Flood Management Plans and the implications of Case C-6/04
Commission Vs United Kingdom1.

1. Article 6 of the Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (the “Habitats Directive”) is concerned with special areas of conservation. In such areas, Member States must establish necessary conservation measures involving appropriate management plans that correspond to the ecological requirements of the habitats and species involved.

2. Article 6(3) of the Directive provides that any plan or project not connected with or necessary to the management of the special areas of conservation sites (SACs), but likely to have a significant effect shall be subject to an appropriate assessment of its implications for the site in view of its conservation objectives.

3. In the light of the assessment conclusions, competent national authorities for the purposes of the plan or project, shall agree to the plan or project only if it will not affect the integrity of the site concerned, and if appropriate, after having obtained the opinion of the general public.

4. The European Court of Justice has recently held in the above case that the failure to, make land use plans subject to appropriate assessment of their implications for SACs, is inadequate transposition of Article 6(3) and (4) of the Habitats Directive. The Court agreed with the Commission’s argument that although land use plans do not authorise development and planning permission must be obtained for development projects, they have great influence on development decisions and the sites concerned.

5. An appropriate assessment was required where there was a probability or risk that it will have a significant effect. The court held “such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have a significant effect on the site concerned.”2 In doing to they have effectively lowered the threshold to be met as to when an appropriate assessment is required. Reiterating what the Court held in the earlier Waddenzee case (C-127/02) paragraphs 40-44.

6. To date, Defra has advised that shoreline management plans (SMPs) and catchment flood management plans (CFMPs) and flood management strategies do not require an appropriate assessment. The rationale has been consistent with that for land use plans (and argued by the UK government in the case) namely: “these plans can be considered to be “plans and projects” for the purposes of Article 6(3) of the Habitats Directive, but they do not

1 20 October 2005.
2 Paragraph 54 of the judgement.

themselves authorise a particular programme to be carried out and that, consequently, only a subsequent consent can adversely affect such a site. It is therefore sufficient to make just that consent subject to the procedure governing plans and projects.\(^3\)

7. In light of the judgement it is therefore necessary to revisit this advice. We accept that SMPs and CFMPs can be “plans” for the purposes of article 6(3) Habitats Directive.

8. An appropriate assessment will be required if there is a probability or risk that it will have a significant effect on the site concerned. Such a risk will exist where it “cannot be excluded on the basis of objective information that a plan which still requires further permissions in order to be put into effect, will have significant effects on the site concerned.”\(^4\)

9. The Advocate General considered of particular relevance:
   (a) whether the requirements of site protection could in principle prevail over an opposing plan only at the last moment as an exception to the normal course of procedure (i.e. a subsequent assessment of the implications would not be carried out with the outcome being open, but rather with the objective of putting the plan into effect).
   (b) whether the plan predetermines the implementation of proposals, so that other possible alternatives are not considered.

The nature of the plans
10. The current guidance\(^5\) on SMPs summarises the aim of the plan as being "the basis for suitable shoreline management policies within a discrete length of the coast and to set the framework for the future management of risks along the coastline." The objectives include identifying preferred policies for managing flood and erosion risks, the consequences of implementing those policies and to inform others, so that future land use and development of the shoreline takes due account of the risks and preferred SMP policies.

11. In developing those policies, it is clear from the guidance that regard must be had to existing legislative requirements so as not to produce policies which we would subsequently be unable to implement. The guidance therefore refers to existing legal obligations including those for SACs e.g. paragraphs 2.6, 3 and 3.4.

12. In particular, whilst determining that SMPs are not within the scope of Directive 2001/42/EC and not requiring a strategic environmental

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\(^3\) Judgement of the court paragraph 53.
\(^4\) Opinion of Advocate General Kokott 9 June 2005 paragraph 43.

assessment⁶, it is accepted that the SMPs “clearly do set a framework for future development⁷. As a consequence an assessment of the environmental impacts of all policy options should take place before they are adopted in the SMPs. Notwithstanding that a more detailed environmental appraisal will be undertaken at the strategy or project stage.

13. The guidance indicates that in the appraisal process strategy plans follow on from SMPs and identify appropriate scheme types to implement the policies in the SMPs. Scheme developments then identify the nature of works to implement the preferred scheme. It is accepted in the guidance that “an assessment of the risks is an integral part of the appraisal process at each stage to ensure that decisions taken at that time are robust, and based on an awareness of the consequences and appropriate mitigation measures.”⁸

14. In relation to CFMPs; CFMPs policy guidance is that “CFMPs will provide a similar level of strategic guidance as… SMPs are already doing for managing the risks related to coastal flooding and erosion.”⁹ Its aim is “to inform and support planning policies and statutory land use plans”. Key objectives include development of policies and opportunities for management of flood risk which take into account effects and changes of land use. Such policies are intended to “feed directly into the development of strategy plans”.¹⁰ As with SMPs, for CFMPs river strategies follow on from the plan which in turn lead to the development of projects and schemes.

15. Policy colleagues are of the view that if these plans work as hoped, adverse effects and the need to provide compensatory habitat would be considered during the development of the plan and policy options. In principle site protection could prevail over a proposed policy in the formulation of the SMPs. The strategies which followed would then look at how to deliver the compensatory habitat if the outcome of the appropriate assessment was it could not conclude no adverse effect on integrity of the site and the strategy had to be carried out for imperative reasons of overriding public interest (there being no alternative to the plan as formulated). The current appraisal process and the guidance document implies that the plan, to a large extent, predetermines the implementation of the proposals.

16. The ECJ considered in the case of land use plans, that the fact applications for planning permissions were required to be determined

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⁶ A similar line has been given on CFMPs. I cannot see that this advice would change in light of the judgement given SMPs would still not required by legislative, regulatory or administrative provisions (this position may change in the future as a result of the EASO project). That said, if it is concluded that an appropriate assessment is required, it would be consistent with current guidance to recommend that operating authorities undertake such an assessment using the approach described in the Directive.
⁷ Ibid page 30.
⁸ Ibid page 2.
⁹ CFMP Policy Guidance July 2004 paragraph 1.2.
¹⁰ Ibid paragraph 2.3.

in the light of the relevant land use plans, necessarily meant that the plans had considerable influence on development decisions and on the sites concerned. Flood management and coastal protection scheme applications are not presently required legislatively to be determined in the light of such plans. Although for grant funding purposes Defra would not fund any proposed scheme which was inconsistent with the SMPs.

17. SMPs and CFMPs are similar to land use plans in that they have a spatial elements and form part of a framework of plans and strategies. The policy is fixed for the period of the plan and the policy informs what is an appropriate project and informs and influences other plans.

18. ODPM guidance on planning policy indicates that Regional planning bodies and local planning authorities in preparing planning strategies should have regard to policies in SMPs\(^\text{11}\) and guidance on SMPs and CFMPs reflects this. The Environment Agency presently exercises an advisory role and may make representations against a development which was inconsistent with the plan. Currently however these bodies only need to have regard to these considerations.

Future proposals

19. ODPM are now consulting on a new planning statement on development in areas of flood risk. If implemented this would result in a Direction requiring an application for major development which a local planning authority, minded to approve against sustained Agency advice to be called in for determination by the Secretary of State. In addition, the Agency’s statutory consultee role in relation to flood risks on certain developments will be extended. Further it will require regional planning bodies and local planning authorities when preparing regional spatial strategies to ensure “a broad consideration of flood risk and set out a strategy for managing it, having regard to the policies in…SMPs and CFMPs…”.

20. These proposals have been made to reflect the direction of Making Space for Water (Defra 2004). Proposals being developed internally for giving the Agency a strategic overview for flood management include strengthening the role of the SMPs. This could mean giving powers to the Agency to intervene in relation to coastal defence works which are inconsistent with the SMPs. In that context it is likely that any future development would be considerably influenced by the SMPs.

Conclusion

21. It is accepted that SMPs and CFMPs are plans for the purposes of article 6(3) Habitats Directive. Whilst each plan must be considered on a case by basis, for the reasons given above, they are likely to have a significant effect on the site concerned, in that it cannot be excluded on the basis of objective information that such plans will have a significant

\(^{11}\) They should also have regard to Catchment Flood Management Plans.

effect on decisions relating to schemes or projects through their effect on strategies which in turn affect such decisions.

22. That said this does not mean that there cannot be a cumulative assessment including such plans and the strategies and schemes which flow from the plan. Indeed the Advocate General anticipates such an approach in her opinion at paragraph 49, when concluding that “adverse effects on areas of conservation must be assessed at every relevant stage of the procedure to the extent possible on the basis of the precision of the plan This assessment is to be updated with increasing specificity in subsequent stages of the procedure”.

23. If an appropriate assessment is required and it is decided that the plan may affect the integrity of the site, the more difficult question then becomes as to whether the plan must be carried out for imperative reason of overriding public interest (there being no alternative to the plan in its present form) and as a result at what point in that procedure do you assess and secure compensatory measures. Further, if and to the extent that this needs to be done before the effects of the SMP/CFMP can be specifically ascertained, the basis for assessing the extent of the compensatory measures required. One approach might be to consider this assessment of the potential need for compensatory measures as a developing process, which parallels the developing process of refining the appropriate assessment, but which does not actually result in compensatory measures being taken until the point when a project giving rise to the adverse effect is to go ahead. As the appropriate assessment becomes firmer and more specific at each stage of analysis (SMP/CFMP; strategy; scheme/project), and the identification of any adverse effect becomes similarly more definite (less contingent), so the identification of a need for compensatory measures can be firmed up and the scheme detailing what they should consist of can be developed more specifically.

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