



People Over Wind case - Implications for Development Control Decision Making

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Regulation 63

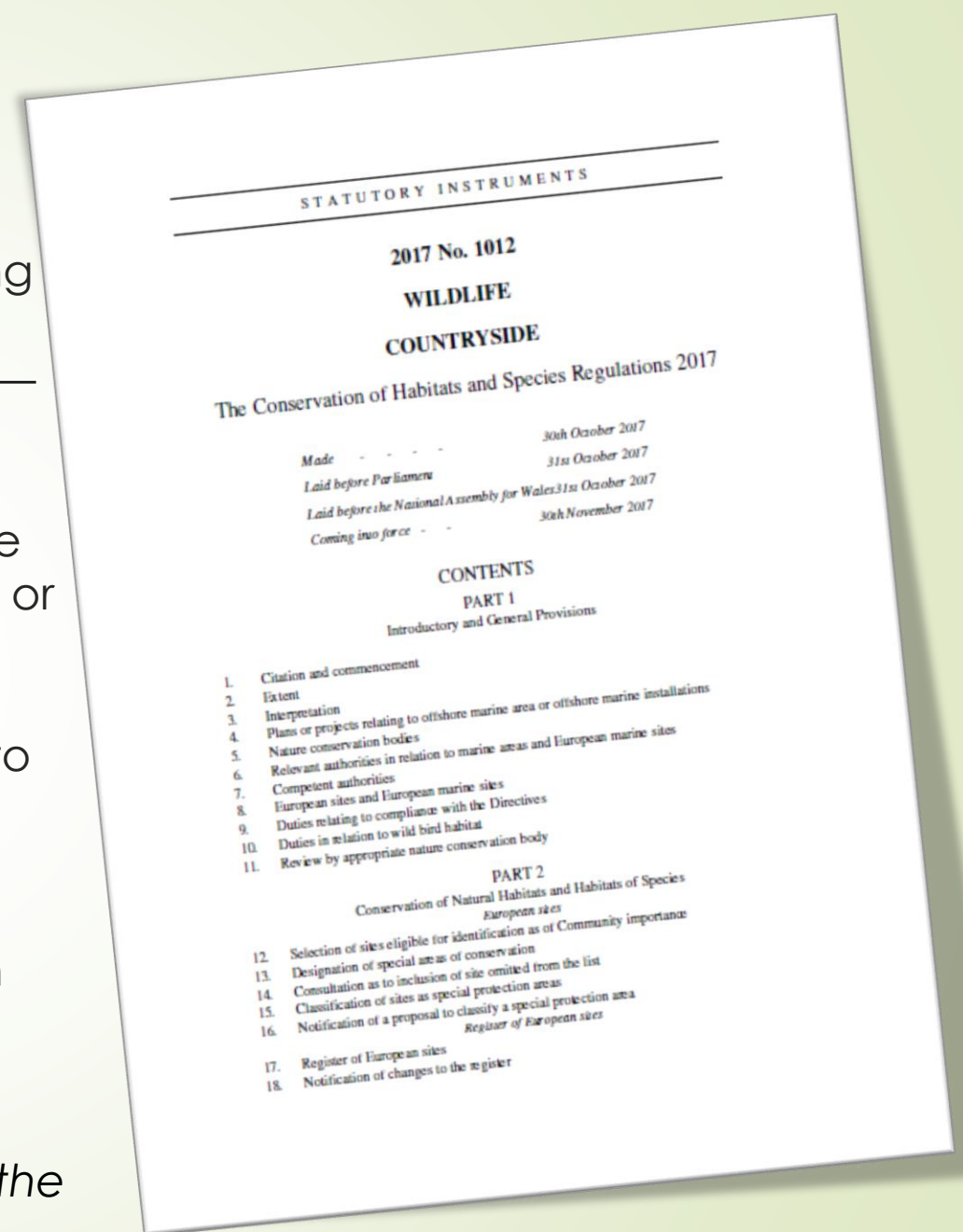
“63.—(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which —

(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 that site,

must make an appropriate assessment of the implications of the plan or project for that site in view of that site’s conservation objectives.”

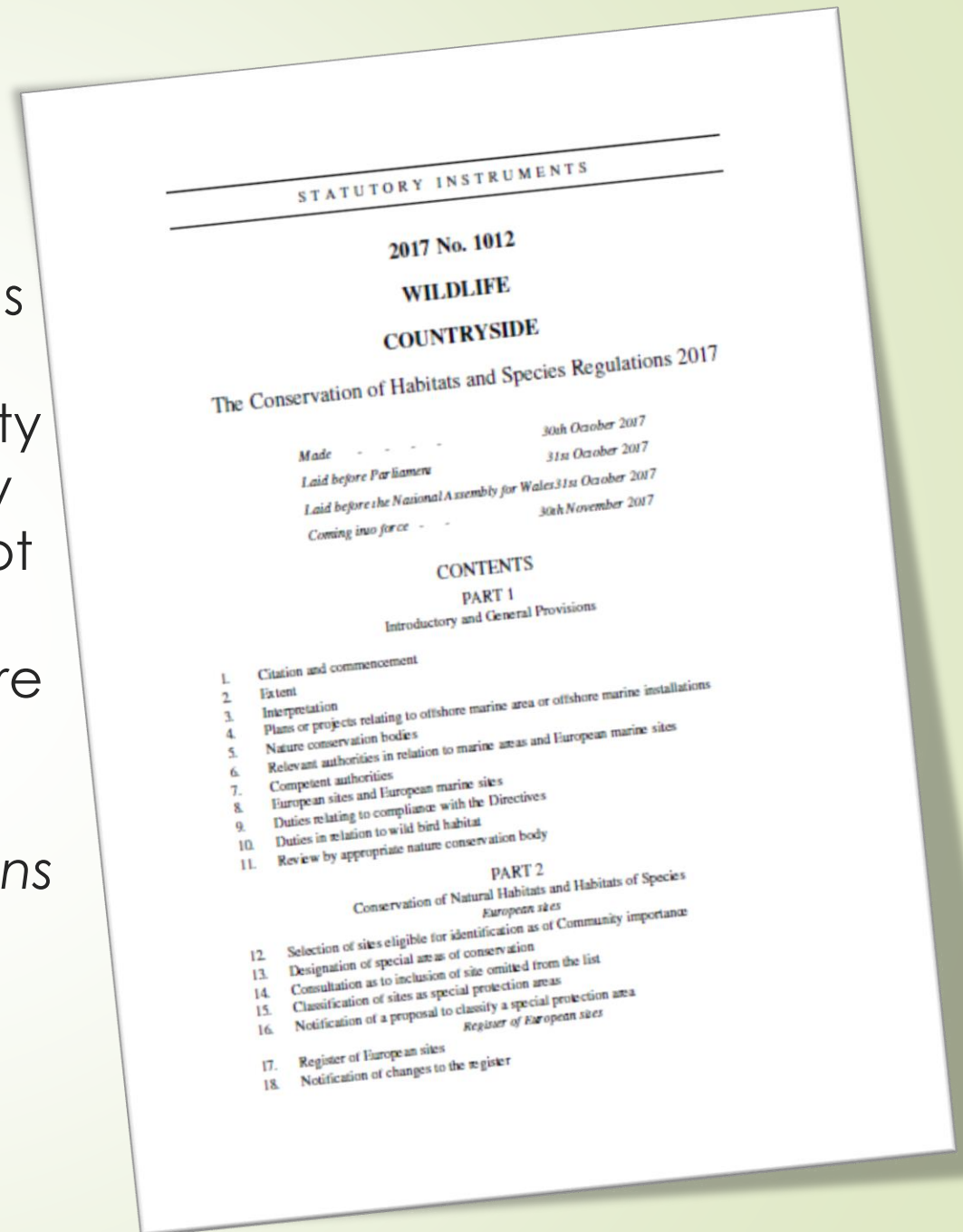
- Regulation 63(1) brings the requirements of the EC Habitats Directive into domestic law



Regulation 63

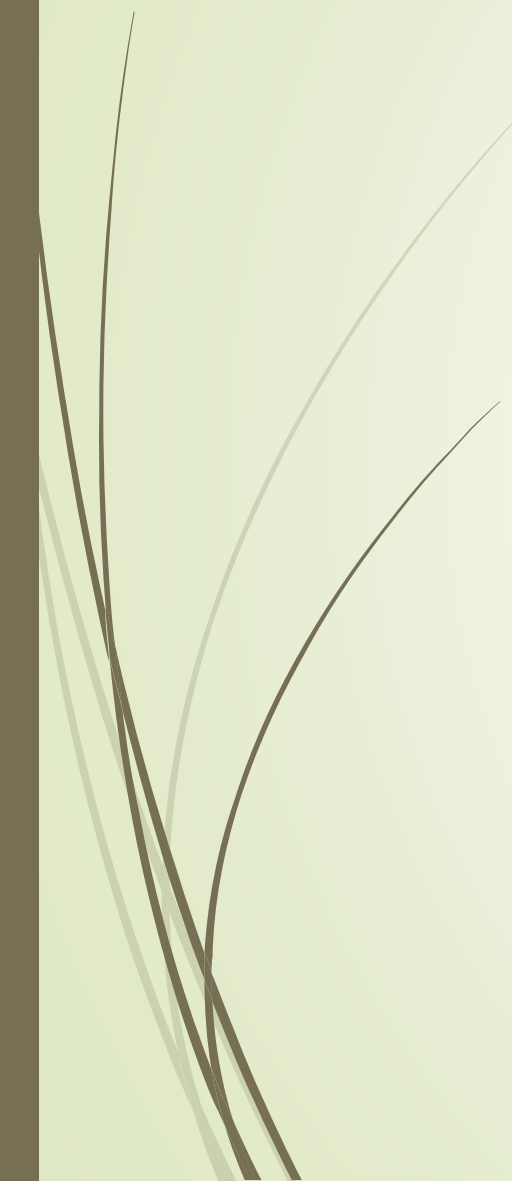
“63.—(5) In the light of the conclusions of the assessment, and subject to regulation 64, the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be).”

(Regulation 64 relates to considerations of overriding public interest where adverse effects upon integrity are identified or cannot be ruled out.)





European designated sites

- Special Protection Areas.
 - Special Areas of Conservation.
 - Ramsar Sites.
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Screening

- Informal process.
- Consideration of likely significant effects (the Regulation 63(1) requirement).
- Audit trail.

Appropriate Assessment

- Required where there is potential for 'likely significant effects'.
- *Waddenzee case [2005] All ER (EC) 353*. Established some overarching principles for 'Appropriate Assessment':
 - it must precede agreement to the plan or project
 - it must compare all the adverse effects arising from the plan of project with the site's conservation objectives
 - If no certainty can be established, it will be necessary to work with probabilities and estimates (which must be identified and reasoned).
 - Following appropriate assessment, a reasoned judgement must be made as to whether or not the integrity of the site concerned will be adversely affected.
 - It is necessary to list the areas in which the occurrence or absence of adverse effects cannot be established with certainty and also the conclusions drawn therefrom.

The 'People over Wind' case - context

- ▶ Case C-323/17 – People over Wind, Peter Sweetman v Coillte Teoranta
- ▶ The project.
- ▶ The affected designations.
- ▶ The features of interest
- ▶ The potential impact.
- ▶ The proposed development.
- ▶ The Screening
- ▶ Identification of impact
- ▶ 'Protective measures' (mitigation/avoidance)
- ▶ The competent authority.
- ▶ The challenge
- ▶ The request for clarification from the European Court of Justice

The 'People over Wind' case - judgement

- Mitigating/protective measures.
- Consideration of measures intended to avoid or reduce harmful effects
- Measures to be considered at Appropriate Assessment
- Undermining the purpose of the Directive (and, domestically, the Habitats Regulations).
- Transparency and Involvement
- The Court's conclusions and ruling.

Implications of the case for Development Control decisions.

- Implications for the (domestic) Habitats Regulations.
- Planning decisions.
- NPPF Paragraphs 10 and 177

“The presumption in favour of sustainable development does not apply where development requiring appropriate assessment because of its potential impact on a habitats site is being planned or determined.”

- No ‘presumption in favour’.
- Likely increase in the number of Appropriate Assessments.



Appropriate Assessment tips

- ▶ Request the information from the applicant (Regulation 63(2)).
- ▶ Cumulative or 'in-combination' effects.
- ▶ Use the best available scientific evidence or knowledge.
- ▶ Include mitigation and avoidance measures.
- ▶ Consult with Natural England and have regard to their advice (Regulation 63(3)).
- ▶ Public consultation is discretionary (Regulation 63(4)), but do not overlook the expertise of other groups, e.g. RSPB and the Wildlife Trusts.
- ▶ Consider using standard text where appropriate.
- ▶ Variations or modifications of existing consents
- ▶ Planners – Ensure that any mitigation/avoidance measures are practicable and are properly secured.
- ▶ Planners - Don't forget to screen the project under the EIA Regulations.



Looking to the future – Part 1 ‘Brexit’

- Post- ‘Brexit’ Regulatory framework
- The explanatory memorandum which accompanied the 2017 consolidation of the Habitats Regulations confirmed the following:
 - ❑ *A further review of the Regulations would be a complex and time consuming exercise which could only be undertaken when resources are available and would be best considered following our exit from the European Union.*
 - ❑ *They are likely to remain in place for some time after the UK exits the EU, and the power to consolidate them will no longer be available once we exit. In the light of this, we think it’s the right time to consolidate the Regulations, aiding usability and clarity.*

Looking to the future – Part 2 ‘NPPF3’

- Current technical consultation on various amendments to the new NPPF.
- Proposed changes to paragraph 177.
- The consultation states:
 - ❑ The [ECJ] judgment means that sites with suitable mitigation are now excluded from the application of the presumption, which was not the intention of the policy.
 - ❑ To rectify this we propose to amend paragraph 177 of the Framework to make clear that the presumption is disapplied only where an appropriate assessment has concluded that there is no suitable mitigation strategy in place.
- The consultation expires 7th December 2018.
- A new NPPF document is anticipated (probably early 2019).

