A further key flyway crossed the A4136 more or less due north of the artificial roost, and this was again used by LHB. This last flyway was not affected by the construction of the spine road.
25. The final drafts of the CS and the CAAP were issued in April 2011. By this stage no AA had been carried out. Versions of the CS and the CAAP for examination by the Inspector were issued on 26 July 2011. By this time the bat survey was in progress

and the AA for the CAAP had still not been carried out. According to these plans, the spine road was shown following the forest road to the east of the Northern United site and then joining the A4136.

26. The Inspector carried out the examination between 12-17 October 2011 for the CS, and between 18-19 October 2004 for the CAAP. Both of these, the latter in particular, had been the subject of further amendment between the time of original submission to the Inspector and the time of the examination. Subject to some additional minor modifications of his own, he approved both of them in reports issued on 21 December 2011.
27. The Council adopted the CS and the CAAP by a resolution made on 23 February 2012. That is the resolution that is under challenge in these proceedings.

### **The principal authorities**

28. I was referred to a number of authorities by both counsel, but I do not find it necessary to refer to them all because as the argument developed it became apparent that many of the relevant principles were not in dispute. I shall mention only those decisions that are of particular relevance to the issues in this case.
29. Mr. Ian Dove QC, who appeared for the Claimant, referred me first to the decision of this court in *University of Bristol v North Somerset Council* [2013] EWHC 231 (Admin), a decision of Her Honour Judge Alice Robinson, sitting as a Deputy High Court Judge. That case is authority for the proposition that an inspector who is carrying out an examination of a CS and/or an AAP must give reasons for his or her conclusions that the plan be adopted, with or without modifications. Further, she held, there being no dispute about it, that the correct legal approach towards the standard of reasons to be given in such a case is that summarised by Lord Brown in *South Bucks District Council v Porter (No 2)* [2004] 1 WLR 1953, at paragraph 36. For reasons which will become apparent later in this judgment, I do not consider that I need say any more about this case.
30. Mr. Dove then referred me to the case of *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* (7 September 2004) C-127/02, a decision of the Grand Chamber of the ECJ. In relation to the requirement for an AA under the Habitats Directive, and the test to be applied, the court said this, at paragraph 61:

“... an appropriate assessment of the implications for the site concerned of the plan or project implies that, prior to its approval, all the aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site’s conservation objectives must be identified in the light of the best scientific knowledge in the field. The competent national authorities, taking account of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned in the light of the site’s conservation objectives, are to authorise such an activity only if they have made certain that it will not adversely affect the

integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects.”

31. Mr. Dove relied also on a helpful passage in the judgment of Owen J in *R (Akester) v Department for Environment, Food and Rural Affairs* [2010] EWHC 232 (Admin), at paragraph 15 where he said:

“The discharge of its duties under the Habitats Directives and the Habitats Regulations by a competent authority is a two stage process. First the authority must consider whether there is a risk of significant adverse effects on a protected site. It is only if satisfied that there is no such risk that it may take no further step. But if there is such a risk, then the requirement for an appropriate assessment is triggered; and the authority must not give consent to authorisation of a plan or project unless satisfied that the risk of significant adverse effects can be excluded (subject only to the provisions of Article 6(4) in circumstances in which the plan or project must be carried out for imperative reasons overriding public interest). For the purposes of the appropriate assessment the competent authority shall consult the appropriate nature conservation body, in this case Natural England, and shall have regard to any representations made by it, see regulation 48(4).”

32. Mr. Dove relied also in a further passage in the same judgment, at paragraph 104, in which Owen J set out certain propositions that were not in dispute:

“It is submitted on behalf of the claimants that an appropriate assessment, or what purports to be an appropriate assessment, will be open to challenge if -

- (a) it arrives at a conclusion that is *Wednesbury* unreasonable,
- (b) its conclusion is based on a partial (in both senses of the word) assessment of the evidence,
- (c) the process is unfair in the sense that the decision maker has evidenced bias or a commercial incentive (*a fortiori* imperative) to reach a particular conclusion,
- (d) no adequate account is taken of conflicting views, whether they be offered by the Government’s statutory nature conservation adviser (Natural England) or members of the general public,
- (e) there is no adequate consultation of the general public.”

33. Mr. James Pereira, who appeared for the Council, referred me to a passage in the opinion of the Advocate General in *Commission v United Kingdom*, C-6/04, J Kokott, in which she said, at paragraph 47:

“Furthermore, particularly in the case of proposals for sections of highway or railway, but in principle also in the case of all proposals under which extensions are intended to be constructed, the first stages of a proposal regularly determine the realisation of the subsequent stages. If the effects of the entire proposal on areas of conservation not at issue until later are examined neither within the framework of the plan nor at the time of the first stages, each stage restricts the number of possible alternatives for subsequent stages, without an appropriate assessment of alternatives being carried out. Such a course of action is often derogatorily described as salami tactics.”

34. Mr. Pereira’s purpose in citing this passage, with the contents of which he did not disagree, was that this is not what happened in this case. He submitted that since the CS was still going through the appraisal process at the same time as the CAAP, the problem identified by the Advocate General did not arise. He pointed out also that the judgment of the Second Chamber did not endorse the point made by the Advocate General that an impact assessment should always be carried out at the earliest possible stage.
35. It will be convenient to discuss some of the other authorities relied on by Mr. Pereira in the context, rather than in this general discussion.

### **The Claimants’ first submission**

36. The Claimants submit that the decision to defer the AA to the lower tier plan, in this case the CAAP, was unlawful and a breach of regulation 102.
37. The argument is that where a consent or approval procedure is to be carried out in several stages in circumstances where subsequent plans are constrained by the parameters of the earlier approval, the effects which the project may have on the environment must be identified and assessed at the time prior to the approval of the first and overarching plan.
38. Thus far, I accept the submission: it is supported directly by the judgment of the European Court of Justice in *R (Wells) v Secretary of State for Transport, Local Government and the Regions* [2004] Env LR 27, at paragraph 52.
39. However, there are two important qualifications to this principle: one explicit and the other implicit. The explicit qualification is that stated in the last sentence of paragraph 52 of the judgment in *Wells*, which is in these terms:

“It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of that procedure.”

The “implementing decision” referred to in that quotation is the lower tier decision that cannot extend beyond the parameters set by the principal decision.

40. The implicit qualification is that the process is staged, not only in terms of hierarchy but also in time. If the principal approval is in fact deferred so that it falls to be given at the same time as the subordinate decision, then the rationale for this rule largely disappears. This is because the principal plan can still be altered or restricted so as to eliminate or mitigate any effects that are revealed by the assessment that is carried out as part of the second stage, or lower tier, decision.
41. As I have already noted, this situation is in fact expressly catered for by regulation 102, which requires the decision maker, before deciding to give any consent to a plan which is likely to have a significant effect on a European site, either alone or in combination with any other plan, to make an appropriate assessment of the implications for that site in view of that site’s conservation objectives. So if there are two plans that, when taken together, are likely to have a significant effect on a European site, it is the impact which the two plans will have in combination that must be assessed.
42. In opposing the claimant’s submission Mr. Pereira referred me to a passage in the decision of Sullivan J in *R (Hart) v The Secretary of State for Communities and Local Government* [2008] EWHC 1204 (Admin), at paragraph 72, where he said:

“The underlying principle to be derived from both the *Waddenzee* judgment and the domestic authorities referred to above is that, as with the EIA Directive, the provisions in the Habitats Directive are intended to be an aid to effective and environmental decision making, not a legal obstacle course. If, having considered the ‘objective information’ contained in the EPR Report, and agreed by NE in the Statement of Common Ground, the first defendant, as the competent authority, was satisfied that the package put forward by the second and third defendants, including the SANGS, would avoid any net increase in recreational visits to the SPA (thereby avoiding any increased disturbance to the Annex 1 bird species), it would have been ‘ludicrous’ for her to disaggregate the different elements of the package and require an appropriate assessment on the basis that the residential component of the package, considered without the SANGS, would be likely, in combination with other residential proposals, to have a significant effect on the SPA, only for her to have to reassemble the package when carrying out the appropriate assessment.”

SANGS are areas of Suitable Alternative Natural Greenspace.

43. In this case both the qualifications that I have mentioned applied. First, the approval process for the CS ran in parallel with that for the CAAP, so that any adverse effects identified when assessing the impact of the CAAP could be taken into account when approving, or modifying, the CS.

44. In these circumstances, Mr. Dove's example of the setting of the boundary of the Northern Quarter in the CS loses its force. Whilst the Council had, within the CS, set the boundary of the Northern Quarter, this could have been changed at any time prior to the approval of the CS if the appropriate assessment carried out in relation to the CAAP had shown that adverse effects on the SACs could not be avoided without changing the boundary so as, for example, to exclude the Northern United site.
45. Further, in the circumstances that prevailed here regulation 102 required the effects of the CS and the CAAP to be assessed together, since the two plans were being progressed together and were both capable of having an impact, whether considered separately or together, on the SACs.
46. Finally, as English Nature pointed out in the letter of 21 April 2006 to which I have already referred, where the proposals set out in the CS would be covered by more detailed Development Plan Documents ("DPDs") which might also require an appropriate assessment, it would seem logical to examine whether these proposals were likely to have a significant effect on a European site when the more detailed documents are produced.
47. Whether or not the view of the English Nature was right, and it seems to me that it probably was, it was entirely reasonable for the Council to follow it: they were under the statutory obligation to have regard to the views of English Nature.
48. For these reasons I reject Mr. Dove's first submission. In the light of this conclusion it is not necessary to consider the more detailed points that were relied on by Mr. Dove at paragraphs 48 and 49 of his skeleton argument.

#### **The Claimants' second submission**

49. This is that the Appropriate Assessment of the CAAP was unlawful. Mr. Dove's submissions under this head can be briefly summarised as follows:
  - i) In order to satisfy the requirements of the Habitats Directive and Regulation 102(4) of the 2010 Regulations it was necessary for the Appropriate Assessment to establish that there was a certainty, beyond reasonable scientific doubt, that plan proposed would not adversely affect the integrity of the site. On the evidence, that was not a test which it was possible for the Appropriate Assessment to pass simply by tinkering with the policies.
  - ii) The evidence of Mr. Priddis, an independent bat worker, demonstrated that there could not be certainty, that is beyond reasonable scientific doubt, that what was proposed in the amended policies would not adversely affect the site's integrity.
  - iii) Nowhere did Natural England conclude that the adverse effects had been excluded beyond reasonable scientific doubt. Natural England's own yardsticks and the Council's failure to meet them effectively spoke for themselves.

- iv) The need for proposals in relation to future monitoring of bat movements showed that the potential for adverse effects existed, otherwise there would have been no need for such monitoring.
  - v) The Inspector did not apply the relevant test in reaching his conclusions. His tests of “likely significant impacts” or “significant negative effects” were not the test required by Regulation 102(4) of “no adverse effect”. Had he applied the correct tests, there would have been a different outcome.
  - vi) The Inspector did not deal with the objections raised by Mr. Priddis, in particular in respect of both the interaction of the bats’ key flyways and the impact upon their flyways of the proposed A4136 junction. If he did consider and dismiss those objections, he gave no adequate reasons for doing so.
  - vii) The Appropriate Assessment was not informed by consultation with Natural England and, indeed, noted on its face that it awaited their response. The response of Natural England on the Appropriate Assessment was not documented. The survey which was commissioned did not address the concerns which Natural England had required the Council to address.
50. Mr. Dove had a further point which was that the Appropriate Assessment was published too shortly prior to the examination and had not been adequately publicised: there was no opportunity for those being consulted properly to absorb the information it contained and to provide an appropriate response. It seems to me that this complaint is of a different nature to the points set out above and so I will treat it as a third and separate submission.
51. I will take Mr. Dove’s points in turn.

### **The statutory test was not met by the Appropriate Assessment**

52. In March 2011 Environmental Resources Management (“ERM”) produced a Pre-Submission draft AAP Sustainability Appraisal Report and a Habitats Regulations Screening Appraisal (“HRSA”) on behalf of the Council. The latter concluded that there was a potential for adverse impact on SACs if the CAAP was implemented. The report identified six potentially likely significant effects. These were as follows:
- “1) Potential disturbance directly from construction and operation activities, indirectly through the interruption of flight lines and fragmentation of the population and through increased visitor pressure to Wye Valley and Forest of Dean Bat Sites and the Wye Valley Woodlands via effects to the Northern United roosts which may be necessary to the integrity of the SACs and including consideration of in-combination effects;
  - 2) Potential effects from habitat loss to Wye Valley and Forest of Dean Bat Sites and the Wye Valley Woodland from loss of woodland edge habitats for the Northern United bat roosts which may be necessary to

- the integrity of the SACs and including consideration of in-combination effects;
- 3) Potential nutrient enrichment and air pollution effects on all identified European sites from the proposed energy centre (assuming it is bio-fuelled) and from traffic and including consideration of in-combination effects;
  - 4) Potential smothering effects from dust and debris during construction to the Wye Valley and Forest of Dean Bat Sites and the Wye Valley Woodlands via effects to the Northern United roosts which may be necessary to the integrity of the SACs and including consideration of in-combination effects;
  - 5) Potential toxic contamination and pollution via water links to the Wye Valley and Forest of Dean Bat Sites and the Wye Valley Woodlands via effects to the Northern United roosts which may be necessary to the integrity of the SACs and the Severn Estuary and including consideration of the in-combination effect; and
  - 6) Potential siltation of water courses via water links to the Severn Estuary and including consideration of the in-combination effects.

These are likely to require more detailed information regarding development layout, construction and operational activities to be able to adequately assess the risk and likelihood of them occurring. It is considered possible through implementation of mitigation measures to avoid these likely effects at a later stage and a clear commitment to ensuring this occurs has been incorporated in the AAP.”

53. The Sustainability Appraisal made these observations:

“In terms of the Lesser Horseshoe Bats, the Pre-Submission Draft AAP and Masterplan proposes largely non-residential land use in the Northern United area, which is likely to have a lower potential for disturbance to the bats than primary residential development would, in terms of lighting, night-time noise and predation. However, the change to the road alignment since the 2009 Preferred Option is likely to have an increased impact on the bats, due to the severance these structures will create. [The Council] will seek to reduce this impact through the initial identification of key bat flight routes which will be subsequently maintained via green links (AAP Policy 15). Appropriate planting, fencing and bollard lighting are proposed to accompany these green links to funnel bats to

crossing points and encourage them to cross at height above the level of traffic. In areas used by protected bat species, lighting will also be designed in order to reduce the disturbance of [*sic*] the bats. As part of this mitigation approach, flexibility will also be maintained to explore a spine road alignment to the south of the existing buildings on the east-west section.

...

As above, the overall impact is assessed to be negative and minor to moderate in nature. Mitigation measures proposed above, particularly in terms of reducing the impact on bat populations, will be critical in minimising potential negative impact and in better enabling adaptation to climate change.”

(Original emphasis)

54. It is clear from these documents that the proposal that the new spine road should run alongside the eastern boundary of the Northern United site gave rise to serious concerns as to the effects on the bat population that used the site.
55. On 4 April 2011, when the Council issued its pre-submission draft of the CAAP, the new spine road was still shown following a line almost due west towards the Northern United site and then heading almost due north at the point where it met the perimeter of the site, so that it then followed the line of the forest road that ran alongside the eastern boundary of the Northern United site. It said that the biodiversity strategy for the Northern Quarter must ensure that:

“Key habitats, feeding owners and computing corridors for protected species are maintained and where possible enhanced.”
56. Policy 15, which concerned with the spine road, effectively reiterated these points.
57. In May and June 2011 the Claimants submitted responses to these documents. In the later response, they said this in relation to the new spine road:

“If the site is not developed then no new road would be necessary. A new road brings into the area complete urbanisation next to a very sensitive biodiversity area and the difficulties of siting the road and the emissions it would bring into a sensitive area illustrates that this site should not be used for development.”
58. On 21 June 2011 the Council provided a compendious response to the various representations that had been made. In response to the claim that the CAAP was unsound in respect of its impact on a protected species, the Council said:

“The issue of appropriate assessment is considered elsewhere and the response is essentially to agree with NE that there will be a need for a comprehensive assessment of the impact of

development proposals to be made at a time when the detail of these is greater than it is now and in the context of additional information, including a bat survey that is [*sic*] now been assembled. It is further agreed with NE that the AAP so far contains sufficient supporting material which makes it in the opinion of the Council able to be considered sound.”

I take this last sentence to mean that the Council thought that the CAAP in its existing form was potentially sound, but recognised that a comprehensive assessment of the impact of the development proposals would be required when all of the additional information had been assembled. However, Mr. Dove characterised this as indicating the existence of the “first seeds of doubt” in the mind of the Council about the suitability of the proposals.

59. In July 2011 there was a further Sustainability Appraisal (“SA”). This contained some relevant observations. In relation to Cinderford (CSP 10), and under the objective of protecting and enhancing habitats and species, it said:

“The outcome overall is likely to be negative. Much of the land at the Northern Quarter is identified as a [key wildlife site], meaning habitats may be damaged during the development of this main area.”

and

“Mitigation requirements as part of AAP for Northern Quarter.”

In relation to Cinderford Northern Quarter (CSP 11), again under the objective of protecting and enhancing habitats and species, it said:

“The outcome is likely to be neutral. The SA objective is neither supported or opposed by the CS policy.”

60. However, Mr. Pereira pointed out that the first observation related to a small area where the AAPs for Cinderford and for Cinderford North Quarter overlapped. This area was remote from the Northern United site and it is not evident that this observation had any connection with bats. Thus, so far as the bats in the Northern Quarter were concerned, the outcome was assessed as neutral.
61. The SA included, at Appendix 10, a Habitats Regulations Assessment. In respect of the Wye Valley and Forest of Dean bat sites this said that any significant development within 2 km of any of the sites would require an appropriate assessment.
62. In July 2011 the Council also issued a Keynote document to address concerns about the CAAP HRSA and to set out the Council’s case on how the issues were being addressed in the CAAP. It summarised the position in the following terms:

“Habitat regulations screening assessment had previously identified it would be more appropriate to carry out ‘appropriate assessment’ when more detail is available at

planning application stages. Further survey work is currently being undertaken following amendments to the proposed road hierarchy to see if this is still the case.”

And, at paragraphs 2.0.3 and 2.0.4:

“2.0.3 Following the change in the proposed road hierarchy, and the deletion of a previous proposal to construct a new north south link road through a planted woodland area from the A4136 the Council and Natural England are considering if this change alters the severity of the potential impacts on bats (principally in the Northern United area) and therefore the conclusions of the HRSA report. In order to inform this evaluation the Council, in consultation with Natural England, has commissioned additional bat surveys beginning in June 2011 and completed by the following September ....

2.0.4 This additional information will be reviewed in light of the existing HRSA and an updated HRSA presented prior to examination. If as a result of this review, and in consultation with Natural England, it is considered that an appropriate assessment is required the Council will undertake one prior to the examination and subsequently review it following any recommendations made prior to the Council adopting the AAP.”

63. On 15 June 2011 Natural England wrote to the Council in these terms:

“In so far as it relates to those areas upon which Natural England is qualified to comment, we consider the Publication draft of the Cinderford Northern Quarter Area Action Plan to be generally sound. In connection with legal compliance however, we have the following comments in relation to Habitats Regulations Assessment:

We note that the Habitats Regulations Screening Assessment (March 2011) concludes with the identification of six potentially likely significant effects on the Wye Valley and Forest of Dean Bat Sites SAC and on the Wye Valley Woodlands SAC. The Screening Assessment notes that further assessment will be needed at a later stage. We agree that further assessment of the identified potentially likely significant effects is required. A meaningful further assessment will require detailed information about how the bat populations use the Northern Quarter area. This will need to include commuting and foraging routes as well as roosting sites. In other words, the movements of the bats around the area need to be better understood before the impacts of the proposals can be properly assessed.

We understand that the Council is in the process of commissioning studies to provide this additional data about the use of the area by bats and that when the data is available, it will be used to take the Screening Assessment further, prior to the Inspector's examination of the Plan."

64. On 14 July 2011, at an evening meeting of the Full Council, Mrs. M K Newton, of the Claimants, questioned the absence of an AA in the CAAP. The response from the Leader of the Council was that the appropriate assessment would be more likely to be relevant at planning application stage. So far as change in the alignment of the spine road was concerned, the Council was considering whether this would alter the severity of impact as assessed in the SA and had commissioned further bat surveys for this purpose. An AA would then be carried out if required.
65. In August 2011 the Council published the examination draft of the CAAP. The spine road was shown as a running alongside the eastern boundary of the Northern United site as already described. In relation to biodiversity the recommendations (in Policy 10) remained unchanged from the April 2011 pre-submission draft from which I have already quoted.
66. On 22 September 2011<sup>1</sup> the Council issued a further Keynote document (CD 5a) in relation to biodiversity and nature conservation for the Northern Quarter. The preface to this document said that it was an update prepared in advance of the forthcoming examination of the local development documents. In the Non-Technical Summary it said:

"An Appropriate Assessment in accordance with the Habitats Directive, in relation to the Wye Valley and Forest of Dean Bat SACs, has been undertaken. The Appropriate Assessments [sic] recommends 5 changes to the AAP to ensure that there are no significant negative effects on the bat populations."

It summarised the conclusions of the bat surveys that had been carried out between June and September 2011, although it noted that the final report would not be with the Council until early October. The following points were noted:

"Areas proposed for development in the AAP are not the main foraging areas for Lesser Horseshoe Bats (LHB) found roosting in buildings at Northern United or the purpose built (PB) roost to the south of the A4136. Main foraging activity takes place in established woodland away from the roost sites.

Of the eight important areas identified there are four primary exit corridors from the PB roost. North across the A4136; South following a line between the lake and the brick works; West crossing the current entrance to the Northern United area and South West covering an area to the south of Northern United.

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<sup>1</sup> See Mr Chapman's second witness statement. This date was not challenged.

There is significant East-West corridor activity across the forestry road to the east of the Northern United area.

...

The two Northern United roosts are only used during the summer months. The PB is mainly used during the summer months but is known to also support wintering roosting (hibernation).”

The document and then set out the six potential impacts identified in the HRSA and proposed five changes to the first of these (“Potential disturbance directly from construction and operation activities”).

67. The second of the changes to the CAAP identified by the AA was in the following terms:

“**Policy 15** after Spine Road second bullet point. ‘The design of the street section must demonstrate to a high standard how the four primary bat corridor routes, from the roost sites, will be maintained and protected during and after the construction of the spine road. Key factors will include:

- i. Proposals to retain and protection of existing trees and vegetation structure wherever possible.
- ii Minimal lighting levels, for example by using shrouded, bollard lighting and motion activated lighting.
- iii Minimum surface path and road widths, appropriate to the function of the road, within primary bat corridor areas
- iv Comprehensive landscaping proposals to establish early tree structure for bats
- v Where appropriate creating new structures such as culverts and gantries to maintain primary bat corridors.
- vi Establish a programme of monitoring for no less than three summers following construction in each of the primary bat corridor areas.”

The second bullet point in the existing CAAP was as follows:

“The design of the street section should seek to avoid, minimise, or compensate (in that order) any impact on forest land and protected species.”

68. The third and fourth changes proposed were as follows:

“Policy 15 after ‘Junction onto A4136’. ‘The design of the junction must demonstrate to a high standard how the primary bat corridors at the entrance to the Northern United site and crossing the A4136 from the roost sites, will be maintained and protected as dark crossing points during and after the construction of the junction.’”

“Policy 21 ‘Proposals for development at the Northern United site will be required to retain and enhance the bat roost in the former Office building. If it is demonstrated that this cannot be achieved a replacement roost must be provided prior to its closure. In addition, prior to the closure of the Bath House roost a new summer and winter roost in a suitable location, to a standard which clearly demonstrates an enhancement for the bat roost it replaces, must be available for use by bats. Proposals must also demonstrate how the bat corridor crossing the current access from the A4136 will be maintained, protected and kept dark.’”

69. In relation to the second of the six points identified in the HRSA, namely the potential effects from habitat loss, it stated that:

“The additional survey data has confirmed there will be no significant loss of habitat which will affect the integrity for the Forest of Dean Bat SACs. LHBs undertake foraging activity away from the proposed development areas. Connectivity between summer roost sites and foraging areas are addressed in the Appropriate Assessment (above).”

The remaining four points identified in the HRSA were eliminated as having no significant effect.

70. The AA itself was appended to the document as Appendix A. It is undated, but refers to the interim bat survey update of 6 September 2011. According to Mr. Chapman, the Council’s lead adviser on environmental issues, this AA was issued in draft to Natural England on 11 September 2011. The version in the hearing bundle appears to be this document because it concludes with the words “Consultation Response from Natural England is awaited”.
71. Under the heading “Consideration of Alternatives” the AA said:

“The strategic vision for regeneration in Cinderford is set out in the Core Strategy. Established forest and the topography of the area restrict development led regeneration areas to those of the AAP.

Route options for access roads, have through a master plan process (see section three Masterplan & Design Code), have considered the potential impacts on bats within the objectives for the AAP and other constraints. Of the 4 route options considered (3.4 of the Masterplan). [sic] The selected option

removes residential development close to the bats roosts and avoids road structures on all sides of the woodland containing the purpose built roost.

Further changes to the road alignment are recommended below providing an additional alternative option to reduce likely significant effects.”

(My emphasis)

72. The wording that I have emphasised is criticised by Mr. Dove who submits that it does not reflect the correct test. Mr. Pereira’s answer was to refer to the following text, under the heading “Assessment”, which says:

“The following policy changes outlined below (taken from table 1 overleaf) would avoid adverse effects on the integrity of the site ....”

(Original emphasis)

This wording, submits Mr. Pereira, is clearly the correct test. I agree. I do not consider that it is undermined by the earlier words. Those say only that the “likely significant effects” that had already been identified would be reduced by the re-alignment of the road. However, I read what follows as a conclusion that the combination of the re-alignment of the road and the additional policy changes to which I have already referred (and which were reproduced in the AA) would avoid the adverse effects. I see no inconsistency between these two statements and so I reject Mr. Dove’s criticism of the AA in this respect.

73. I turn now to the interim bat survey of 6 September 2011. By means of static bat detectors this covered about 40-50% of the area of the Northern Quarter. There were also human observers, both stationary and walking. There were five observer locations on the Northern United site, two of which were on or close to the forest road to the east of the site. There were eight roosts used by bats or, perhaps more accurately, exit points from the roosts, of which four were used by LHB. These were at the north end of the old main office building and a dormer exit along the west side of the same building (the office building ran roughly north-south alongside the eastern boundary and the forest road). There were two exits at the eastern end of the former Bath House near the south-east corner of the site. Bats emerging from these exit points crossed the forest road at three key flyways.
74. There was a fourth key flyway across the forest road at the north - just before its junction with the A4136. That road ran roughly at south-west/north-east and passed to the north of the Northern United site. This flyway was used by LHB in the artificial (or purpose-built) roost which was situated 100-200 yards east of the north-east corner of the Northern United site.
75. A curious feature of the amendments to Policy 15 is the reference to the importance of maintaining “... the four primary bat corridor routes to/from the roost sites”. At first blush these would appear to be the four key flyways across the forest road east of the Northern United site to which I have just referred. However, once the alignment of

the spine road was changed so that it no longer ran to the east of the Northern United site, but instead passed through the site to the west of the buildings in which the LHB roosted, at least two, and probably three, of these flyways would no longer be affected by the spine road.

76. When I queried this with Mr. Pereira he was, perhaps understandably, unable to provide a ready answer. However, he then told me on instructions that this referred to four different flyways, labelled A, B, G and E. I have to say I was wholly unconvinced by this answer. B was the northernmost of the four flyways that crossed the forest road and was probably unaffected by the late alterations of the alignment of the spine road. Flyway A crosses the A4136 to the north of the artificial roost and would be unaffected by the construction of the spine road. Flyway G was not at that time a flyway across a road: it is described as a "... vegetated piece of land between the salvage yard, brick factory and the lake". Whilst it is true that the new spine road would pass through this area, flyway G is not described as a key flyway, nor is it a route to/from the United Northern roost sites (the bats came mainly from the artificial roost). Flyway E is one of the original three flyways across the forest road - directly opposite the end of the Bath House, but the latest re-alignment of the new spine road would take it to the south of the Bath House building and so I do not see how this flyway would be much affected, if at all, by anything other than the occasional headlights of cars passing along the new spine road. Certainly, the bats would not have to fly across the spine road if following the existing routes.
77. However, on the basis that the greater includes the less, I doubt if this apparent error (assuming it was an error) made any real difference because at least one of the original four key flyways across the spine road would still require the measures referred to in the AA. From the point of view of the LHB, the change of alignment of the spine road in the vicinity of the Northern United site could only have been an improvement because, as I have already explained, two, and probably three, of their principal routes in and out of the roosts in the Northern United site would not then have to pass over the spine road.
78. Nevertheless, this suggests that the alterations to the CAAP that were made following the interim bat survey were made in some haste (largely because the that survey was not commissioned until the spring of 2011) presumably following the site meeting on 28 February 2011 and the letter from Natural England dated 14 March 2011.
79. Following the issue of the draft AA to Natural England there was an exchange of e-mails in which Natural England suggested various alterations to the AA. By 17 October 2011, the day before the start of the examination into the CAAP, Natural England was content in principle with the proposed wording of the AA and was prepared to support it. In fact, the Inspector recorded at paragraph 33 of his report on the CAAP that Natural England now endorsed the Council's policies as consistent with the national guidance in PPS9, Circular 06/2005 and Biodiversity 2020 (DEFRA - April 2011) and said that this satisfactorily reinforced the conclusions already reached.
80. In these circumstances, for the reasons that I have already given, I consider that the AA of the CAAP did not apply the wrong test under the European Directive and the 2010 Regulations so that it was not flawed in that respect. Further, the Council was

entitled to give its subsequent approval by Natural England, as modified, significant weight.

81. Subject to the issue in relation to the evidence of Mr. Priddis, I cannot identify any aspect of the potential impact to the SACs that the Council failed to take into account, or any matter that was taken into account by the Council but which should not have been. In these circumstances the AA and its adoption by the Council cannot be impugned on *Wednesbury* grounds.
82. I now turn to the evidence of Mr. Priddis.

### **The evidence of Mr. Priddis**

83. In a note that Mr. Priddis prepared for the inspector prior to the hearing, he said that the CAAP would detrimentally affect the colony because the artificial roost was now to be surrounded by roads. He made the point that when LHB encounter a gap in the cover on their flight path they tend not to cross it until the light level is lower. If such a gap, caused for example by a road, existed immediately beside their roost it would affect their foraging habits. Instead of emerging from the roost at their usual time, they will wait about 20-25 minutes until it is sufficiently dark. This loses precious feeding time when air temperatures are still warm and peak numbers of insects are flying. In addition, he said that if LHB have to cross a road which has no cover, they will fly at a very low level which would make them vulnerable to being hit by traffic.
84. However, when Mr. Priddis made these comments he would probably not have known about the new proposed re-alignment of the spine road so that they would have been predicated on the assumption that the spine road would follow the forest road to the east of the Northern United site (in other words, before the proposed re-alignment). With the proposed re-alignment of the spine road very few of the bats leaving the Northern United roosts would cross it.
85. At paragraph 10 of this note Mr. Priddis said this:

“Whilst I understand that the [Council] may be looking at various means of mitigation, albeit extremely late in their process and not yet published, it should be noted that mitigation should really be used only to provide *enhancement* for such an important breeding colony of bats, if the first protocol tests have been passed. Mitigation is not intended as a primary means of trying to make plans, which have failed other protocol tests, become acceptable.”

In these circumstances, he said that he believed that the CAAP, as presented, was unacceptable.

86. In his evidence to the Inspector, according to a note compiled in November 2011, Mr. Priddis began by complaining about the last minute flurry of documents produced by the Council, which, Mr. Priddis said, had not allowed proper consideration of the proposals by the members of the public. I shall return to this point later.
87. Mr. Priddis’s note covered the following:

- i) The artificial roost was sited in the worst possible location having regard to the proposed alignment of the new spine road.
  - ii) There was a detailed description of the habits, foraging and flying techniques of the LHB.
  - iii) He said that an AA should be carried out prior to the development plans and CAAP being drawn up.
  - iv) He disagreed with the statement in one of the keynote documents that the loss of one roost was unlikely to have a negative effect the availability of the favourable roost in the area. He believed strongly that this conclusion was wrong because LHB usually have several roost buildings associated with a breeding colony. He believed that they needed these in order to select the one that best suited their requirements on a day-to-day basis.
  - v) He maintained that the new spine road junction with the A4136 was too close to the new artificial roost and should be relocated. That was because this new junction would need traffic lights and street lighting, which the LHB do not like. It was also on a bat flight route. Although he saw the revised road alignment for the first time on the morning of the hearing, his concern remained about the location of the junction of the spine road and the A4136.
  - vi) Whilst he welcomed the document CD 5a, he pointed out that its very late issue negated most of the purpose of having it since it could not inform the actual content of the CS and CAAP.
  - vii) He made the point that such when LHB encounter a gap in the cover on their flight path they tend not to cross it until the light level is lower. This means that instead of emerging at their usual time, they will wait about 20-25 minutes which loses precious feeding time when air temperatures are still warm and peak numbers of insects are flying. However, it looks as if this comment was predicated largely on the assumption that the spine road would follow the forest road to the east of the Northern United site (in other words, before the proposed re-alignment). With the proposed re-alignment of the spine road very few of the bats leaving the Northern United roosts would cross it. However, in fairness to Mr. Priddis, he may not have been aware when he made these observations of the latest proposals for the re-alignment of the road. He went into these matters in some detail in the note that he prepared for the Inspector prior to the hearing, to which I have already referred.
  - viii) Finally, he made the point that the replacement roost for the Bath House should be established as a matter of priority, since the bats would take time to adjust to using a new roost and the existing roost should not be destroyed until it had been demonstrated that the bats were using the new one.
88. Whilst I do not doubt that Mr. Priddis is very well qualified to express these views, they are essentially matters of opinion. But his point about the need for a new alternative roost to be established well before the demolition of the Bath House appears to coincide with the view of Natural England. In my view it was met by Policy 21 in the adopted version of the CAAP. This says, at page 81:

“In addition, prior to the closure of the bath house roost a new summer and winter roost in a suitable location, to a standard which clearly [is] an enhancement for the bat roosts it replaces, must be in use by lesser horseshoe bats.”

It is to be noted that this requires the alternative roost not merely to have been built, but to be in use by the LHB, before the existing roost at the Bath House was closed.

89. However, for the avoidance of any doubt, I wish to make it clear that my conclusion on this point is based on my understanding that the statement in Policy 21 is intended to meet the point raised by Mr. Priddis at paragraph 71 of his November 2011 note.
90. I am not in a position to say whether or not Mr. Priddis’s apprehensions are justified that the proposed measures in relation to the junction with the A4136 will be insufficient. This is a matter of expert opinion and planning judgement. The Council’s conclusion that the proposals were adequate was endorsed by Natural England and, in my judgment, the Council was entitled to adopt that aspect of the CAAP in the light of this endorsement.
91. The other matters raised by Mr. Priddis, such as his concern that the new road, even as re-aligned, will adversely affect the colony are, essentially, matters of opinion about future events. Again, in the light of the endorsement of the CAAP by Natural England, I consider that the Council’s decision to adopt the CAAP in spite of the objections of Mr. Priddis was one that cannot be challenged on *Wednesbury* grounds.

### **The validity of Natural England’s endorsement**

92. Mr. Dove sought to get round the fact that the Council’s proposals had the approval of Natural England by challenging the legal basis upon which Natural England had given its approval. In my view, it is clear from Natural England’s letters (for example, its letter of 1 February 2011) that it well understood that the test to be applied was that a proposed plan must not have an adverse effect on the integrity of the European site. In spite of the beguiling submissions of Mr. Dove, I consider that the court should not make the assumption that, within six months or so, Natural England had forgotten this basic point.
93. In an e-mail to Mr. Chapman dated 4 October 2011, Natural England wrote:

“We note that it was not possible to radiotrack juvenile bats because they were underweight; repeating radiotracking during the next breeding season might run into similar problems. The survey work has provided valuable information but it is still at the limit of what we would view as acceptable. While we would certainly not accept this level of survey if this was a licence application, we do not advise that further survey work should be carried out to support the conclusions of the appropriate assessment. It should be noted though that any licence applications associated with the spine road or re-development of the Northern United buildings will require, as a minimum, emergence surveys for all three lesser horseshoe roosts around the Northern United site.

Our advice is that you could only exclude an adverse impact on the integrity of the Wye Valley and Forest of Dean Bat Sites Special Area of Conservation if a really good package of mitigation and compensation can be put in place before the impacts occur.”

(My emphasis)

The e-mail concluded:

“We would be happy to continue working within your authority to further develop the policy wording in the AAP to ensure that an adverse effect on integrity can be avoided. Please feel free to contact me to discuss this further.”

94. Natural England was talking in terms of the need for adverse impacts to be avoided. That is the wording used in the 2010 Regulations. It is pedantic to suggest that Natural England had to go further and use the precise language of the case law of the European Court of Justice. That would be to introduce, in the words of Sullivan J (as he then was) a “legal obstacle course”.
95. Accordingly, I reject this ground of complaint.

#### **The relevance of the proposals for future monitoring**

96. It is clear that the CAAP is not in itself a grant of planning permission for the construction of the new spine road. It is an overall plan for the area under the aegis of which applications for planning permission will be made for the various projects envisaged in the plan.
97. The provisions in Policy 15 set out the requirements that must be fulfilled if an application for planning permission for the spine road is to be successful. It is well accepted that the inclusion of such mitigating provisions may be relied on to support a conclusion that relevant effects are not likely: see *Feeney v Oxford City Council* [2011] EWHC 2699 (Admin), at [88]-[91] (in respect of an AA of a plan); *Hart DC v Secretary of State* [2008] EWHC 1204, at [61] (in respect of screening decisions and appropriate assessment of applications for planning permission).
98. The requirement for monitoring is one that is placed upon the body that constructs the spine road and it is triggered only when the construction has been completed in the primary bat corridor areas. It is, in effect, an incentive to the contractor to ensure that he achieves the standards and objectives required when building the road: if he does not, the monitoring will reveal the shortcomings with, no doubt, adverse financial consequences for the contractor.
99. In these circumstances I see no ground for assuming that the imposition of a requirement for such monitoring somehow reveals a lack of reasonable belief that adverse effects were not occur if the plan is properly implemented. I do not consider that there is anything in this ground of complaint.

100. In the light of this conclusion, and the conclusions that I have already reached, it follows that the Council was, on the material available, entitled to adopt the CS and the CAAP in spite of the points raised by the objectors. Subject only to Mr. Dove's challenge to the Inspector's report, the claimant's challenge to these decisions must fail.

**Did the Inspector apply the wrong test?**

101. In the light of the conclusion that I have just reached it is in my view irrelevant whether the Inspector, in approving the CS and the CAAP, acted correctly or incorrectly. Once the court has found that the Council was entitled to adopt the plan approved by the Inspector, that in my view is an end of it. It would be otherwise if the Inspector had rejected the CS and CAAP, but that is not what happened.
102. However, I will consider briefly the submissions of Mr. Dove that the Inspector applied the wrong test as a matter of law. This complaint is founded on two paragraphs of the report on the examination of the CAAP, paragraphs 38 and 39. At paragraph 38 the Inspector said:

“As para 98 of Circular 06/2005 confirms, there is no requirement to undertake additional surveys to satisfy professional curiosity. Whilst more details could have been provided earlier in some respects, the test is whether further work was needed to assess the likely significant impacts, as it is not necessary to consider every possible limited or very detailed impact that would not have an influence on the form and content of the AAP proposals.”

An AA is required if it is apparent that a plan is likely to have an adverse impact on the relevant feature, in this case the SACs. The likely significant impacts of the plan are what the AA must address. As I read this paragraph, all that the Inspector is considering is whether further work is required by way of AA or whether what has been done already has adequately considered and eliminated the likely significant impacts that gave rise to the need to the assessment. I can find no error of law in this paragraph.

103. I now turn to paragraph 39. Here the inspector said:

“Notwithstanding, the Appropriate Assessment (AA) (CD 5a) subsequent to the HRSA concluded that five particular changes to the AAP would ensure that there are no significant negative effects as a result of the proposals. Suitable amendments have now been made to the policies and proposals of the AAP in the **FPCs** and all are clearly required for soundness. Moreover, flexibility remains in terms of the exact design and location of the new spine road, which will be subject to an EIA, and particularly the junction with the A4136 so that it can be adjusted to take into account potential mitigation measures.”

Strictly speaking, what Mr. Dove submits is correct: the relevant test is the absence of adverse effects, not the absence of “significant negative effects”. However, it is

clear that in this passage the Inspector was simply summarising in his own words what the AA said.

104. What the AA actually said, in the passage that I have already quoted, was that the five proposed changes would ensure that there would be no adverse effects. This was the correct test. In my view, the Inspector's mistranscription of the wording of the AA is of no consequence. He was clearly referring to the AA and, on its face, the AA was applying the correct test. Accordingly, I reject the challenge to the Inspector's conclusions in these two paragraphs.
105. This challenge to the Inspector's application of the correct test and the challenge to his lack of adequate reasons are new ones. They were not raised in the Statement of Facts and Grounds. They appeared for the first time in Mr. Dove's skeleton argument served on 8 May 2013, two working days before the hearing. The challenge to the Inspector's application of the correct test raised a short point and Mr. Pereira was well able to deal with it. However I consider that different considerations apply to the challenge in respect of reasons.
106. Mr. Pereira submits that it is not appropriate to embark upon an analysis of what the Inspector did or did not decide, or why he decided it, without having a full set of the material before the Inspector and some form of record, however rudimentary, of the examination process. The examination into the CS took place between 12-17 October 2011, and that into the CAAP was between 18-19 October 2011.
107. I consider that there is force in the submission. I do not think that it would be right to allow this point to be taken now, particularly since the reports were issued at the end of 2011, well before the issue of the claim form in this action on 4 April 2012. If the Inspector's reasons are deficient on the face of the reports, then that was the point that could and should have been taken at the time when these proceedings were started.
108. Further, although the court has seen the note by Mr. Priddis summarising the points that he said that he made to the Inspector, such documents must be approached with a little caution. I mean no disrespect to Mr. Priddis, but it is all too tempting when compiling a post hearing note to include - albeit unwittingly - a summary of what one had intended to say, or hoped had been said, rather than what was actually said. Indeed, by the time the note comes to be prepared it may well be that those two things have merged into one. Further, I have already mentioned the rather unsatisfactory evolution of the development of the re-alignment of the spine road. It is not clear to me at what point during his address to the Inspector Mr. Priddis was aware of, or had taken fully on board, the latest version of the re-alignment of the road that had been tabled at the hearing. That is not a criticism of him; it is an unfortunate result of the late way in which this developed.
109. In these circumstances, the court cannot be at all confident about the material that was put before the Inspector or the sequence in which it came. It is possible that submissions made at the outset of the hearing became overtaken by events. Without having a reasonably accurate record of the proceedings and without knowing precisely what information was put before the Inspector, it is very difficult to make a fair assessment of his reasons for reaching all the conclusions that he did. Further, neither the Inspector nor the Secretary of State is a party to these proceedings, and has had not opportunity to comment on this aspect.

110. In these circumstances and since, for the reasons that I have already given, I regard it as irrelevant whether the Inspector gave good reasons or bad for his approval of the CAAP, because in the end he approved it, I do not think that it would be fair or appropriate to embark on an examination of the adequacy of his reasons for rejecting the evidence of Mr. Priddis as Mr. Dove invites me to do.

### **The AA was not informed by consultation with Natural England**

111. In my view this ground of complaint fails on the facts. It appears that it was probably based on incomplete material produced by the Council. However, in the light of the material that is now before the court and to which I have already referred, it is plain that Natural England had significant input into the AA, both prior to the first draft coming into existence and thereafter. The bat survey is just one example of Natural England's contribution. Had it not been for the insistence of Natural England, it might not have been carried out, at least not in 2011.

### **The lack of consultation**

112. Although this was another new point, in the sense of not being relied on in the Statement of Facts and Grounds, it was a matter raised at the time by the Claimants, and the Council has disclosed all the relevant documents showing what happened between the issue of the draft CS and CAAP in April 2011 and the Inspector's examination in October 2011.
113. It is a matter of record that the Inspector's reports record that the CS and CAAP were submitted for examination on 26 July 2011. By that time the AA for the CAAP had not come into existence. Indeed, the AA was first issued in draft on 22 September 2011 and was not in a form that Natural England was prepared to approve until about 17 October 2011 - the day before the examination of the CAAP was due to begin.
114. I would have thought that it goes without saying that, as a general rule, where there is to be a public consultation on a particular issue, the public is entitled to have access to the material that is to be relied on by the body seeking consultation a reasonable time before the relevant hearing is to take place or the date by which representations are to be submitted: see the observations of Owen J in *Akester* that I have set out above. In this case, the documents that were to be examined were fairly extensive and in the circumstances I consider that a reasonable period of notice would have been not less than six weeks, particularly as the consultation period overlapped the end of the summer holiday season. So for a hearing that was to take place on 12 October 2011, I would regard 1 September 2011 as the latest reasonable date for the provision of the relevant information by the Council.
115. As it was, the interim bat survey was not available until at least 6 September 2011 (although I do not know when the claimants were provided with a copy of it<sup>2</sup>). Keynote document CD 5a, which contained the AA, was issued on 22 September 2011. No one was able to identify when the first plan showing the proposed re-alignment of the spine road to the west of the LHB roosts in the Northern United site was produced, but I assume that some indication was given at the same time as the

<sup>2</sup>

Mr Chapman says that Mr Priddis was given a verbal update on the bat survey on 9 September 2011, but there is no evidence as to precisely what information was given to Mr Priddis on that occasion.

issue of CD 5a. However, the Inspector suggested that the final route was the one tabled at the hearing on 18 October 2011.

116. Whilst much of the material in the CS and CAAP was not new and those documents were issued at the end of July 2011, the information in the interim bat survey and document CD 5a, including of course the AA, was of crucial importance. Matters were made worse by the fact that the wording of the AA was still not in its final form and was not in fact finalised until the day before the examination of the CAAP.
117. The strictures of Mr. Priddis made at the hearing about the late production of information were in my view entirely justified. Too many important documents were issued at the last minute. I find that there was a breach of regulation 102(3) in that the steps taken by the Council to take the opinion of the general public fell well short of those which any reasonable council, having decided to consult, should have taken.
118. However, the Council's failings in this respect were to some extent mitigated by the fact that the Inspector gave interested parties a further period in which to make supplementary written submissions. Whilst this went some way towards remedying the position, as any judge knows post hearing submissions often do not have the same impact as submissions made orally to a tribunal where there is the opportunity to adjust the tone and content of the submissions to the needs of the occasion and the reaction of the tribunal.
119. The sense of injustice felt by the claimants about the adoption of the CAAP is I consider in large measure the result of this last minute provision of information relevant to the hearing. They feel that they were bounced. Indeed, the Inspector himself observed that the AA was carried out too late in the day, an observation with which I agree.

## **Conclusions**

120. For the reasons that I have given I consider that the Council was entitled to adopt the CS and of the CAAP as it did. Its decision to do so was not unreasonable in the sense that it was a decision that no reasonable local authority in its position could have reached.
121. It is to be regretted that the Council left it so late in the day to prepare the AA with the consequent adverse effects on its ability to consult adequately with the public.
122. I consider that the Council failed to carry out an adequate consultation because the AA and, in particular, the important changes to the re-alignment light of the spine road were, it seems, not finalised until the day before, or possibly the day of, the Inspector's examination of the CAAP.
123. However, in the end I consider that the Claimants and others had an opportunity to present their views and to have them taken into account by both the Inspector and the Council. In these circumstances I do not consider that it would be either appropriate or proportionate to quash the decisions to adopt either the CS or the CAAP. However, I must emphasise that the Council is to ensure that the mitigating steps that have been incorporated into the plans are strictly implemented. It will not be

sufficient to construct the spine road and then simply ignore the requirement for further monitoring thereafter.

124. By way of afternote, I would add this. Local authorities are sometimes accused of acting in an overbearing manner. I do not regard this as such a case. The 2010 Regulations are stringent and require a lot of detailed work if compliance is to be achieved. This places a heavy burden on a local authority. In this case the Council has been kept up to the mark not only by Natural England but also by the determined and well considered campaign by the Claimants to ensure that the local biodiversity is not irrevocably damaged by any future development. This is not the lunatic fringe: on the contrary, it was the action of well-informed, sincere and legitimately concerned individuals. In years to come those who live in the Forest of Dean may have good reason to be grateful to them.
125. If necessary, I will hear counsel on any questions of costs that cannot be agreed, or on any other matters arising out of this judgment.

## Table of Acronyms

AA	Appropriate Assessment
AAP	Area Action Plan
CAAP	Cinderford Area Action Plan
CS	Core Strategy
CS SA	Core Strategy Sustainability Appraisal
CS SA & ER	Core Strategy Sustainability Appraisal & Environmental Report
CSSDSA	Core Strategy Submission Draft Sustainability Appraisal
DCLG	Department for Communities and Local Government
DPD	Development Plan Document
GCER	Gloucestershire Centre for Environmental Records
HRA	Habitats Regulations Assessment
HRSA	Habitats Regulations Screening Assessment
NQ	Northern Quarter
PPS	Planning Policy Statement
SA	Sustainability Appraisal
SA & ER	Sustainability Appraisal & Environmental Report
SAC	Special Area of Conservation
SEA	Strategic Environmental Assessment
SPA	Special Protection Area

## **APPENDIX A**