

11 THE LEGAL REQUIREMENTS OF THE BIRDS AND HABITATS DIRECTIVES

11.1 Introduction

11.1.1 This section presents the key components of the Legal Opinion provided by Bond Pearce LLP. The Legal Opinion is repeated in full as Appendix J to this report.

11.2 Summary of the Legal Opinion

11.2.1 The classification of the Thames Basin Heaths Special Protection Area by the Government of the United Kingdom on 9 March 2005 secured, for the habitat of the three Annex I bird species (nightjar, woodlark and Dartford warbler) protected by the designation, a high level of protection. It placed on the UK an obligation to restore and maintain the site at favourable conservation status. Currently, the Thames Basin Heaths SPA is considered to have an unfavourable status owing to degraded habitat.

11.2.2 In respect of the Thames Basin Heaths SPA the United Kingdom is obliged to:

- Take positive conservation measures in respect of the habitats and species for which the SPA has been classified (Article 4(1) of the Birds Directive).
- Make provision for the avoidance of habitat deterioration and significant species disturbance (under Article 6(2) of the Habitats Directive).
- Ensure that a series of procedural and substantive safeguards are applied in respect of plans and projects which are likely to have a significant effect on the interest for which the SPA has been classified (Articles 6(3) and (4) of the Habitats Directive).

11.2.3 These obligations derive from the Birds Directive and the Habitats Directive. As such, the UK and its emanations (including Natural England, the Planning Inspectorate and local planning authorities – Competent Authorities) must interpret the obligations having regard to the precautionary principle and to the principle of proportionality. The obligations have been largely transposed into England, Scotland and Wales by the Conservation (Natural Habitats &c.) Regulations 1994 (the 1994 Regulations), as amended.

11.2.4 English Nature (now Natural England) has advised that proposed residential development within the vicinity of the Thames Basin Heaths SPA is likely to have a significant effect on the SPA as a result of increased recreational use and other residential pressures. The evidence on which this assessment is made has been peer reviewed. Although it is not conclusive as to the point at which additional recreational use will cause further deterioration in the condition of the habitat, the nature of this uncertainty itself requires EN to invoke the precautionary principle.

The risk to the SPA is to be treated as existing unless it can be excluded on the basis of objective information.

- 11.2.5 This means that each planning application and every land use plan which contemplates a net increase in residential development (even if only for one dwelling) and which is sufficiently proximate to the Thames Basin Heaths SPA to be likely to affect it must be considered by the Competent Authority against the provisions of Article 6(3) of the Habitats Directive. Article 6(3) requires account to be taken of the likely effects of any individual plan or project both alone and in combination with any other plan or project. In the absence of evidence to the contrary, Competent Authorities should conclude that in combination with other plans and projects any planning application and any land use plan for residential development will have a significant effect on the Thames Basin Heaths SPA. Unless avoidance measures can be taken, the plan or project can be permitted only for reasons of overriding public interest and in conjunction with compensatory measures. It is not considered that the proposed residential development is likely to satisfy this test. Therefore, for such development to proceed, avoidance measures must be identified.
- 11.2.6 The Thames Basin Heaths draft Delivery Plan is an innovative proposal by English Nature (EN) (now Natural England) to assist Competent Authorities and developers concerned with new residential development proposals within the wider vicinity of the Thames Basin Heaths SPA. It forms part of a more extensive Thames Basin Heaths Project. Its objectives are:
- To prevent a net increase in recreational use of the Thames Basin Heaths SPA arising from developments within approximately 5km of the SPA boundary.
 - To prevent direct adverse effects on the Thames Basin Heaths SPA arising from the proximity of new residential development by preventing any new residential development within 400 metres of the boundary of the SPA.
- 11.2.7 The draft Delivery Plan seeks to achieve its objectives through the definition of three zones around the boundary of the Thames Basin Heaths SPA. Guidance is proposed for each zone.
- 11.2.8 When combined with other measures promoted to manage and control access to and the use of the Thames Basin Heaths SPA, English Nature considers that the provision of Suitable Accessible Natural Green Space (SANGS) will divert sufficient people from using the Thames Basin Heaths SPA to ensure there is no net increase in recreational use. This would enable Competent Authorities considering applications for plans and projects which are likely to have a significant effect on the Thames Basin Heaths SPA to conclude that these avoidance measures are sufficient to avoid any significant effects. On that basis, it would not be necessary for any decision-maker to undertake an appropriate assessment of each plan or project in order to determine whether it is likely to adversely affect the integrity of the Thames Basin Heaths SPA, either alone or when considered in combination with all other residential plans and projects around the SPA.

- 11.2.9 There is no legal obligation on English Nature to advance a solution to the challenges faced by developers and the Competent Authorities. However, owing to the fragmented nature of the Thames Basin Heaths SPA and the involvement of three county and eleven district councils, English Nature hope that this strategic proposal will enable a consistent approach to be adopted to the determination of planning applications and land use plans concerning new residential development.
- 11.2.10 The draft Delivery Plan will not remove from each Competent Authority the obligation to consider each plan and project against Regulation 48 of the 1994 Regulations. However, provided that a Competent Authority is satisfied that the provision of SANGS will ensure that the new development will not lead to a net increase in recreational use of the Thames Basin Heaths SPA then it can conclude that there will be no likely significant effects arising from the plans and projects before it. In such cases, no appropriate assessments will be required.
- 11.2.11 The Thames Basin Heaths draft Delivery Plan is promoted for a pilot three year period with the intention that it should be refined if the results of further studies suggest that the proposals need to be amended. It is:
- Consistent with the objectives and provisions of the Directives.
 - Predicated on a precautionary basis.
 - Strategic, to apply to land use plans and planning applications across fourteen administrative areas.
 - Developed through discussion with the relevant competent authorities.
 - Specific to the habitats of the three Annex I birds for which the Thames Basin Heaths SPA was classified.
 - Specific to the identified risks of disturbance which would be significant for the three Annex I bird species for which the Thames Basin Heaths SPA was classified.
 - Outside the Thames Basin Heaths SPA but focused on the avoidance of harm within the site.
 - Concerned with anticipated, predicted events and activities (not with reducing existing levels of recreational use).
 - Not itself legally binding. Alternative avoidance measures may be acceptable if evidentially supported.
 - Does not fetter the decision of any Competent Authority. A Competent Authority is not precluded from disagreeing with the advice of Natural England or from considering alternative avoidance measures, provided that it complies with its obligations under the Habitats Directive.
 - Fair in application. The contribution to be provided in respect each dwelling within a zone will be the same, whichever district an application site lies within or whatever the scale of the development.

- Intended to ensure that residential development can take place in such a way that the UK (Ministers, nature conservation bodies and county and local authorities) would not be in breach of obligations under the Directives.
- A proposal which, if adopted, would conserve local planning authority resources that would otherwise be required in the undertaking of appropriate assessments for each and every planning application for residential development, as opposed to those which do not comply with the proposals in the draft Delivery Plan.

11.2.12 Although a number of alternatives to the Thames Basin Heaths draft Delivery Plan have been advanced by stakeholders during the Peer Review consultations, it is not considered that any on their own would enable the UK to comply with its obligations under the Habitats Directive. In the event that the research commissioned into the effectiveness of the Thames Basin Heaths draft Delivery Plan demonstrates in time that the SANGS concept is not effective, and that the other measures that comprise the Thames Basin Heaths Project are not sufficient to enable the favourable conservation status of the SPA to be restored and maintained then the UK will be obliged under Article 6(2) of the Habitats Directive to take other measures.

11.3 Key conclusions of the Legal Opinion

11.3.1 The purpose of this Legal Opinion is to contribute to the Peer Review of the evidence base. This has been done by:

- Describing the key processes and requirements of the Birds and Habitats Directives that apply to the consideration of proposals that might affect a designated SPA.
- Assessing the key elements of the English Nature Delivery Plan and how this has been derived, correctly or incorrectly, from the requirements of the Birds and Habitats Directives.
- Assessing the alternatives to the Delivery Plan that have been identified in consultation with stakeholders against the requirements of the Birds and Habitats Directives, classifying them as in conformity, or not, with those Directives.

11.3.2 In respect of each of the three subject areas considered detailed consideration is provided within the full Legal Opinion (Appendix J). The key conclusions reached are recorded below.

The Legal Framework

11.3.3 EC Law defines the legal framework for the protection of the protected features of the Thames Basin Heaths SPA. In the case of the Thames Basin Heaths SPA the relevant EC Law comprises the Birds Directive, the Habitats Directive and the principles of proportionality and the precautionary principle.

- 11.3.4 The UK has a legal obligation under the Habitats Directive to restore and maintain the favourable conservation status of the Thames Basin Heaths SPA. The balance between development and conservation is defined by Article 6 of the Habitats Directive. Article 6(4) provides that a plan or project that may adversely affect the integrity of an SPA can proceed only where justified by reasons of over-riding public interest where compensatory measures are provided.
- 11.3.5 In considering whether a plan or project will adversely affect the integrity of an SPA the Competent Authority must consider its effects both alone and in combination with other plans and projects. Following the decision of the European Court of Justice in *Commission -v- UK* account must be taken of land use plans as well as individual development proposals. In the case of residential development which is sufficiently close to the boundaries of the Thames Basin Heaths SPA to give rise to likely residential and/or recreational pressures on the SPA this requires account to be taken of the thousands of other residential development proposals proposed over the next ten or so years. The conclusion reached is that this level of effect will adversely affect the integrity of the SPA. It is not expected that a case would be successful if asserted on the basis that that the need for residential development in this particular location was so important that it constituted a reason of over-riding public interest since alternative solutions are available. Therefore, if residential development is to proceed within this area it can only do so if avoidance measures are provided to ensure that there will be no significant likely effects on the Thames Basin Heaths SPA.

The English Nature draft Delivery Plan

- 11.3.6 The English Nature draft Delivery Plan is promoted for use in the application of the requirements of Article 6(3) of the Habitats Directive to individual plans and projects. The key elements of the draft Delivery Plan comprise:
- The evidence that the effects of further residential development within approximately 5km of the SPA boundary are likely to have a significant effect on the SPA.
 - The evidence for the assessment that the provision of SANGS will lead to the diversion of sufficient recreational users from the Thames Basin Heaths SPA to lead to no net increase in recreational use.
 - The identification of three zones and the recommendation of avoidance measures for each zone.
 - The evidential base for the boundaries for each zone and the avoidance measures for each.
- 11.3.7 It is considered that the principles underlying the Thames Basin Heaths draft Delivery Plan are consistent with the provisions of the Birds Directive and the Habitats Directive and with the principles that must be applied in their interpretation. In respect of each of the key elements consideration is given below as to their conformity with the legal framework.

- The evidence of the adverse effects which recreational use and proximate residential development can have on heathlands is such that Competent Authorities should invoke the precautionary principle.
- The Peer Review recognises theoretical support for the SANGS concept. Empirical evidence is, however, weak. Nevertheless, pending more robust scientific evaluation and having regard to the principle of proportionality it is considered the Competent Authorities can accept the evidence in the absence of more compelling evidence.
- In respect of Zone A it is concluded that the proposal to preclude all residential development within 400 metres of the SPA boundary is substantiated by the evidence considered.
- In respect of Zone B it is considered that the inner boundary is logical and supported by evidence. The Peer Review has questioned the basis of the two kilometre outer boundary and considers that an application of available evidence would support a 1km boundary. The evidential basis should therefore be reviewed to ensure that the 2km boundary is the most logical in light of the available evidence.
- In respect of Zone C the Peer Review concludes that the selection of the 5km outer boundary is supported by the evidence. The inner boundary of 2km should be reviewed as discussed in respect of Zone B above.
- The evidence regarding the identification of the 8 ha and 16 ha alternatives SANGS provision for Zones C and B respectively is considered by the Peer Review to be very weak, this makes the selection of these figures at great vulnerability to legal challenge in the event that other evidence emerges. However, pending more robust scientific evaluation and given the rationale presented in the draft Delivery Plan for these figures it is not considered that a Competent Authority would be acting unlawfully or unreasonably in applying these figures in considering the acceptability of avoidance measures.

11.3.8 Overall, the draft Delivery Plan, taken together with the wider package of measures promoted under Article 4(1) of the Birds Directive (to take special conservation measures to ensure the survival and reproduction of the protected bird species) and Article 6(2) of the Habitats Directive (to take steps to avoid habitat deterioration or significant species disturbance) it is sufficient to be acted upon pending the outcome of a more comprehensive scientific evaluation, a risk assessment and the on-going participation of interested parties. It is understood that all three of these elements form part of current and proposed projects during the pilot period of the draft Delivery Plan.

Alternatives

11.3.9 It is not considered that any of the alternatives considered on their own offer a means of controlling an increase in recreational use of the Thames Basin Heaths SPA in the face of a significant increase in population.

11.3.10 Further, any Competent Authority seeking to rely on any alternative on its own would be unable to conclude that on the application of the Regulation 48 tests in

the case of a particular planning application or draft land use plan policy, there would be no likely significant effect on the Thames Basin Heaths SPA. Although the period of time when the Regulation 48 assessment would lead to the conclusion, on the basis of the current evidence, that there would be a significant adverse effect differs between the alternatives, each would give rise to a breach of Article 6(3), whether in the short term, the medium term, or the long term.

11.3.11 In addition, some of the alternatives could proceed only if the evidence that requires the application of the precautionary principle is ignored. For example, the following alternatives:

- Do nothing, there is not an issue (H.01)
- Drop the draft Delivery Plan in favour of a plan, monitor, manage approach (H.03)
- Zones around the SPA with thresholds to apply a de minimis rule (H.04)
- Release small sites up to a threshold of say 1% population increase now (H.05)
- Management to capacity (H.10)
- More controls on dogs (H.13)

11.3.12 However, some of the alternatives would be acceptable when taken together with the draft Delivery Plan as part of the wider Thames Basin Heaths Project. These include the following alternatives:

- The sub-region approach (H.06)
- Strategic SANGS in advance of development (H.08)
- SANGS and visitor management combination (H.09)
- Access management first and foremost (H.11)
- Developers to fund improved SPA management (H.12)
- More controls on dogs (H.13)
- A body to receive funds, purchase, create and manage greenspace (H.14)

12 CASE STUDIES OF DEVELOPMENTS IN OR ADJACENT TO SPA'S OR SAC'S

12.1 Introduction

12.1.1 The driving force behind the request to describe case studies of developments from other parts of the European Union was the suggestion that in other member states they take a less strict approach to the protection of SPAs and SACs. In particular recent actions by Belgium have been cited as showing such a lax approach but no evidence has been provided by those making the suggestion.

12.2 Approach

12.2.1 The process of seeking to identify such case studies has been one of searching the websites and reports produced by European NGOs such as the World Wide Fund for Nature (WWF) and BirdLife International who have a track record of initiating complaints to the European Commission, which if upheld, proceed to the European Court. The reports on implementation of the Birds and Habitats Directives by the Commission have also been examined along with the record of European Court cases held on the website curia.europa.eu.

12.3 Results

12.3.1 There are several sources of information where member states have failed to apply the protective regime required by EU environmental directives and the Birds and Habitats Directives in particular (Commission of the European Communities 2006, Kocsis-Kupper *et al* 2004, WWF 2001 and WWF 2006).

12.3.2 The most comprehensive and authoritative of these is the report from the Commission on the implementation and enforcement of Community environmental law up to and including 2005 (Commission of the European Communities 2006). This considered all Directives that were related to the environment, categorised infringements and included statistics for the Birds and Habitat Directives combined. The reporting included complaints, petitions and action such as the issuing of a 'reasoned opinion' that precede court cases. As a result it gives a more rounded picture of member state performance than other reports (eg Kocsis-Kupper *et al* 2004, WWF 2006) since it identifies action that solved a problem without resort to the Court.

12.3.3 Tables 12.1 and 12.2 provide a summary of the instances cited in the Commission report and compares infringements against the Birds and Habitats Directives ("Nature Directives" in the tables) with the sum of all environmental Directives. Information is presented only for the twelve countries that formed the European Union in the 1980's. This selection of countries is because it takes time to translate Directives into national legislation and then experience problems with

implementation. Infringements by the thirteen states who joined later in the enlargement process are available in the Commission report but not included here. Reporting for these late entry states relates to only a small number of years and the comparison is not valid.

12.3.4 Table 12.1 provides information on infringements that relate to problems with the transposition of the Directives, that is how they are reflected in national legislation. This may be that the national legislation does not include any measures or what is there does not conform to the full requirements of the Directives.

12.3.5 Table 12.2 provides information on infringements that relate to failures to abide by the requirements in practice, that is an action has been taken in the member state that is contrary to the Directive or there has been a failure of action. An example would include a failure to prevent a development that resulted in significant impact to the integrity of a SPA.

Table 12.1: Failure to transpose a Directive.

Member state	Nature Directives	All environmental Directives
Belgium	0	5
Denmark	1	2
France	5	12
Germany	2	5
Greece	2	5
Ireland	2	7
Italy	2	17
Luxembourg	0	3
Netherlands	1	4
Portugal	1	2
Spain	1	6
United Kingdom	2	10
Totals	19	78

Table 12.2: Failure to fulfil the objectives of a Directive

Member state	Nature Directives	All environmental Directives
Belgium	6	12
Denmark	1	3
France	7	21
Germany	8	13
Greece	7	23
Ireland	9	30
Italy	18	52
Luxembourg	0	4
Netherlands	1	5
Portugal	9	25
Spain	16	45
United Kingdom	5	17
Totals	87	250

12.3.6 If a ‘league table’ approach is taken it can be seen that the United Kingdom is neither the “dirty man of Europe” (Rose 1990) nor does it have a totally ‘clean’ record. Some other states have a poorer record but the fact that this has been recognised and action taken, including enforcement following judgements of the European Court, means that their performance today should be much improved.

12.3.7 It should also be borne in mind when comparing performance across member states that just because one country has failed to fulfil the requirements of the Birds Directive it is not a legal grounds for another member state to do so as well

12.4 The specific case of Belgium

12.4.1 The assertion has been that Belgium ignores the Birds Directive. This appears to derive from the fact that Belgium had a judgement against it by the European Court that it had failed to provide an adequate and enforceable system for protecting SPAs in its Flemish Region (European Court of Justice 2003). On that basis it can be said to have ignored the Directive in part of its territory but remedial action

was required and implementation should now be up to the required standard. As stated above this failure by Belgium is not legal grounds for the United Kingdom to ignore the Directives in making decisions on the Thames Basin Heaths SPA specifically or on SACs and SPAs generally.

12.5 Conclusion

- 12.5.1 It has proven impossible to find cases where damage to an SPA or an SAC has been permitted by a member state that has not then been the subject of a complaint to the Commission and European Court or has followed due process with “imperative reasons of overriding public interest” (IROPI) and no alternative justified and compensatory measures put in place.
- 12.5.2 What this finding does not preclude is the possibility that developments may have been consented in a member state that both the public authorities and the NGOs do not consider will have led to damage because they have a different perception to threats and damage in comparison to similar bodies in the UK.
- 12.5.3 Some member states have been the subject of a greater number of complaints and court cases than the UK. A particular judgement in 2003 against Belgium regarding its the failure to provide an adequate and enforceable system for protecting SPAs is thought to be the source of the suggestion that protective mechanisms are weaker in some other member states.

13 OTHER POSSIBLE APPROACHES

13.1 Introduction

13.1.1 These alternative approaches have been developed based on suggestions made at the two workshops, feedback from the Project Steering Group members, submissions by third parties and discussions amongst RPS staff.

13.1.2 Where a LPA has not been progressing the mini-plan approach we consider that the following combination of measures should be considered as having potential for an alternative approach. A number of alternatives concentrate on the detail of the delivery mechanism, that is the nature of site based restrictions or the body to create greenspace. As such they could be applied alongside the existing draft Delivery Plan, any revised version, or a mini-plan.

13.2 Prioritisation of alternatives

13.2.1 The alternatives that had been developed were prioritised and those that were considered to be of high priority were worked up in greater detail than the medium to low priority. All alternatives are included in Appendix H. The high priority alternatives have been given a code number and that coding is used below to cross-refer them to the detail given in the Appendix.

13.2.2 The alternatives were also given a time scale of short, medium or long term and the high priority alternatives are listed below, based on their time scale.

High priority, short term alternatives

- Do nothing, there is not an issue (H.01)
- Drop the draft Delivery Plan in favour of a plan, monitor, manage approach (H.03)
- Zones around the SPA with thresholds to apply a de minimis rule (H.04)
- Release small sites up to a threshold of say 1% population increase now (H.05)
- The sub-region approach (H.06)
- Use adopted LPA open space standards for SANGS determination (H.07)
- SANGS and visitor management combination (H.09)
- Access management first and foremost (H.11)
- More controls on dogs (H.13)
- A body to receive funds, purchase, create and manage greenspace (H.14)

High priority, medium term alternatives

- Suspend application of the Delivery Plan pending the production and assessment of the South East Plan (H.02)
- Strategic SANGS in advance of development (H.08)
- Management to capacity (H.10)
- Developers to fund improved SPA management (H.12)

High priority, long term alternatives

- No actions with a long term prospect of implementation were given a high priority

13.3 Assessment and identification of combinations

13.3.1 In assessing the combinations, three key conclusions from the review of evidence were used to test their relevance and potential effectiveness. These were

- Evidence for the damaging effects of disturbance to Annex I heathland birds by recreational access exists but it is weak. More significantly the majority of this evidence relates to the effects of existing access patterns and little of it was developed to predict the effects of incremental increases in visitor numbers from the existing baseline.
- This limited body of evidence applies equally to the management of existing access to the heaths and the current focus on tackling the predicted small number of additional visits created by ‘infill’ or ‘windfall’ development in a one to two year timescale is not justified by the relatively insignificant difference that this will make to what may be currently excessively disturbed SPA heaths (but even this is not known for certain due to the current limitations on the information).
- Evidence that providing new greenspace will attract new residents away from existing greenspace (be it the SPA or heathlands generally) is lacking.

13.3.2 This led to the following proposed combinations that were considered, from the perspective of the RPS team, to be appropriate means to take forward the issue of delivering the housing allocations and protecting the SPA. These ‘desirable’ packages are set out below divided into immediate/short term combinations of actions and medium/long term combinations of actions.

Desirable immediate and short term combination

13.3.3 The combination of measures to be applied in the next 12 months, before substantial quantities of potential mitigating land is likely to come on-stream, is as follows.

- Start to address visitor management over the coming bird breeding season, recognising that this is the start of a medium term process (H.11 and H.13).
- Apply the options for flexibility in case specific circumstances, where it is possible to support it with an evidence base (section 8).
- Implement the mini-plan procedures where they have been agreed and encourage other LPAs to consider using this approach.
- Target the Thames Basin Heaths SPA with green infrastructure funds in a similar manner to the targeting of growth areas (H.06 and H.14).
- Develop and initiate a programme of studies to increase the evidence base on visitors, effectiveness of SANGS, defining a carrying capacity and the bird response to incremental increases in visitor pressure such that it delivers results in the medium term (see specific recommendations section 15).

13.3.4 It should be noted that the visitor management actions are likely, as shown by the review of the ecological evidence, to provide more benefit to Annex I bird populations under pressure from current visitors. Actions would be applied on a precautionary basis for the breeding season in 2007, accompanied by education and awareness raising, where high recreational access is shown to coincide with high densities of Annex I species. To permit this targeting it is assumed that the current contract let to Footprint Ecology and/or the access management planning process currently in progress will reveal such pressure points.

Desirable medium to long term combination

13.3.5 The combination of measures to be applied in the medium to long term is as follows:

- Put in place an interim process, that is strictly time limited, for permitting small scale and infill development up to a limit that has been derived from a strategic environmental assessment and appropriate assessment (H.05) while requiring that larger developments are considered on their individual merits, with an appropriate assessment.
- Continue with the production and appropriate assessment of the South East Plan and LDFs to ensure that the overall policy and process is agreed through a democratic procedure (H.02). These assessed plans would replace the interim process once they had been agreed.
- The effectiveness of visitor management (including the twin track approach of restrictions and alternative recreation areas for those ‘pushed off’ the SPA) is tested, allowing a better evidence base to be gathered on potential mitigation and compensatory actions (see specific recommendations section).
- At the end of the interim period there is a thorough, evidence based review that allows the next phase of development planning and SPA protection to be rolled forward.

- 13.3.6 Alongside this consideration has to be given to the need for a ‘last resort’ statutory mechanism that can be applied to control access on registered Common Land and where use by historical right is claimed.

13.4 The recommended combination that is compliant with the Directives

13.4.1 The proposed alternative processes have been tested by the legal advisors to this review (Bond Pearce LLC) and the results of that consideration are presented in Appendix J and summarised in section 11. Their conclusion has been that those alternatives that proposed small scale and infill development over a strict time period, up to a threshold limit or of a de minimis size; or might be permitted while monitoring is undertaken for SPA impacts, were not found to be compliant with the Directives. They were deficient because the proposals did not derive from a sufficient evidence base that indicated with certainty the absence of damage to the SPA. As a result, when the precautionary principle was applied, they had to be found unacceptable. It was also found to be unacceptable to define such thresholds or limits by policy decision rather than an evidence base.

13.4.2 The measures proposed that were in compliance with the Birds and Habitats Directives achieved that status largely because they applied to local management action and investigative studies or were detailed factors to be taken into account in a case-by-case assessment of a proposal that was to be run through the current, Directive compliant decision making process (the Habitats Regulations steps). Those that failed and have not been carried forward into the final conclusion of this review are those alternatives that sought to change some underlying principle of decision making. The overall result is that it has not been possible to find a ‘radically different’ alternative to the draft Delivery Plan that does not fail some element of the Directives or, because it lacks an evidence base, the precautionary principle.

Directive compliant immediate and short term combination

13.4.3 There are a number of measures that could be applied in the next 12 months in combination with the draft Delivery Plan, a mini-plan or the existing Habitats Regulations decision making steps in a case specific decision, that would provide a package that is in compliance with the Birds and Habitats Directives and would aid the delivery of housing supply alongside the protection of the SPA. These are:

- Start to address visitor management over the coming bird breeding season, recognising that this is the start of a medium term process (H.11 and H.13).
- Apply the options for flexibility in case specific circumstances, where it is possible to support it with an evidence base (section 8).
- Implement the mini-plan procedures where they have been agreed and encourage other LPAs to consider using this approach.
- Target the Thames Basin Heaths SPA for green infrastructure funds (H.06 and H.14).

- Develop and initiate a programme of studies to increase the evidence base on visitors, effectiveness of SANGS, defining a carrying capacity and the bird response to incremental increases in visitor pressure such that it delivers results in the medium term (see specific recommendations section 15).

13.4.4 The ‘options for flexibility’ approach above requires the specific application to be supported by the additional evidence to justify the case specific circumstance. It also requires the application to be assessed by the LPA in the step-wise manner required by the Habitats Regulations. The result is that ‘flexibility’ places additional burdens on the developer, LPA and Natural England compared to an application with SANGS in accordance the draft Delivery Plan or a mini-plan.

13.4.5 To implement this immediate and short term programme Natural England should immediately:

- Begin a publicity and education campaign to raise understanding amongst user groups as to why restrictions (both voluntary and through CRoW) will be introduced. Note that publicity, education and on-site wardening to promote voluntary action is the only possible immediate action on “Section 15” Common Land.
- Apply the existing CRoW Act provision, where that is legally permissible, to ensure that dogs are kept on a lead and on a marked set of paths. Note that these measures are only required during the bird breeding season on specific parts of the SPA, they are not blanket closures. They cannot be applied on “Section 15” Common Land.
- Implement the restrictions that are available on open access land under the CRoW Act for bird conservation reasons to withdraw open access. Replace this with routes along waymarked paths to which the public would have access along with the existing Public Rights of Way to which the CRoW Act restrictions will not apply. Note that these measures are only required during the bird breeding season on specific parts of the SPA, they are not blanket closures. They cannot be applied on “Section 15” Common Land.
- The compliance with these access management measures should be monitored and reported publicly. The distribution of Annex I bird territories across the whole of the SPA should continue to be monitored. This will test the predictions of Mallord that woodlark territory establishment would change with altered recreational pressure and the predictions derived from Murison that Nightjar territory location would also change.
- Initiate the research programme listed in the actions below such that its results are delivered in the medium term.

Directive compliant medium to long term combination

13.4.6 The combination of measures to be applied in the medium to long term that have been found to be compliant with the Directives, is as follows.

- Continue with the production and appropriate assessment of the South East Plan and LDFs to ensure that the overall policy and process is agreed through a democratic procedure (H.02).
- Test the effectiveness of visitor management (including the twin track approach of restrictions and alternative recreation areas for those 'pushed off' the SPA) and develop a better evidence base on potential mitigation and compensatory actions (see specific recommendations section).
- Carry out a thorough, evidence based review of the implementation of the draft Delivery Plan and agreed mini-plans after a period of two to three years.

13.4.7 The above testing and review processes are intended to ensure that future decisions on residential development proposals are determined in a manner that is based on positive predictions of impact, or lack of it, on the integrity of the SPA. This is in contrast to the current position of having to be potentially over cautious due to the lack of knowledge resulting in the application of the precautionary principle.