BREXIT AND THE HABITATS REGULATIONS

Interpretation of legal protection for Natura 2000 sites must remain unchanged

SUMMARY

Changes have been made to the wording of the 2017 Conservation of Habitats and Species Regulations to ensure that the regulations continue to work properly post-EU Exit. Some of these changes, made through the 2019 EU Exit Regulations, introduce new terms, new wording and new powers into the 2017 Regulations. ClientEarth and the Marine Conservation Society were concerned that the 2019 Regulations introduced changes that went beyond mere technical corrections to deficiencies in the law, and potentially undermined the effectiveness of environmental law post-Brexit, and so, with support from solicitors Leigh Day, challenged their legality.

Following an application for judicial review at the High Court of England and Wales, Justice Natalie Lieven made clear that, while the 2019 Regulations were themselves lawful, they should not be interpreted or used to do anything that would previously have been unlawful. This was based on the Government's argument that the new wording and powers would only be exercised in accordance with existing EU law, including CJEU case law.

Through this, steps have been taken that help safeguard the Habitats Directive from being a casualty of the UK exiting the EU. This note has been produced to clarify to those with an interest in Natura 2000 sites that the core obligations relating to the management of those sites remain unchanged post-Brexit. And in particular, to clarify that declassification or downgrading of a Natura 2000 site will be unlawful unless it goes through the strict process as set out by EU law.

The Court made statements about three aspects of wording introduced by the 2019 Regulations, summarised below.

NEW REGULATION 16A

The 2019 Regulations introduce a new Regulation 16A into the 2017 Regulations.
The relevant excerpt is below (emphasis added):

> 1. The appropriate authority must, in co-operation with any other authority having a corresponding responsibility, manage, **and where necessary adapt**, the national site network, so far as it consists of European sites, with a view to contributing to the achievement of the management objectives of the national site network.
> 2. The management objectives of the national site network are—
>   a. to maintain at, or where appropriate restore to, a favourable conservation status in their natural range (so far as it lies in the United Kingdom's territory, **and so far as is proportionate**)—
>   i. the natural habitat types listed in Annex I to the Habitats Directive;
>   ii. the species listed in Annex II to that Directive whose natural range includes any part of the United Kingdom's territory;
>
> ...
>
> 6. In paragraph (2)(a), "proportionate" means proportionate to the relative importance of—
>   a. the part of the natural range lying in the United Kingdom's territory, and
>   b. the part of the natural range lying outside the United Kingdom's territory, for achieving a favourable conservation status

The addition of the words in bold creates a new power to ***adapt*** the national site network. The full extent of this power is unclear: it would be highly problematic if it were used to undermine the network of Natura 2000 sites.

Similarly, the new wording "so far as is proportionate" appears to risk a lowering of environmental protection by qualifying the requirement to meet favourable conservation status across the site network.

However, on both of these terms, the court made clear that these changes to the 2017 Regulations must not be used in a way that lowers the standard of protection or in any way changes the effect of the Directive.

In particular, the Court found that the words 'where necessary adapt' could only be used to declassify, delimit or downgrade Natura 2000 sites where the process set out in Article 9 of the Directive and associated case law had been followed. [1] The Judge stated that if the Secretary of State "were to use the power to adapt given in Regulation 16(a)(1) to go beyond the power in Article 9, then that would be very likely, in my view, to be ultra vires". And going on to note that a "specific future decision relying on [the 2019] Regulations" could well give rise to a future challenge.

On the proportionate wording, the Court stated similarly that: "if on a particular factual case it could be argued in the future that the Secretary of State, or the appropriate authority, is trying to water down the effect of the Directive by arguably misusing the proportionality provision then that would an entirely different thing [i.e and potentially unlawful]."

The new wording in Regulation 16A must therefore not be relied on to water down the protection of Natura 2000 sites. Any attempt to do so would likely be unlawful.

NEW REGULATION 12(5)

Elsewhere in the 2019 Regulations, a change is made to Regulation 12(5):

> *(5) For aquatic species which range over wide areas, such sites are to be determined to be of national importance only where there is a clearly identifiable area* ***which is distinct in*** *providing the physical and biological factors essential to their life and reproduction.*

The addition of the words in bold introduce a new requirement into the 2017 Regulations that an area must be "distinct" in order for an authority to designate a conservation site in relation to aquatic species which range over a wide area.

The Government argued that the change was made simply to restate the law in a clearer or more accessible way. The Court, despite being unsure that "the addition of the words "which is distinct" makes anything clearer or more accessible", accepted the Government's argument that this change in wording does not alter the legal meaning of the Regulations.

The requirement for an area to be distinct must therefore not be used as an excuse to stall or delay the progress that has been made in the designation of sites for these species. [2]

NEXT STEPS

In summary, despite changes in the wording to the 2017 Regulations, **the legal position and duties to achieve favourable conservation status remain unchanged and sites cannot be declassified without following the proper procedure**.

It is encouraging that the Government and the High Court agree that the new wording in the 2019 Regulations should not be used to water down environmental protection. However, it is crucial to remain vigilant to any potential use of these new wordings in ways that offer lower protection to Natura 2000 sites in the UK.

We encourage you to get in touch with us if you would like to know more about these Regulations or if you think they are being relied on to weaken protections (contact: twest@clientearth.org).

1 Article 9 of the Habitats Directive sets out that the Commission may consider a special area of conservation for declassification only where this is "warranted by natural developments". CJEU jurisprudence has further clarified the circumstances in which a site can be declassified. For example in case C 301/12 (Cascina Tre Pini), the CJEU found that "the failure of a Member State to fulfil that obligation of protecting a particular site does not necessarily justify the declassification of that site […] On the contrary, it is for that State to take the measures necessary to safeguard that site".

2 We note that in case C 669/16, Commission v United Kingdom, the UK has already used the difficulty of defining 'clearly identifiable' sites for the harbour porpoise – an aquatic species which ranges over wide areas – as an excuse for their failure to designate sufficient sites.

marine conservation society ClientEarth Leigh Day