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Case No: CO/7831/2006

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

Royal Courts of Justice
Strand, London, WC2A 2LL

05/12/2008

B e f o r e :

THE HON MR JUSTICE BLAIR

Between:

THE QUEEN ON THE APPLICATION OF PETER CHARLES BOGGIS EASTON BAVENTS CONSERVATION	**Claimant**
- and -	
NATURAL ENGLAND	**Defendant**
-and-	
WAVENEY DISTRICT COUNCIL	**Interested Party**

Mr Gregory Jones and Mr James Neill (instructed by Parkinson Wright) for the Claimant
Mr John Howell QC and Ms Jane Collier (instructed by Browne Jacobson LLP) for the Defendant
Mr Christopher Balogh (instructed by Jane Reynolds, Legal Services, Suffolk County Council) for the Interested Party
Hearing dates: 17, 18 and 19 November 2008

Mr Justice Blair:

1. This is a claim for judicial review. There are two grounds. Permission in respect of the first was given on 14 September 2007 by Mr Nicholas Blake QC sitting as a Deputy Judge of the High Court, and permission in respect of the second was given by the Court of Appeal on 29 February 2008. The challenge is to the notification and subsequent confirmation of part only of the Pakefield to Easton Bavents Site of Special Scientific Interest (SSSI). The part in question is in the Easton Bavents part of the site, which comprises about one kilometre of the twelve kilometre stretch of coastline within the SSSI. There is no challenge to the validity of the SSSI as it applies to the rest of the site.

2. The disputed area of land is by the North Sea in Suffolk. At this point the coast consists of low cliffs. The sedimentary nature of the soil gives little protection against the tides. Since 1640, the cliffs have retreated over three and a half kilometres, and the process continues at the rate of a few metres or so a year. The sediment is rich in fossils from the Pleistocene era – which covers the glacial and interglacial periods over the last 1.8 million years or so better known as the Ice

Age – and along the coast these fossils are exposed by erosion. The area has attracted scientists since at least the middle part of the nineteenth century. The Defendant used to be called the Nature Conservancy Council, at the relevant time was called English Nature, and is now called Natural England. It has the duty of identifying sites of special scientific interest ("SSSIs") to preserve them for present and future generations. The cliffs at Easton Bavents were originally included in a SSSI in 1962, and in 1989 the site was re-notified under the Wildlife and Countryside Act 1981.

3. But people also live on the land. One of them is the Claimant, Mr Peter Boggis. He is now an old man, and has lived his life in Easton Bavents. The land on which his house stands is close to the shoreline. It was occupied by his grandfather, and he in turn wants to leave it to his family when he dies. He is no stranger to power of the sea. A storm in the spring of 2001 took away land up to ten metres from the cliff face. The pictures he has produced show what appears to be a great bite taken from the cliffs. The papers before the Court show that even worse incidents have happened just to the north of Easton Bavents, where up to 27 metres of land from Covehithe Cliffs was lost in the 1953 storm surge. And of course, now there is climate change to reckon with. The coastline just to the south has been protected, but Easton Bavents is not.

4. So Mr Boggis and some of the other residents formed a group called Easton Bavents Conservation, who are the second Claimants. Fearful for their properties, they took matters into their own hands, and at their own expense built a barrier between the cliffs and the sea. I am told that it was constructed from local soil and materials, though the Environment Agency has said that some of the construction materials were inappropriate. The technical term for such a barrier is a "sacrificial sea defence", or SSD, because the seaward edge is intended to erode and maintain the input of sediments to the shoreline. It runs roughly north/south for about 1033 metres. Whatever its precise makeup, it was a substantial undertaking, as is clear from photographs which I have seen. The fact that Mr Boggis, who had turned seventy when the work began, and the other residents were prepared to undertake such a task shows their resolve to protect their land. And the sea defence has worked, but because it gets eroded, it needs to be maintained.

5. In terms of permissions, the Claimants say that the work was lawfully carried out under certain waste disposal licence exemptions granted by the Environment Agency. To the contrary, Natural England says that its construction constituted an offence under s. 16 Coast Protection Act 1949 since it was carried out without the consent in writing of the coast protection authority in whose area the work was carried out, in this case Waveney District Council, which is the Interested Party. The Council commissioned a May 2005 report from the Halcrow consultancy group which expressed the opinion that the least damaging option was to leave the sea defences in place. Despite the fact that the Claimants have not yet applied for planning permission, the Council sympathises with them, and has come to Court to support them.

6. Natural England however takes a different view. It considers that the sea defence compromises the scientific value of the site by impeding access to the cliff face, and encouraging the growth of vegetation. In any case, by the time it was constructed, the cliffs within the 1989 SSSI had been washed away. In 2005 Natural England decided to do something which would, as it saw it, protect the site into the future. Calculating the rate of erosion over the next fifty years, it decided on the enlargement of the SSSI to include an area of up to 225 metres on the landward side of the cliffs. This included Mr Boggis' property. On 8 December 2005, he and the people who would be affected were notified accordingly. At the same time, a list of operations was sent out which required English Nature's consent. Number 19 was the, "Erection, maintenance, and repair of sea defences or coast protection works …". Failure to comply would constitute a criminal offence. Mr Boggis had to desist, and no work has been done on the sea defences since the end of 2005 – I was told that there is only about twenty per cent of it left. He and other residents objected to the notification, but their objections were not successful. On 28 June 2006, the Council of English Nature met and decided to confirm the notification.

7. There is another factual development which has happened since these proceedings started. Mr Charlie England also lives in Easton Bavents on land owned by Mrs Horrex. His house is close to the edge of the cliffs in a part protected by the sea defences. On 6 February 2007, he asked Natural England's consent to maintain the sea defences so far as they affect his property. Natural England refused on 29 June 2007, concluding that it "is proportionate and in the public interest to refuse consent at this site". The matter became urgent after two metres of land were lost in the tidal surge of 9 November 2007.

8. Mr England appealed under the provisions of s. 28F Wildlife and Countryside Act 1981. The matter was considered by an Inspector, who reported on 19 February 2008. As the Inspector pointed out, the appeal site was only a very small section of the sea defences comprising approximately 50 metres. His conclusion was that the aims of the 1981 Act would be better met by seeking to protect the SSSI by way of the sea defences rather than allowing it to erode away. When the loss of homes and property was placed in the decision-making balance it was, the Inspector concluded, clear that the refusal of consent would constitute an unnecessary and disproportionate interference with Mr England's human rights.

9. After the Inspector's Report was received, the Secretary of State quashed Natural England's refusal to give its consent on 11 March 2008. The decision letter notes that only a relatively small section of the cliffs that form part of the SSSI was the subject of the appeal. The conclusion reached is that the argument made by Natural England against the sacrificial sea defence on conservation grounds was not sufficiently compelling to outweigh Mr England's desire to protect his property from the threat of destruction. The conclusion in that regard is limited to the 50 metres of the sea defences which were the subject of this appeal. The letter makes it clear that it does not convey any approval or consent which may have been required under any other enactment.

10. It is important to note that the decision that the Secretary of State had to make is different from what the Court has to decide on this claim. Essentially the Secretary of State had to decide where the balance lay – to preserve the natural action of the sea, or preserve the homes of the people affected. The question before the Court is different. The Court has had to decide points of law. The decision to confirm the SSSI so far as it affects Easton Bavents is challenged on two grounds. First, it is said that English Nature acted "*ultra vires*" in designating this land as an SSSI. The question on this ground is not whether English Nature *should* have done so – on which views will radically differ – but whether it *could* have done so as a matter of law.

11. As to the second ground, it is said that English Nature was required by a European Directive to undertake an appropriate assessment of the implications of the SSSI on a neighbouring area called Easton Broad, a coastal lagoon which is part of the Benacre to Easton Bavents Special Protection Area, or SPA, known for its rare wild birds. No one suggests that this was a deliberate omission on English Nature's part, whose whole *raison d'être* is conservation. But the procedure was not gone through, and with the permission from the Court of Appeal, the Claimants argue that this renders the decision so far as it affects the disputed area unlawful. For one or both of these reasons, the Claimants say that the confirmation of the SSSI so far as it affects Easton Bavents was legally invalid, and should be quashed.

12. As Natural England points out, the part of the SSSI whose notification is impugned is not precisely defined, but it is in the vicinity of some 1,033m of cliff face in the most southerly part of the SSSI. That is the approximate length of the sea defences constructed by Mr Boggis. The Claimants' case (as Natural England understands it) is that, although English Nature was entitled to notify the cliff face itself as it stands in that location, it was not entitled to notify any area seaward of those cliffs or inland from them. The way it is put in the Claimants' skeleton argument, is that the claim is for judicial review of the decision of Natural England of 28 June 2006 confirming the notification of the Easton Bavents cliffs and land immediately in front of and behind them as an SSSI. The Claim is expressed to cover the sea defences on the seaward side of the cliffs, and the land behind the cliffs.

13. One of the main questions debated during the hearing was whether English Nature's actions in notifying this area as one of special scientific interest could be described as "conservation". The Claimants argue that they have had the precise opposite effect. Far from conserving the geology and associated fossils of this area of coast, the effect of the notification of the SSSI has been to allow them to be washed away. Not so, argues Natural England. Conservation is a concept which is wide enough to include a policy of allowing nature's acts to take their course. Just as the fossils in the soil have been exposed by the sea for past generations of scientists to study, so the process should be allowed to continue for the future. The outcome of this issue is said to have wider ramifications than just for the cliffs at Easton Bavents, and I shall have to decide which of these interpretations of the term "conservation" is correct in law.

The creation of the Pakefield to Easton Bavents Site of Special Scientific Interest

14. In his witness statement, Mr Andrew Wood, who is Natural England's Executive Director for Operations, describes the background to the work of the organisation. The genesis of the body was the report of the Special Committee on the Conservation of Nature in England and Wales presented in 1947. The Committee was chaired by Sir Julian Huxley, one of the foremost scientists of his day, who went on to become first Director-General of UNESCO. As a consequence, the Nature Conservancy was established by Royal Charter in 1949 (Mr Balogh, counsel for Waveney District Council, produced a copy of the charter). Various bodies were set up and amalgamated over time, and the immediate predecessor of Natural England, which was English Nature, was created by the Environmental Protection Act 1990. This was the body responsible for the current SSSI. Members of the Council of English Nature, Mr Wood explains, were appointed for their particular experience, knowledge and expertise in various areas relevant to nature conservation and scientific matters. Its functions were transferred to the new body called Natural England in October 2006, but that came after the notification and confirmation of the SSSI in this case.

15. I have already indicated that this area of Suffolk coastline has long been considered of special interest, and it is necessary to say something of the area from a conservation point of view. This may also help clarify the legal regime within which the notification of the new SSSI took place. There is a Special Protection Area (SPA) and a Special Area of Conservation (SAC) contained within the area of the new SSSI (though not within the Easton Bavents cliff area). SPAs are established under the Birds Directive of 1979. The Benacre to Easton Bavents SPA is within the SSSI to the north of Easton Bavents cliffs. Sites called SACs are designated pursuant to the 1992 Habitats Directive. The Benacre to Easton Bavents Lagoons SAC is also included within the area of the SSSI to the north of the cliffs. A somewhat different type of site is what has been called a GCR site. The GCR is the Geological Conservation Review, and as explained by Professor Hart in his witness statement, a programme of site evaluation over the last two decades has identified over three thousand GCR sites encompassing the range of geological and geomorphologic features of Great Britain. He explains that the Easton Bavents cliffs GCR (though known by just one name) contains two GCR sites which are different, although with overlapping areas and geological features, the importance of which is both stratigraphical and palaeoenvironmental.

16. A site of special scientific interest, in other words an SSSI, is created under the provisions of the Wildlife and Countryside Act 1981. Under s. 28(1) of the Act as then in force (which I set out below), English Nature had to notify landowners and others of any area of land if in its opinion that area is of special interest by reason of its flora, fauna or geological or physiographical features. In exercising its statutory powers, English Nature had to have regard to advice given to it by the Joint Nature Conservation Committee. In practice, this consists of guidelines for the identification of SSSIs published in the Geological Conservation Review.

17. The process that led to the confirmation of the SSSI which is subject to challenge in this case is set out in Mr Wood's witness statement and in the detailed grounds dated 14 April 2008 prepared by the Claimants for this hearing So far as affected parties are concerned, the formal process begins with a "notification", which in this case was issued on 8 December 2005, and leads to a

period of consultation which cannot exceed nine months (s. 28(5)). In this case, along with the notification there was quite an extensive package of documents including the "citation" of the SSSI which included reasons for the notification, English Nature's views about management, maps showing the land notified, and various supplementary documents. It also included a list of operations requiring English Nature's consent. Such operations have been called "OLDs", which is short for operations likely to cause damage. As mentioned, one of these OLDs prohibited the maintenance of sea defences. Contravention without English Nature's consent and without reasonable excuse constituted a criminal offence (s. 28E(1) and s. 28P(1) Wildlife and Countryside Act 1981).

18. The new SSSI is known as the "Pakefield to Easton Bavents Site of Special Scientific Interest". It comprises an area of 735.33 hectares stretching along approximately 12 kilometres of the North Sea coast of Suffolk between these two places. The reasons given for notification as they apply to the land at Easton Bavents are at the heart of the legal issue which I have to decide, and I must consider them with some care. It is not in dispute that the reasons are contained in three documents – the citation, the notification report to which the citation was attached, and the subsequent report for Council prepared by officers of English Nature.

19. The Claimants submit that these reasons cannot be supplemented by material produced after the date of the confirmation. I would accept that approach in principle, whilst recognising that English Nature's reasoning was not static over the seven months between notification and confirmation, because the process involved the taking of objections, and responding to them. Furthermore, at the hearing all parties relied on post-confirmation evidence and material in order to explain (rather than supplement) the reasoning that led to the notification of this SSSI being confirmed, and that evidence and material has been necessary to put the facts of this case into context. The Claimants also submit that inconsistent reasoning would be a ground for challenge.

20. To begin with the citation, the "Reasons for Notification" were stated as follows: "Pakefield to Easton Bavents is nationally important for the geological exposures of the Lower Pleistocene Norwich Crag Formations and associated Pleistocene vertebrate assemblages, and the coastal geomorphology of Benacre Ness". Pausing there, these geological exposures include the cliffs at Easton Bavents. Mr Wood makes it clear that the interest in the cliffs is geological only. To anticipate some of the arguments, the Claimants point to the fact that scientific interest in geomorphology (that is, the study of the evolution and configuration of landforms) is ascribed to Benacre Ness, which is an area of shingle north of the cliffs. The scientific interest in Easton Bavent, they submit, is solely to do with its exposed cliff face. The reasons go on to deal with the area to the north of the Easton Bavents cliffs which is not in dispute in these proceedings, stating that "the site is also nationally important for its vegetated shingle features, saline lagoons, flood-plain fens, an assemblage of nationally rare and nationally scarce vascular plants, scarce breeding birds, four breeding birds assemblages in four different habitats, and wintering bitterns…".

21. In layman's language, the area was considered to be of special scientific interest for a number of reasons. It included exposed parts of the land formations of the early Pleistocene period, and the fossils that could be found in these exposures. These were the cliff faces at Easton Bavents. Most of the SSSI covered the area north of Easton Bavents cliffs. There the scientific interest is in the habitat, plants and wildlife of the wetlands of the Suffolk Coast, particularly its bird life. That includes the bittern, which is one of Britain's rarest birds. This is the area where the Easton Marshes SPA is found. There is no challenge to the SSSI so far as it covers the area north of the Easton Bavents cliffs.

22. Similarly, under the heading, "Reasons for the notification of the SSSI under section 28C", the introductory report to the notification states that, "The exposed sediments at Easton Bavents and Covehithe are of national importance for stratigraphical and palaeoenvironmental studies of the Lower Pleistocene in Britain". It goes on to deal in more detail with the fossils. This is consistent with the explanation given by Professor Hart as to the GCR sites.

23. A lengthy report was then prepared by officers of English Nature, and in due course submitted to the Council which was the governing body of English Nature. This report (which is undated but must have been finalised some time before the Council meeting on 28 June 2006) contained among other things a description of the special interest of the site, reasons for the SSSI boundary as notified, a consideration of objections relating to the scientific justification and boundary location, and the objection map showing the land occupied by Mr Boggis and other objectors. It also deals with the operations listed in the notification as OLDs. The report goes into more detail as to the reasons why the Pakefield to Easton Bavents area is considered one of special scientific interest. Both parties have referred extensively to this document so far as it relates to Easton Bavents, and it is common ground that the matters set out in the report are relevant to the question I have to decide.

24. The officers said that recent publications had "confirmed the national importance of the geological deposits to the west – that is to the landward side – of the previously notified SSSI". They go on to say that, "The principle of including land within the SSSI with unexposed geological interests underlying it, and recognising that continuing coastal processes will in time expose that interest, has been applied previously…". Examples from elsewhere in England are then given. This passage is central to the dispute in relation to ground A. It acknowledges the fact that whereas the 1989 SSSI had encompassed the cliff face, the new SSSI extended inland to areas not yet exposed. They would in time *become* exposed, but only if the sea was allowed to do its work unimpeded.

25. Numerous objections were received from people who live there objecting to the inclusion of the land at Easton Bavents in the SSSI. These cover many issues of great concern to the residents, and are discussed in some detail in the report. In considering them, the officers' report refers to the "highly dynamic and rapidly-eroding coast line", and says that, "One of the main reasons for this 're-notification' of the previously notified … SSSI is that since its notification in 1989, much of the coast included within the boundary of that site has extensively eroded and in places the landward boundary … now lies below the Mean Low Water mark". In other words, in these places (and that includes Easton Bavents) the cliff faces as they stood in 1989 have disappeared into the sea. As to Easton Bavents, they say that "…the cliffs were previously notified to protect the important coastal exposures. This section of the SSSI was approximately 60m wide and included the cliffs and beach area only. Where unimpeded, the gradual erosion of this cliff has maintained good exposures of the sediments and the fossils they contain over the intervening period, but left the nationally important exposures unprotected as the cliffs now lie entirely outwith the boundary of the previously notified SSSI".

26. Then the officers touch on a number of matters that the Claimants submit are also important. They say that, "in relation to the presence of sediments of special interest behind the cliffs at Easton Bavents (and therefore within the 50 year boundary area) the study of the faces and photographs indicate that the important sediments are still present. … The Crag Group and the Norwich Crag are present across most of this part of East Anglia (from about 25km west of the coast) and generally increase in thickness towards the coast". The officers go on to explain why, in their opinion, studying the sediment by way of boreholes has "severe limitations".

27. The officers record that objections stated that "allowing the continued erosion of the cliffs when the aim is to conserve the features of special interest seems illogical, and it has been suggested that sea defences would better conserve the sediments". However in the officers' view, it was important that "exposure of the geological sequence is maintained to allow for monitoring and recording … The sacrificial defence constructed by Easton Bavents Conservation has protected the sediments from erosion by the sea, and in the process has obscured the lower sediments and rendered them inaccessible for study. It is English Nature's opinion that this has reduced their value and therefore they are considered to be in an unfavourable condition". The reference to "study" may be noted here and elsewhere in this report, and is relied upon by the Claimants in their legal argument to which I shall come in due course. The officers continue that "the

sacrificial defence also leads to the accretion of material and this is already becoming evident as windblown sand is beginning to obscure sediments that used to be exposed in the cliffs".

28. The officers referred to objections to the effect that English Nature's duty to protect geological features was incompatible with its stated aim of maintaining, and where appropriate restoring, natural coastal processes, noting that some had suggested that protecting the cliffs from coastal erosion would provide a reserve that could be studied in the future. They continued, "The key management principle for coastal geological sites is to maintain exposure of the geological interest by allowing natural processes to proceed freely. Inappropriate construction of coastal defences can conceal rock exposures and result in the effective loss of the geological interest. In addition, any development which prevents or slows natural erosion can have a damaging effect. Erosion is necessary to maintain fresh geological outcrops. Reducing the rate of erosion usually results in rock exposures becoming obscured by vegetation and rock debris".

29. They went on to deal with another point that the objectors had made, and which is made in these proceedings: "The sediments beneath fields landward of the cliffs are included within the boundaries of the SSSI as notified on account of their current (rather than potential) value. The same geological sediments that are currently exposed in the cliffs are present landward and so these sediments are also of national importance. This notification has been considered in the 50 year context, and within that context areas encompassed by the 50 year boundary are, in the opinion of the English Nature, of special interest".

30. Having considered the objections, the officers recommended to the Council confirmation of the notification. A meeting of the Council took place in Witney in Oxfordshire on 28 June 2006. To take Mr Wood's account, after a brief introduction by the Chair, the Conservation Officer of the Suffolk Team presented the Council paper. His presentation was accompanied by slides. Specialist geologists and geomorphologists were available to answer questions that Council Members might have. Council Members did question officers about the special interest of the site. Several objectors made representations, and Mr Gregory Jones (counsel who has appeared for the Claimants on this hearing) made submissions on their behalf. Members then discussed the special interest issue among themselves. The confirmed minutes record in paragraph 4.21.5 the officers' recommendation to confirm the notification of the Pakefield to Easton Bavents SSSI without modification to the boundary, but with minor amendments to the list of operations (the OLDs) requiring English Nature's consent. These "minor amendments" did not apply to paragraph 19, by which the maintenance and repair of the sea offences required consent. The minutes record that the Council unanimously agreed the notification of Pakefield to Easton Bavents SSSI as outlined in item 4.21.5, and decided to confirm the notification of the SSSI. That is the decision which is the subject of these judicial review proceedings to far as it applies to the disputed area.

The judicial review proceedings

31. Before coming to the substance of the arguments, it is necessary to say something about the course of these proceedings. They were begun on 21 September 2006, and permission was initially refused on paper. On the renewal application on 14 September 2007, Mr Nicholas Blake QC (sitting as a deputy judge of the High Court) gave permission on one only of the grounds being advanced. This was Ground A as follows: "English Nature has acted *ultra vires* by misdirecting itself as to the extent of its powers under the 1981 Act and acting outside those powers, namely in designating an area of land as an SSSI on the basis that, although the land is not currently of scientific interest, it may become so in the future".

32. In his reasons, the deputy judge referred to the central question as being whether the defendants could lawfully grant and confirm the designation made, for the reasons which they gave, in respect of a particular area of land under the particular statutory regime. In that spirit, the parties have approached the issue not so much on the technicalities of the law of *ultra vires*, but rather on the substance of the matter, namely whether Natural England as English Nature is now called

could lawfully have designated this SSSI for the reasons it relied on. As the Claimants summarise it, in essence the question is whether the reasons that English Nature gave for confirming the notification of the SSSI to its new extent were ones which fall within the scope of their powers under the Wildlife and Countryside Act 1981.

33. The Claimants appealed to the Court of Appeal from this decision in relation to one of the other grounds in respect of which permission had not been given by the Deputy Judge, which was ground G. Permission was first refused on the papers. But following oral submissions by the Claimants, on 29 February 2008, Mummery LJ and Munby J gave permission to argue this ground as well. Ground G asserts "Breach of duties under the Directive 79/409/EEC ("the Birds Directive") and Directive 92/43/EEC ("the Habitats Directive") and the Conservation (Natural Habitats etc) Regulations 1994 ("the 1994 Regulations")". There are therefore two grounds for decision in this case.

The statutory provisions

34. The notification of sites of special scientific interest goes back to the National Parks and Access to the Countryside Act of 1949, but the provisions relevant to this case are to be found in Part II of the Wildlife and Countryside Act 1981 as amended. (These provisions have since been replaced.) By s. 52(1) of the 1981 Act in force at the time, an SSSI is an area of land which has been notified under s. 28. So one then looks at s. 28 and finds as follows:

> (1) Where [English Nature] are of the opinion that any area of land is of special interest by reason of any of its flora, fauna or geological or physiographical features, it shall be the duty of [English Nature] to notify that fact -
>
> (a) to every local planning authority in whose area the land is situated;
>
> (b) to every owner and occupier of any of that land; and
>
> (c) to the Secretary of State.

35. This is the crucial provision that has to be interpreted in the present case. For the present, it may be noted that it placed a *duty* of notification on English Nature if it was of the opinion that any area of land is of special interest. Subsection (3) went on to provide for objections:

> (3) A notification under subsection (1) shall specify the time (not being less than three months from the date of giving the notification) within which, and the manner in which, representations or objections with respect to it may be made; and [English Nature] shall consider any representation or objection duly made.

36. Subsection (4) provided that landowners must be told what aspects render the land of special interest, and operations which are likely to cause damage must be identified, and they must be given English Nature's views about management of the land:

> (4) A notification under subsection (1)(b) shall also specify -
>
> (a) the flora, fauna, or geological or physiographical features by reason of which the land is of special interest, and
>
> (b) any operations appearing to [English Nature] to be likely to damage that flora or fauna or those features,
>
> and shall contain a statement of [English Nature's] views about the management of the land (including any views [English Nature] may have about the conservation and enhancement of that flora or fauna or those features).

As mentioned above, the words "operations … likely to damage … those features" are known by the acronym OLDs. By paragraph 19 of these, English Nature in effect prohibited continued maintenance of the sea defences.

37. Subsections (5) and (6) put a nine month time limit on notifications, after which it had to be withdrawn or confirmed:

> (5) Where a notification under subsection (1) has been given, [English Nature] may within the period of nine months beginning with the date on which the notification was served on the Secretary of State either -
>
> (a) give notice to the persons mentioned in subsection (1) withdrawing the notification; or
>
> (b) give notice to those persons confirming the notification (with or without modifications).
>
> (6) A notification shall cease to have effect -
>
> (a) on the giving of notice of its withdrawal under subsection (5)(a) to any of the persons mentioned in subsection (1); or
>
> (b) if not withdrawn or confirmed by notice under subsection (5) within the period of nine months referred to there, at the end of that period.

38. It is convenient to mention here Lightman J's construction of subsection (5) in *R (Fisher) v English Nature* [2004] 1 WLR 503 at [18], where he said that, "Though section 28(5) in setting out the alternative courses available to English Nature uses the word "may", a term which ordinarily connotes a discretion, notwithstanding the obiter dictum in *R v. Nature Conservancy Council ex parte London Brick Property Ltd* [1996] Env. LR 1 to the contrary, as it appears to me, if English Nature continues to be of the opinion that the statutory criteria are satisfied, the discretion can only lawfully be exercised one way, that is in favour of confirming the notification. They cannot lawfully withdraw the notification or allow it to lapse." (This passage was cited with approval by Wall LJ on appeal in *R (Fisher) v English Nature* [2005] 1 WLR 147 at [95].)

39. Sections 28E and 28G both prohibit the operations which have been specified as OLDs, and at the same time provide an avenue of appeal for an aggrieved landowner. Section 28E provides that the "owner or occupier of any land included in a site of special scientific interest shall not while the notification under section 28(1)(b) remains in force carry out, or cause or permit to be carried out, on that land any operation specified in the notification unless:

> (a) one of them has, after service on him of the notification, given [English Nature] written notice of a proposal to carry out the operation specifying its nature and the land on which it is proposed to carry it out; and
>
> (b) one of the conditions specified in subsection (3) is fulfilled."

The conditions in subsection (3) include that the operation is carried out with English Nature's written consent. By s. 28F there is a right of appeal to the Secretary of State against English Nature's refusal of any such consent. There are time limits, but longer periods can be agreed in writing between the parties. It was this right of appeal in relation to the sea defences that was successfully pursued by Mr Charlie England.

40. There is another provision from a different statute which both the Claimants and the Council rely upon in support of their Ground A argument and which it is convenient to deal with here. Section 131 of the Environmental Protection Act 1990 as then in force provided that:

(1) For the purposes of nature conservation, and fostering the understanding thereof, the Councils shall…have the functions conferred on them by sections 132 to 134 below (which are in this Part referred to as "nature conservation functions".

(2) It shall be the duty of the Councils in discharging their nature conservation functions to take appropriate account of actual or possible ecological changes.

…

(6) In this Part "nature conservation" means the conservation of flora, fauna, or geological or physiographical features.

41. The reference to the "Council's functions" included the notification by English Nature of an SSSI under s. 28 of the Wildlife and Countryside Act 1981. To anticipate the argument, it is contended by the Claimants and Waveney District Council that what English Nature was doing in notifying this SSSI was destroying, not conserving, the geological features that made Easton Bavents of special scientific interest. However for present purposes, I am concerned just to fit s. 131 into the overall statutory scheme.

42. Natural England accepts that its predecessor English Nature had the s. 28 function (among others) conferred upon it for the purpose of nature conservation and fostering the understanding of nature conservation by virtue of section 131(1) of the Environmental Protection Act 1990. It also accepts that for this purpose nature conservation meant the conservation of flora, fauna or geological or physiographical features. But it did not accept the submission of Waveney District Council that English Nature was bound to perform its duties under s. 28 of the 1981 Act only if, and to the extent that, such performance was within, and promoted, the s. 131 purpose.

43. The Claimants make the same submission, but put it slightly differently. They refer to s. 131 as imposing an "overriding nature conservation function". Natural England, on the other hand submits that Parliament did not intend to limit or curtail the specific duties it had previously imposed when enacting that the functions to which s. 131 applies should be collectively vested in English Nature for the purpose of promoting nature conservation. It recognised that their discharge in accordance with their own terms would promote it.

44. I prefer the submission of Natural England on this point, but doubt that it makes much practical difference. As I have said, though it does not accept that its s. 28 duty was curtailed by s. 131, it does accept that English Nature had the s. 28 function conferred upon it for the s. 131 purpose of nature conservation, and fostering the understanding of nature conservation, and that for this purpose nature conservation meant the conservation of flora, fauna or geological or physiographical features. As the passages quoted above from the various documents produced by English Nature in the notification process demonstrate, the notification of this SSSI so far as relevant to this claim was on the explicit basis that erosion should be allowed to take its natural course (with a necessarily consequent loss of fossils). The core issue between the parties is whether or not this was a legitimate approach to conservation. My understanding is that Natural England accepts that it must make this good to succeed on this part of the case. Indeed as it points out, conservation is at the heart of the work that this body and its predecessors do – as already mentioned "Conservation of Nature" was the title of the seminal 1947 Report. (However for completeness I should also note that s. 131 Environmental Protection Act 1990 does not in fact apply to Natural England which succeeded to the functions of England Nature.)

The parties' submissions on Ground A

45. Before setting out the parties' submissions on Ground A, I recall the statutory test as contained in s. 28(1) of the Wildlife and Countryside Act 1981 – where English Nature is of the opinion that any area of land is of special interest by reason of any of its flora, fauna or geological or physiographical features, it has a duty to notify that fact to the people and bodies stated.

Geological features are the relevant ones in this case. It was that process which English Nature performed on 8 December 2005, and which its Council confirmed on 28 June 2006. The question is whether they lawfully did so as regards the disputed area of land.

46. In their written submissions, the Claimants have summarised their case on this ground as follows. Natural England has interpreted its powers under s. 28 Wildlife and Countryside Act 1981 in a way that is manifestly contrary to the purposes for which it was afforded those powers. In particular:

(a) It has misinterpreted the meaning of geological feature for the purposes of that provision;

(b) It has also erred in determining what is of special scientific interest in this instance.

In doing so it has acted in excess of its powers and contrary to its overriding nature conservation function as provided for by s. 131 Environmental Protection Act 1990.

47. In amplified form, the Claimants (supported by Waveney District Council) submit that English Nature acted *ultra vires* by:

(a) Misconstruing what is a "geological feature" for the purposes of s. 28 of the Wildlife and Countryside Act 1981;

(b) designating the land behind the cliffs as an SSSI on the basis of its future as opposed to current scientific interest;

(c) exercising its powers under s. 28 in a way inconsistent with its overriding statutory function of nature conservation by seeking to destroy, rather than conserve, the geological features of the existing cliff face;

(d) exercising its powers under s. 28 in a way inconsistent with its overriding statutory function of nature conservation by seeking to create areas of interest rather than preserve existing ones;

(e) acting outside its statutory function of nature conservation as carried out by English Nature under s. 28 by designating the land inland from the cliff face and the defences for the purposes of study rather than for existing special scientific interest.

48. To this I would add a passage from Waveney District Council's written submissions which encapsulates the argument as it articulates it. The inclusion of the Easton Bavents cliffs in the SSSI was for the purpose of protecting the exposure of the fossils/sediments in them by promoting the cliffs' erosion by the unrestrained operation of natural processes, rather than the fossils/sediments themselves. The exposure, it submits, is not itself a nature conservation feature capable of triggering notification. This is not conservation within the ordinary, natural meaning of s.131 Environmental Protection Act 1990 by which s. 28 is properly to be construed.

49. Natural England on the other hand submits that the Claimants wrongly assume that it is only the cliff face as it was then visible at the time of notification/confirmation that is of interest, but in this respect it is the geological exposure that is of special interest. That exposure is maintained by erosion. It quotes from the Geological Conservation Review which states that, "the broad conservation principle for exposure sites depends on the maintenance of an exposure, the precise location of which is not always critical". It submits that the exposure, which displays new sections as erosion continues to maintain it, enables a three dimensional picture of the landscape and associated depositional environments to be developed and allows them to be properly studied, as they have been and still require to be.

50. Taking the headings from the Claimants' skeleton argument, I shall take their various sub-arguments (as supported by Waveney District Council) and Natural England's response to them one by one, before expressing my conclusions.

(a) Misconstruing what is a "geological feature"

51. The Claimants submit that in the formal reasons for the notification in the citation, the geological feature of interest which was identified was the exposed, physical sediment not the continuing or future exposure of sediment. They say that it is the reasons for the extent of the SSSI's new boundary (as distinct from the in-principle reason for the notification of the cliff face itself) that appear to indicate that the geological feature of interest is the continuing acts of exposure of those sediments. At the heart of Natural England's case, they say, is a fundamental misconception regarding, and failure to differentiate between: (a) an act of exposure of a cliff face, for example through erosion by the sea, and (b) an exposed cliff face. The latter is a geological feature, but the former is not a geological feature on the plain and ordinary meaning of the words "geological feature" in s. 28.

52. Natural England submits that English Nature did not treat the actual process of erosion as itself constituting a feature of geological interest. What was of interest (to which that process was related and maintained) was the geological exposure in the cliff face. That exposure of the sediment is dependent for its maintenance on the continued natural processes that occur on land to the seaward side of the cliffs. It is submitted that the legal assumption that underpins the misdirection alleged is that a "feature" can only be something physical that exists now and cannot therefore include a "process". The Claimants, it is said, thus appear to assume that only static physical aspects of the world can constitute geological or physiographical features. That is not a result that ordinary English requires and it would not accord with the statutory context. SSSIs are designed to enable all natural aspects of the world which are of special interest to be conserved and the physical world itself is not static.

(b) Misinterpretation of special interest

53. This part of the claim essentially relates to the boundary of the SSSI. On the basis that the geological feature of interest could only have been the exposed physical sediments in the cliff-face (a premise which however Natural England does not accept), the Claimants submit that its case that the area landward and seaward of the cliffs is of special interest is untenable. It is said that its case has been inconsistent, because whereas the officer's Report said that "the boundary…has been drawn to include land supporting the features of interest", elsewhere the report indicates that it is the sediments themselves that are of special interest, not the fact that they "support" other features of interest. It is submitted that Natural England has been forced to defend what are called the former reasons (that the land has been included as being of special interest because it "supports" the features they label "geological exposures") because only in that way can it justify allowing the continued processes of erosion. What in fact English Nature did was to include land within the SSSI that is currently not of special interest, but may become so in the future. It may have value but it does not have special interest warranting notification.

54. Natural England responds that the extent of the area inland from the existing cliff line was based on a 50 year prediction of the area which might be eroded providing a reasonable time frame based on robust estimates of how the coast will evolve for identifying an area of special interest, as explained in the officers' report. This it is submitted is not an irrational basis for selecting an area of special interest. Even if (as the Claimants assume) the only geological feature of special interest had been the geological exposure, the area notified would still be justified. It is an area of special interest precisely because, it is said, it is an area within which the geological exposure may be maintained. Reliance is placed on the officers' report to the effect that, "it is important that exposure of the geological sequence is maintained to allow for monitoring and recording of the geological sequence". Land that helps maintain the matters which are of special interest may be included within an area notified as being of special interest. It is wrong to suggest that the

landward side of the cliffs is not currently of special interest. There is no sensible distinction between value and interest in this regard – the special interest of these sediments lies in their value for geologic studies.

(c) and (d) Exercise of powers inconsistently with English Nature's function of nature conservation

55. The thrust of this submission is that by permitting (indeed requiring) erosion, English Nature and now Natural England are not performing an act of conservation, but an act of destruction. To quote from Waveney District Council's skeleton argument, "what is maintained or conserved by [the] SSSI designation is not the Cliffs qua nature conservation feature but the process of erosion". By seeking to destroy, rather than conserve, the existing geological features of the existing cliff face and the land behind it is said that English Nature acted outside the powers conferred on it by s. 28 Wildlife and Countryside Act 1981. Similarly, it is said that Natural England has also appeared to seek to create or enhance special interest (this point comes from the statement of English Nature's views about management). In doing to so it has acted outside its statutory function of nature conservation. These points derive their legal foundation from s. 131(1) Environmental Protection Act 1990 which I have discussed above. In that regard, Natural England accepts that the s. 28 function was vested in it for the purpose of nature conservation, and I need not add anything here as to the legal effect of s. 131(1).

56. The Claimants' submission is that Natural England is pursuing a policy of the creation of special scientific interest, through the policy of enforced erosion of cliffs in order to reveal further exposed sections of cliff face, as opposed to the designation and protection of the physical features of interest themselves. By doing so, it is said to be pursuing a policy of destruction of existing features of special scientific interest, by encouraging the erosion of the existing cliff-face. Thus, the fossils exposed are washed away and lost. This policy is not, it is submitted, in accordance with its statutory function of nature conservation. Citing the Oxford Dictionary definition of conservation (see below), it is said that the decision to notify the sea defences as part of the SSSI was one deliberately calculated to cause harm, decay and loss to the existing cliff face – that cannot be characterised as in any way falling within its nature conservation functions.

57. Natural England's response is that the decision to confirm the notification was not taken to create or to destroy any geological feature of interest. It was taken because English Nature was of the opinion that (this part of) the area was of special interest by reason of its geological features. Given that opinion, it was duty bound to confirm the notification of its opinion. It is submitted that it is not only the cliff face as it was visible at the time of notification or confirmation that is of special interest, but the geological exposure, and that exposure is maintained by erosion. Plainly maintaining that feature of special interest necessarily involves the loss of sediments as they are eroded, but that involves a judgment as to what it is preferable to maintain. The essence of its submission is that nature conservation, that is to say the conservation of flora, fauna or geological or physiographical features, is not limited to the preservation or protection of things as they currently are. Similarly the conception of nature conservation advanced by Waveney District Council, the physical preservation of physical features, is (it is submitted) far too narrow.

(e) Unlawfully designating the area of land for the purpose of study rather than for its existing special scientific interest

58. The Claimants submit that English Nature's real purpose for including the SSD within the boundaries of the SSSI was to afford scientists an opportunity to study new sections of the cliff face, and that this is not a purpose for which the power conferred by s. 28 Wildlife and Countryside Act 1981 can be exercised. The legal basis for this submission is as follows. Section 15(2) National Parks and Access to the Countryside Act 1949 differentiates between "providing ... special opportunities … for the study of geological and physiographical features of special interest in the area" (s. 15(2)(a)), and "preserving … geological or physiographical features of special interest in the area" (s.15(2)(b)). The Claimants argue that s. 15(2)(a) expressly provides that a "conservation purpose" is the *study* of geological features of special interest, differentiating

that aspect of a "conservation purpose" from a purpose of *preservation* of geological features of special interest. In the absence of any similar, express inclusion of scientific study as a nature conservation purpose in s. 28, it is submitted, the scope of English Nature's nature conservation function for the purposes of that section is limited to the ordinary and natural meaning of the word conservation: i.e preservation. It submits that if English Nature had wished to preserve the area for study there were other powers to achieve that aim but which would have entailed the payment of compensation. In any event, it is said that there was no evidence of any plans or commitment that work would be done to recover or study the material exposed by coastal erosion, and therefore there was no evidence that could satisfy its own test.

59. Natural England responds that the area notified is of special interest by reason of its geological features inter alia because of the exposure in the cliff face. That the interest it may have is a scientific interest for the purpose of study does not render such an interest illegitimate, particularly in an area of special scientific interest. English Nature had the functions conferred by s 15 of the 1949 Act vested in it (I do not think this is in dispute). No distinction was made in the purposes for which the functions relating to SSSIs were conferred. The fact that English Nature had power to enter agreements with landowners for the land to be managed so as to provide special opportunities for study does not show that such features may not be features of special interest by virtue of their interest for the purpose of study. Finally, it points to the evidence of Professor Hart (who was a member of the Council of English Nature) who says that many people are interested in studying the site, and that thirty three scientific papers have been published since 1962 referring to the site. (The Claimants point out that this evidence was tendered in July 2008 long after the impugned decisions.)

Ground A: Legal analysis and conclusions

60. The statutory structure of English Nature and the provisions of s. 28 to s. 28P of the Wildlife and Countryside Act 1981 are discussed in detail in *R (Aggregate Industries UK Ltd) v English Nature* [2002] EWHC 908, [2003] Env LR 3 by Forbes J, and in *R (Fisher) v English Nature* by Lightman J at first instance ([2004] 1 WLR 503), and by Wall LJ in the Court of Appeal at [2005] 1 WLR 147 in a judgment with which the other members of the Court agreed. I need not repeat that analysis in this judgment.

61. As I have mentioned, the language of s. 28 speaks of a duty placed on English Nature to notify an area of special interest. In *Fisher* at [18], Lightman J explains the basis upon which notification of an SSSI takes place: "English Nature has a duty under section 28(1) to notify an area of land if it holds the opinion that the statutory criteria are satisfied. If (for example) English Nature is of the opinion that an area of land is of special interest because of the bird population, which it supports, then it must notify. Section 28(1) affords scope for judgment: it affords no scope for discretion. The notification has immediate legal effect. English Nature must however thereafter within nine months decide whether to withdraw the notification or confirm it (with or without modifications) or it will lapse" (cited with approval by Wall LJ [2005] 1 WLR 147 at [95]).

62. There is a body of material consisting among other things of codes and guidance which give practical help as to the identification and management of an SSSI. But the statute itself does not spell out what is meant by an "area of land … of special interest by reason of any of its flora, fauna or geological or physiographical features". Some guidance in this regard is however to be found in the judgment of the Court of Appeal in *Fisher*, where Wall LJ said that:

> "The 1981 Act does not define the size of an SSSI. The words used are deliberately vague: 'any area of land'.... to my mind, provided that the designation of the site is directly related to the fauna by reason of which it is of special interest, there is no reason why it should not comprise 13,335.70 hectares or more" ([2005] 1 WLR 147 at [131]).
>
> Furthermore, it is clear that the extent of the area to be notified is a matter of judgment by English Nature, not for the Court (see the *Aggregates* case at para 106(iii), Forbes J).

63. Likewise, the parties have not relied on any particular statutory definition of "conservation", other that in s. 131(6) Environmental Protection Act 1990. In language that echoes s. 28, this provides that, "… "nature conservation" means the conservation of flora, fauna, or geological or physiographical features". But this does not tell one much about what may count in law as the conservation of geological features. In that respect, the parties have turned to sources other than statute or case law to support their cases.

64. The Easton Bavents cliffs are said to be of geologic interest, and what constitutes the science of geology so far as relevant to this case is illuminated by an entry in Encyclopaedia Britannica cited by Natural England. It describes the various sub-disciplines in this branch of science as including the sub-disciplines concerned with landforms and the processes that produce them (geomorphology and glacial geology) and those dealing with geologic history, including the study of fossils and the fossil record (palaeontology) and the development of sedimentary strata (stratigraphy).

65. As to the meaning of "conservation", Mr Gregory Jones cites the Shorter Oxford English Dictionary which defines conservation as:

> "The action of keeping from harm, decay, loss, or waste; careful preservation…the preservation of existing conditions, institutions, rights etc… the preservation of the environment, esp. of natural resources."

> He provided an extract from the complete work as well, from which one can see a reference to "conservation" of the "water and river of Thames" as early as a statute of Henry VII. Neither the cliffs nor the fossils, he submits were "kept from harm" by this SSSI, quite the reverse. Waveney District Council quoted from the 1949 Royal Charter setting up Nature Conservancy (Natural England's original predecessor) to the effect that its function was to establish, maintain and manage nature reserves in Great Britain, including the maintenance of physical features of scientific interest.

66. Thus Mr Balogh submits, conservation is about the maintenance of physical features, not their disappearance. He cites the Convention concerning the Protection of the World Cultural and Natural Heritage adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) meeting in Paris on 16 November 1972. Article 2 provides that:

> For the purposes of this Convention, the following shall be considered as `natural heritage':

> natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;

> geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;

> natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.

> By Article 4, each State Party recognizes the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of such natural heritage situated on its territory. It follows, both the Claimants and the Council submit, that a State Party such as the United Kingdom has an international duty of conservation. The purpose is one of transmission to future generations. Yet, it is submitted, in the present case, the result of Natural England's acts is that geological formations with their fossil assemblages are irretrievably lost.

67. Natural England relies in this respect on the views of the Joint Nature Conservation Committee, whose advisory role I have mentioned already. When considering conservation in areas of geological interest, the JNCC has advised that the fundamental conservation principle for any site of geological interest is "whether to protect resource or maintain the exposure". Natural England submits that this is a well recognised approach to geoconservation, and cites a 2008 book by CV Burek and CD Prosser "*The history of geoconservation: an introduction*", Geological Society of London, Special Publications, v.300 p1-5 at p2. (The Claimants argue that since Mr CD Prosser is a senior officer of Natural England, the source has to be read in that light). According to the introduction, geoconservation "usually involves working with natural change to retain a feature of interest, for example, maintaining a clear exposure of a stratigraphical sequence in an eroding cliff, despite the erosion. It is not about stopping the erosion and freezing the exposure in time. Preservation on the other hand, can be taken as keeping something in the same state, stopping it from changing, i.e. mothballing it and allowing no physical change".

68. Both Mr Balogh and Mr Howell QC have drawn attention to chapter 6 of the Introduction to the Geological Conservation Review. This is entitled "*Earth Heritage Conservation*", and under the heading "Conservation Strategy" is stated the following:

Classification of site types

> There are two main types of site:
>
> **Integrity sites** contain finite deposits or landforms which are irreplaceable if destroyed. A typical situation is a glacial landform of limited lateral extent … Other examples include presently active, and previously active geomorphological sites…, caves and karst, unique mineral, fossil or geological feature sites, and some stratotypes.
>
> **Exposure sites** provide exposures of a rock which is extensive or also well developed below the ground surface. Exposure sites are numerically the more common type and may include exposures in disused and active quarries, cuttings and pits; exposures in coastal and river cliffs…; foreshore exposures; mines and tunnels; inland outcrops and stream sections.
>
> The broad conservation principles for these types of site are different. "Integrity" sites are, by definition, finite and irreplaceable. To conserve them a more "protectionist" approach must be adopted. In contrast, the broad conservation principle for exposure sites depends on the maintenance of an exposure, the precise location of which is not always critical. Quarrying may be welcomed under some circumstances because it creates a fresh exposure and progressively reveals new rock surfaces, enabling a rock body to be analysed in three dimensions. Similarly, marine erosion is often vital in the creation of fresh rock faces at coastal sites, particularly in softer rock formations".

But counsel seek to draw different conclusions from this passage. Waveney District Council would characterise the scientific value of Easton Bavents cliffs as "finite and irreplaceable", whilst Natural England regards the cliffs as an exposure site, with marine erosion vital in the creation of fresh rock faces.

69. I preface my own conclusion as to Ground A by noting a passage to which the Claimants drew attention in CV Burek and CD Prosser's book "*The history of geoconservation*". It comes at the beginning of a contribution to the book by Philip Doughty. The author had evidently accepted with reluctance the invitation to write on the topic of the "origins of geological conservation", because as he puts it, "geoconservation is a nebulous topic. Everyone who has approached the topic has found a major problem in defining its scope". That applies equally to the legal analysis.

70. The central question as identified by the Deputy Judge in relation to the *ultra vires* issue was whether English Nature could lawfully grant and confirm the designation of the SSSI, for the reasons which it gave. The "Reasons for Notification" given in the citation were (so far as

relevant) that the cliffs are "nationally important for the geological exposures of the Lower Pleistocene Norwich Crag Formations and associated Pleistocene vertebrate assemblages". In a sentence, Natural England says that this means the exposure of the cliffs as maintained by erosion.

71. From a legal perspective, a proper starting point is the statement in *Fisher* by Wall LJ in relation to the size of an SSSI that the "words used [in s. 28] are deliberately vague" ([2005] 1 WLR 147 at [131]). In my respectful view, that approach applies in the present case as well. The concept of the conservation of a geological feature, which was the purpose for which the SSSI was notified so far as concerns the Easton Bavents cliffs, is not an easy one to pin down. Mr Howell QC suggests that there is a difference in the cases put forward by the Claimants and the Waveney District Council in that regard. The Claimants argue that the only relevant geological feature is the currently exposed cliff face, and that any area landward or seaward may be of potential interest, but cannot be notified as being of current interest. That way of putting it would track Ground A quite closely. The District Council on the other hand argues that an exposure is not something that can be regarded as a geological feature. Its objection is not to notification of the landward area of the cliffs, but that the restrictions on stopping erosion are incompatible with the purpose of conservation. The Council's real concern, Mr Howell says, is with the restriction imposed by English Nature as regards the maintenance of the sea defences.

72. But whatever the differences in their position, they reached the same outcome. The Claimants in particular criticised what they considered to be inconsistencies in the three documents containing the reasons for the notification and confirmation – the citation, the notification report to which the citation was attached, and the subsequent confirmation report prepared by officers of English Nature. I would accept that the matters are put somewhat differently in the documents, particularly the officers' report, but consider that this reflects the fact that it contains the officers' response to the objections that had been received. It elaborated but did not change in any substantial way the reasons for notification which in my view remained in essence the same throughout.

73. As to the arguments on the substance of Ground A, my conclusions are as follows. An exposed cliff face is plainly capable of being a geological feature of special interest for the purposes of s. 28, and the Claimants accept this. However English Nature did not in my view misconstrue the statutory provision by interpreting "feature" in terms of the feature as maintained by erosion. The reference in the "Reasons for Notification" to the "coastal geomorphology of Benacre Ness" does not in my judgment imply that the limit of the scientific interest in Easton Bavent is its exposed cliff face. Geomorphology is a branch of geology, and it is clear from the reasons overall that the erosion of the cliffs was itself of interest.

74. So far as the boundaries of the SSSI are concerned, the land behind the cliffs consists of fossil bearing sediments for a distance of some 25 kilometres. That does not mean (as the Claimants and the Council have argued) that if any of the landward area was notified, it must have been irrational not to notify the whole 25 kilometres. The 225 metres of land comprised in the SSSI as notified was based on a 50 year prediction of the effects of erosion as explained in the officer's report. This is not an irrational basis in law for selecting an area of special interest, particularly since those affected had a right of appeal in relation to the preclusion of the sea defences. Nor does the drawing of the boundary have the effect of notifying the land behind the cliffs as an SSSI on the basis of its future as opposed to current scientific interest. The fact that the fossils are currently unexposed does not mean that the land is not of current interest. Nor do I consider that English Nature acted outside its statutory function of nature conservation by designating the land inland from the cliff face for the purposes of study rather than for existing special scientific interest. Study – in this case the study of the sediments and the fossils they contain – is what a site of special scientific interest is all about. There is no incompatibility in this regard.

75. That leaves the difficult question of what is meant by "conservation" in this context. There is at the least a forensic attraction in the contentions of the Claimants and the Council. A policy of

allowing erosion to take its course, they submit, conserves nothing. Metre by metre the cliffs, along with the fossil bearing sediment of special scientific interest, slide into the sea and are lost for good, unless some enterprising fossil hunter happens by, and bags a fossil in time. As Mr Balogh citing *Alice in Wonderland* neatly put it, this is like conserving the grin, and not the Cheshire cat.

76. However I am satisfied that in law, this approach takes too limited a view of the meaning of conservation. To take the analysis in the Introduction to the Geological Conservation Review quoted above, in the conservation of "integrity" sites a more protectionist approach may be expected, whereas in the case of an "exposure" site (and Easton Bavents cliffs fall into this category) conservation may result in the maintenance of the exposure. Conservation is in my judgment a dynamic concept which may involve keeping things as they are, but does not necessarily do so. It may also involve allowing natural processes to take their course, as in the case of erosion by a river, or by climatic forces, or by the sea, and similar considerations will apply when the area of land in question is of special interest by reason of its flora or fauna.

77. It follows from the above that as regards Ground A, I am satisfied that the notification and subsequent confirmation of the SSSI as it applied to the disputed area at Easton Bavents was not *ultra vires*. English Nature could lawfully notify and confirm the SSSI including this area for the reasons which it gave, and the claim in respect of Ground A fails.

Ground G

78. The second and only other ground on which permission was given to bring these proceedings is in respect of breach of duties under EC Directives called the Birds Directive and the Habitats Directive, together with implementing regulations called the Conservation (Natural Habitats etc) Regulations 1994. The contention on this ground is that before notifying or confirming the SSSI as including the cliffs at Easton Bavents, English Nature should have considered the need for an appropriate assessment of the implications for the Benacre to Easton Bavents Special Protection Area (SPA) which as I have said is situated to the north of the Easton Bavents cliffs at Easton Marshes. It failed to consider the necessity for such an assessment, and such a failure on its own is, it is submitted, sufficient to justify the quashing of the decision to confirm the notification of the SSSI so far as it affects the disputed area, though the Claimants also rely on the fact that no assessment was in fact carried out.

79. Special Protection Areas are classified under the EC Directive on the conservation of wild birds (79/409/EEC), commonly known as the Birds Directive. The Directive requires the Member States of the European Community to identify the most suitable territories for certain rare or vulnerable species and for regularly occurring migratory species. SPAs are intended to safeguard the habitats of the species for which they are selected and to protect the birds from significant disturbance. Special Areas of Conservation (SACs) are designated under Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (known as the Habitats Directive) which applies to habitats and non-bird species. Together, these areas form the "Natura 2000" Europe-wide network of sites. The Pakefield to Easton Bavents SSSI contains two European sites (both to the north of the cliffs). These are the Benacre to Easton Bavents Special Protection Area (SPA) and the Benacre to Easton Bavents Lagoons Special Area of Conservation (SAC).

80. This ground is tied in factually with the paragraph 19 prohibition on the maintenance of the sea defences without the consent of English Nature. In summary, the Claimants contend that this prohibition will have a knock on effect up the coast entailing a significant risk from coastal erosion on the saline lagoon within the SPA, with a resultant loss of habitat for the bird species which live there. Under Article 6(3), a "significant effect" is the trigger for the "appropriate assessment" requirement in the Habitats Directive. Natural England considers that the failure to maintain the sea defences would not have been likely to have had a significant effect on the SPA or, for that matter, the SAC.

Article 6(3) Habitats Directive

81. It is common ground that the nub of the legal dispute on Ground G is whether or not the notification and confirmation of the SSSI as regards the disputed area constituted a "plan or project" as that term is used in Article 6(3) of the Habitats Directive. There is a further point raised under Article 6(3) which has been canvassed at the hearing, namely whether the disappearance of the sea defences was as a matter of fact likely to have a significant effect on the SPA. Waveney District Council does not support the Claimants' contentions on Ground G, and Mr Balogh has not addressed me on it.

82. The relevant parts of Article 6 of the Habitats Directive provide that:

> "2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far 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 or 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.
>
> 4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.
>
> Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest."

83. The effect of Article 6(3) is that "any plan or project" likely to have "a significant effect" on the site in question "shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives". The three phrases in quotations are the important ones for present purposes. As I have said, the term "site" includes an SPA like that at Easton Broad.

84. There are two points to get out of the way at the outset. First, in his written submissions, Mr Gregory Jones placed reliance on regulation 48 of the Conservation (Natural Habitats etc) Regulations 1994 which implement the Habitats Directive in Great Britain. In fact as Mr Howell QC pointed out, regulation 48 applies only to the matters specified in regulations 54 to 85 (see regulation 47), and notification of an SSSI is not one of them. Mr Jones now accepts this point. However it makes little practical difference, because Mr Howell accepts that Article 6(3) is determinative of this issue if it applies.

85. Second, Mr Jones at one point suggested that the Article 6(3) point had been raised at or before the Council Meeting on 28 June 2006. This is not borne out by the minutes or by his speaking notes for the Council Meeting with which I was helpfully provided after the hearing. He rightly accepts now, as I understand it, that the Council did not have this point before it when it met to decide whether or not to confirm the notification, though the factual basis for it was. Paragraph 21 of Mr Jones' notes show him saying that, "…unrestricted erosion of the Cliffs will lead to the

loss of the saline lagoon at Easton Broad, which is included within the current SSSI and is designated … as a Special Protected Area (SPA) under Article 4 of the EC Directive on the conservation of wild birds…". In any case he submits, and I do not understand it to be in dispute, that the fact that the point was not clearly raised at the time does not affect its legal force. If the point is a good one, I think it is accepted that the decision of the Council will be invalidated to the extent that it applies to the disputed area.

86. A useful starting point is the decision of the European Court of Justice in *EC Commission v United Kingdom* C-6/04 (10 October 2005). In that case, it was held that the UK had failed properly to implement the Habitats Directive because the implementing regulations did not clearly require land use plans to be subject to appropriate assessment. The ECJ's reasoning was that a land use plan "may have great influence on development decisions and, as a result, on the sites concerned" (paragraph 55).

87. The leading authority on the effect of Article 6(3) is the decision of the European Court of Justice in the *Waddenzee* case (Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee, Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* (7 September 2004). This case was a reference from the Netherlands where licences had been issued annually for the mechanical fishing of cockles. It was held that the cockle fishing activity fell within the Article 6(3) concept of "plan" or "project".

88. Natural England cites paras 22 to 26 of *Waddenzee* which go to the meaning of "plan or project" as follows:

"22. The 10th recital in the preamble to the Habitats Directive states that 'an appropriate assessment must be made of any plan or programme likely to have a significant effect on the conservation objectives of a site which has been designated or is designated in future'. That recital finds expression in Article 6(3) of the Directive, which provides inter alia that a plan or project likely to have a significant effect on the site concerned cannot be authorised without a prior assessment of its effects.

23. The Habitats Directive does not define the terms 'plan' and 'project'.

24. By contrast, Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), the sixth recital in the preamble to which states that development consent for projects which are likely to have significant effects on the environment should be granted only after prior assessment of the likely significant environmental effects of these projects has been carried out, defines 'project' as follows in Article 1(2):

'– the execution of construction works or of other installations or schemes,

– other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources.'

26. Such a definition of 'project' is relevant to defining the concept of plan or project as provided for in the Habitats Directive, which, as is clear from the foregoing, seeks, as does Directive 85/337, to prevent activities which are likely to damage the environment from being authorised without prior assessment of their impact on the environment."

89. The Claimants cite paras 39 to 45 which go to the question of "significant effect" as follows:

"39 According to the first sentence of Article 6(3) of the Habitats Directive, 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 or projects, is to

be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives.

40 The requirement for an appropriate assessment of the implications of a plan or project is thus conditional on its being likely to have a significant effect on the site.

41 Therefore, the triggering of the environmental protection mechanism provided for in Article 6(3) of the Habitats Directive does not presume – as is, moreover, clear from the guidelines for interpreting that article drawn up by the Commission, entitled 'Managing Natura 2000 Sites: The provisions of Article 6 of the "Habitats" Directive (92/43/EEC)' – that the plan or project considered definitely has significant effects on the site concerned but follows from the mere probability that such an effect attaches to that plan or project.

42 As regards Article 2(1) of Directive 85/337, the text of which, essentially similar to Article 6(3) of the Habitats Directive, provides that 'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment … are made subject to an assessment with regard to their effects', the Court has held that these are projects which are likely to have significant effects on the environment (see to that effect Case C-117/02 Commission v Portugal [2004] ECR I-0000, paragraph 85).

43 It follows that the first sentence of Article 6(3) of the Habitats Directive subordinates the requirement for an appropriate assessment of the implications of a plan or project to the condition that there be a probability or a risk that the latter will have significant effects on the site concerned.

44 In the light, in particular, of the precautionary principle, which is one of the foundations of the high level of protection pursued by Community policy on the environment, in accordance with the first subparagraph of Article 174(2) EC, and by reference to which the Habitats Directive must be interpreted, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned (see, by analogy, inter alia Case C-180/96 *United Kingdom v Commission* [1998] ECR I-2265, paragraphs 50, 105 and 107). Such an interpretation of the condition to which the assessment of the implications of a plan or project for a specific site is subject, which implies that in case of doubt as to the absence of significant effects such an assessment must be carried out, makes it possible to ensure effectively that plans or projects which adversely affect the integrity of the site concerned are not authorised, and thereby contributes to achieving, in accordance with the third recital in the preamble to the Habitats Directive and Article 2(1) thereof, its main aim, namely, ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora."

90. It is also pertinent to mention para 47 to the effect that, "where such a plan or project has an effect on that site but is not likely to undermine its conservation objectives, it cannot be considered likely to have a significant effect on the site concerned".

The parties' submissions

91. The Claimants' case under this ground is that the designation of the SSSI is a "plan or project" for the purposes of Article 6(3) of the Habitats Directive, and that in the circumstances of this case, English Nature was obliged to consider the need for/carry out an appropriate assessment of the implications of the SSSI designation for the Benacre to Easton Bavents SPA.

92. In this regard, they submit that the term "plan or project" should be interpreted widely, taking account of the purposive approach of the ECJ to EU legislation and the aim of the Directive, and Article 174(2) of the EC Treaty and the "precautionary principle". Their submissions go on as follows. Citing the words from the *EC Commission v United Kingdom* that I have set out above, they say that the act of designating land as an SSSI has "great influence on development decisions" for the following reasons:

(a) The designation of the SSSI is in effect a statement of what activities should or should not be authorised. It does not merely impose a requirement for authorisation;

(b) The reasons for designating an SSSI are material considerations in whether or not to grant consent for OLDs specified under s. 28(4) of the Wildlife and Countryside Act 1981.

(c) In this instance, the designation of the SSSI is not merely a material consideration in any future decision as to whether or not consent should be granted. The reasons given for the notification itself and the confirmation of the notification pre-suppose that any consent for operation to maintain the Defences will not be granted, because:

(i) The reasons for the designation were to conserve geological features of interest that Natural England considered included functioning processes of erosion.

(ii) If a process of erosion was considered to be the feature that required protection, it is inconceivable that Natural England would grant consent for maintaining the sea defences that would prevent that feature existing;

(iii) The above has been borne out by a refusal of consent applied for by a neighbouring landowner, namely Mr Charlie England.

(d) The designation has an even greater influence on development decisions than a land use plan because of the exposure to immediate criminal sanctions if OLDs are carried out without consent;

(e) The mere existence of an appeal process under s. 28E of the 1981 Act does not preclude a court from finding that the designation itself can still have a sufficient determinative effect on the right to use land to be considered to be a plan or a project.

93. The Claimants submission is that the "designation of the [sea] defences as part of the SSSI, and the resultant encouragement of erosion of the cliffs and the land behind them, constitutes an intervention in the natural surroundings and landscape" (see *Waddenzee* at [24]). This is a relevant factor, it is submitted, in determining what constitutes a plan or project for the purposes of the Habitats Directive. The result that necessarily is assumed to follow from the designation of the SSSI is the removal of the sea defences. That this is done in a prohibitory or indirect way does not lessen the degree of intervention in the landscape caused by the designation.

94. Natural England submits that the Claimants' case rests on the contention that notification of a SSSI and the specification of operations likely to cause damage themselves constitute a "plan" or a "project" for the purpose of the Habitats Directive, but they do not. They are in fact, it is submitted, one of the principal means by which the requirement imposed by the Habitats Directive for national law to include a procedure in accordance with which there is an appropriate assessment of such plans and projects (if required) is transposed into domestic law.

95. It submits that notification of SSSIs creates a legal regime that in part transposes the requirements of the Habitats Directive to ensure that any plan or project (which requires it) is subject to appropriate assessment before it is authorised. Notification creates the necessary requirement for authorisation: it does not give it. The same is true of the requirement imposed to obtain planning permission for any development. Neither requirement is itself a "plan" or "project". They are the means of ensuring that projects are carried out only after any appropriate assessment which is required has been made.

96. Notification of a SSSI and the list of operations requiring consent is not, Natural England submits, a "project". As to the assertion that the requirement to obtain authorisation to construct or maintain a sea defence in this area is itself an intervention in the natural surroundings and landscape, it is the construction or maintenance of a sea defence or other coast protection work that would constitute such intervention. The need to obtain authorisation for such work (whether

in the form of consent under the 1981 Act or planning permission) enables an appropriate assessment of such a project to be carried out (if required) before authorisation is granted.

Plan or project: Legal analysis and conclusions

97. The Secretary of State has stated that, "the protection and management of internationally designated sites are achieved [in England] by a combination of the Habitats Regulations and section 28 of the Wildlife and Countryside Act 1981, as amended" (DEFRA Circular 01/2005, ODPM Circular 06/2005 at [7]). The reason, Mr Howell QC submits, why s. 28 of the 1981 Act serves that purpose is that it identifies areas which are of special interest (such as European sites) and it also requires operations likely to damage that interest to be authorised before they are carried out. Accordingly he says, the Conservation (Natural Habitats etc) Regulations 1994 assume that any European sites will be protected by notification, and that any application for consent as regards OLDs under the 1981 Act (or for planning permission which dispenses with the need for such consent) for any operation which is (or which forms part of) a plan or project likely to have a significant effect on a European site, will be made the subject of an appropriate assessment. Notification of SSSIs, he submits, creates a legal regime that in part transposes the requirements of the Habitats Directive to ensure that any plan or project (which requires it) is subject to appropriate assessment before it is authorised.

98. I agree with this submission, with the proviso that it is directed to plans and projects as they affect the SSSI, and the issue in the present case relates to the effect on the SPA. It is consistent with the discussion as to the relationship of the domestic and European regimes by Lightman J in *R (Fisher) v English Nature* [2004] 1 WLR 503 at [29]-[30], [38]. In [29], the judge cites regulation 3 of the 1994 Regulations to the effect that English Nature shall exercise its powers under s. 28 so as to secure compliance with the Habitats Directive. He goes on to cite Forbes J in the *Aggregates* case at [125] to the effect that English Nature was to take into account "the site's function as part of a larger area of European importance". At [38], Lightman J said that he saw "no reason to disagree with the Government's views as to the relationship between SPAs and SSSIs in terms of the Birds Directive…".

99. As the Claimants submit, *EC Commission v United Kingdom* takes an expansive view of the scope of Article 6(3), but neither that case nor *Waddenzee* contains a formulation of the meaning of "plan or project". In submissions of great authority and value, Mr Howell QC submits that for the purposes of the Habitats Directive, a "project" is an intervention in the natural surroundings and landscape. Insofar as a "plan" differs from a project, it is a formal statement of an intended course of future action in respect of the authorisation of such interventions. Thus the reason for making such plans subject to an appropriate assessment is that they govern subsequent decisions of the authority whose plan it is on what to authorise. Thus, he submits, the reason why a development plan constitutes a plan for the purpose of the Habitats Directive is that applications for planning permission are required by law to be determined in accordance with that plan unless material considerations indicate otherwise.

100. Adopting that approach, I consider that the law can be stated so far as presently relevant as follows. For the purposes of Article 6(3) of the Habitats Directive, a "project" is (among other things) an intervention in the natural surroundings and landscape (*Waddenzee* at [24]). A "plan" is a formal statement of an intended course of future action in respect of the authorisation of such interventions. The reason for making such plans subject to an appropriate assessment, is that they govern subsequent decisions of the authority whose plan it is on what to authorise (*EC Commission v the United Kingdom* at [51]-[56]).

101. It follows that in my view, a notification under s. 28 Wildlife and Countryside Act 1981 of English Nature's (now Natural England's) opinion that an area is of special interest together with a list of operations requiring consent will normally neither be a "plan" nor a "project" within the meaning of Article 6(3) of the Habitats Directive. I accept Mr Howell's submission that Natural England's opinion on the interest which an area of land may have (which will provide the reason

for any notification) is simply its opinion about the interest that a particular area has. It is no more a plan than an expression of view by an authority about existing features of interest which a site may have, or an expression of a view by a public body about whether a project should be allowed to proceed.

102. But it is the continuation of Natural England's argument as it applies to the Easton Bavents cliffs in the light of paragraph 19 of the OLDs that I have found difficult to accept on the particular facts of the present case. The effect of paragraph 19 is that the "erection, maintenance, and repair of sea defences or coast protection works …" without Natural England's consent and without reasonable excuse is an offence under s. 28P(1) of the 1981 Act. Natural England submits that the Claimants are wrong to assert that this was in effect a statement of what activities would or would not be authorised. The list of operations, it submits, simply identified what operations required consent: "It did not predetermine or govern the question whether or not such operations would be permitted".

103. The Claimants contend that on the facts of this case, notification should be taken to be a "plan" because the notification did pre-suppose that consent for the maintenance of the sea defences would not be granted. Natural England submits that this is wrong: "what they [the reasons given] recognise is that English Nature considered that the OLDs it specified were likely to damage the items which in its opinion gave the area its special interest. Whether authorisation for any OLD should be granted, whether by Natural England or the local planning authority or by the Secretary of State on appeal from either, will depend on what effect any such operation is thought to have and all other relevant considerations".

104. Against these submissions, I set out what the officers of Natural England said about the sea defence in their report to the Council (as mentioned above it is not in dispute that this is one of the three documents in which the reasons for the confirmation are contained):

> "With regard to Mr P Boggis' sacrificial coastal defence, as the placement of material in front of the cliffs results in the bulk of the important exposures at this location being obscured, English Nature are unlikely to issue a consent for these works in their current form. Officers have highlighted the responsibilities of Easton Bavents Limited as landowners to obtain consent from English Nature before carrying out, or causing or permitting to be carried out any of the operations listed are requiring English Nature's consent, and that English Nature have not consented [to] the reconstruction and maintenance of Mr Boggis' sacrificial defence of the land owned by Easton Bavents Limited".

105. The officers thus specifically stated that English Nature was unlikely to consent to the sea defences in their current form. On the basis of this Report, the Council of English Nature confirmed the notification of the SSSI without modification to the boundary and without amendment to paragraph 19. Contrary to its submission, I consider that in substance this did predetermine the question whether or not such operations would be permitted. The position at the time of notification in December 2005 was that the Easton Bavents sacrificial sea defences had been put in place. As I have said, the Claimants say that they were constructed lawfully, though Natural England disputes that. Be that as it may, Natural England submits that it did not "authorise" the removal of the sea defences, since this was done by the sea. But I agree with Mr Gregory Jones that the notification in the light of the reasons given amounted to a statement that authorisation for the maintenance of the defences would be withheld in the future, with the inevitable consequence that they would be washed away over time. The putting of the sea defences in place was clearly an intervention in the natural surroundings and landscape, but so in my view was the prohibition on their maintenance.

106. It is correct to say that the Claimants could have asked Natural England for consent. When I asked Mr Jones why his client had not done so, he said (with justification in my view) that the outcome was seen to be a foregone conclusion. With considerable hesitation, and on the very unusual facts of this case, I have concluded that so far as it applied to the authorisation of the

maintenance of the Easton Bavents' sea defences, the notification and confirmation of this SSSI did include a formal statement of an intended course of future action. Applying the test set out above, it was in that respect (but that respect only) a "plan" within the meaning of Article 6(3) of the Habitats Directive. It follows that the Claimants get over the first hurdle in making their Ground G argument good.

Significant effect: Legal analysis and conclusions

107. A plan falls within Article 6(3) of the Habitats Directive if it is "likely to have a significant effect" on the protected site in question. In the passages from *Waddenzee* set out above, the European Court of Justice interpreted those words liberally, holding that the triggering of Article 6(3) does not presume that the plan or project definitely has significant effects on the site concerned, but follows from mere probability. In the light of the precautionary principle (see the first subparagraph of Article 174(2) EC), such a risk exists if it cannot be objectively excluded. In case of doubt an appropriate assessment must be carried out, thereby contributing to achieving biodiversity through the conservation of natural habitats and of wild fauna and flora. On the other hand, where a plan or project has an effect on the site but is not likely to undermine its conservation objectives, it is not considered "likely to have a significant effect" for these purposes.

108. The parties' respective submissions are straightforward, though the evidence on which the submissions are based is not. There has been a great deal of material placed before the Court in this regard, including some received after the hearing. To try to identify what was relied on, the Claimants submitted at my request a further skeleton dated 17 November 2008, to which Natural England responded on 24 November.

109. In short, the Claimants point to the "sheer proximity" of the Easton Bavents cliffs and the sea defences located there to the SPA. They submit that they do not have to quantify the degree of risk – it is for Natural England to exclude such a risk on the basis of objective information (*Waddenzee* at para 46). They point to the first report from Dr Mark Lee (a geomorphologist) commissioned by Natural England which is said to have indicated that the existence of the coastal protection works at Easton Bavents had the effect of reducing predicted recession rates at Easton Broad cliff by 50%. Therefore they say that it established a causal nexus between the defences and the coastal erosion of the cliffs protecting the saline lagoon of Easton Marshes that formed part of the SPA.

110. As to this report, Natural England responds that the report did not say that the sea defence "had" the effect of reducing recession rates at Easton Broad cliff by 50%. It recognised that 50 year recession rate at those cliffs was difficult to quantify but stated that "it is possible" that it might have an effect of reducing previously predicted rates of recession by 50%. This is, it is said, entirely consistent with Dr Lee's latest reports, in which he noted in 2008 that there has been no obvious impact from the SSD on recession rates at Easton Broad cliffs.

111. In its skeleton argument, Natural England submits that it correctly considers that the maintenance of the sea defences or the failure to maintain them would not have been likely in any event to have had a significant effect on the SPA or, for that matter, the SAC. It is said that the Eastern Broad barrier beach will continue to retreat in response to the relative sea-level rise anticipated ("RSLR") and the rate of retreat will be controlled by the RSLR, the beach crest height and any flood management or similar practices. Maintaining the sea defences (even if possible) can be expected to have only a minor impact on the behaviour of the barrier (ie retreat and tidal flooding), especially when compared with the RSLR. The overwashing ratio is expected to increase but at a slower rate. Even a doubling of the barrier size (an upper bound estimate of credible beach growth) would only result in a 1-2% reduction in the retreat rate predicted to occur as a result of RSLR. It would remain extremely dynamic in response to large storm and surge events. Relying in particular that on a Joint Report by Mr Reach (a senior specialist in Marine Ecology with Natural England) and Mr Robinson (who is an officer on its East Suffolk Land and

Sea Management Team) it submits that the effects of the sea defences present no risk of any significant effect on the SAC or on the SPA either way..

112. In response, the Claimants produced a report dated 17 October 2008 by Professor Christopher Vincent of the University of East Anglia who says that, "Comparing each of the two scenarios presented to me in turn, when considering the scenario in which a soft sea defence is maintained in the location in which it has been constructed below the cliffs at Easton Bavents, my view is that, in comparison to a situation where there had been no soft sea defences constructed, the risk of significant likely physical effects on the barrier beach in front of Easton Broad, part of the SPA and SAC, by 2050 cannot be discounted". Natural England criticises Professor Vincent's reasoning, and say that the report has not caused it or Dr Lee to change their views.

113. My reading of the evidence I have seen is that Natural England may well be right to say that the effect on the SPA will be neutral whether or not the sea defences are maintained. On Mr England's appeal I note that the Inspector concluded in an addendum that neither the refusal nor the grant of consent would have an adverse effect on the integrity of European sites to the north (though he may only have had the short 50 metre stretch in mind). However I consider that on the evidence before the Court on this hearing, the risk cannot be objectively excluded. In case of doubt, an appropriate assessment must be carried out (see the decision in *Waddenzee* at para 44).

114. Further, Mr Jones relied upon *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603 to contend that it does not matter whether an appropriate assessment would have affected the outcome. In that case, a grant of planning permission was quashed because of a failure to carry out an environmental impact assessment (EIA) to determine whether the proposed development would be likely to have significant effects on the environment as required by EC Directive 85/337/EEEC. In a judgment with which the other judges agreed, Lord Hoffmann rejected a contention that the decision should be upheld because upon the facts it would not have been affected by the assessment, saying at p 616C:

"A court is therefore not entitled retrospectively to dispense with the requirement of an EIA on the ground that the outcome would have been the same or that the local planning authority or Secretary of State had all the information necessary to enable them to reach a proper decision on the environmental issues."

115. Referring to s. 288(5)(b) Town and Country Planning Act 1990 by which the court "may" quash an *ultra vires* planning decision, Lord Hoffmann said (at p. 616D) although this provision:

"… clearly confers a discretion upon the court, I doubt whether, consistently with its obligations under European law, the court may exercise that discretion to uphold a planning permission which has been granted contrary to the provisions of the Directive. To do so would seem to conflict with the duty of the court under Article 10 (ex Art 5) of the EC Treaty to ensure fulfilment of the United Kingdom's obligations under the Treaty".

116. Natural England sought to distinguish the case on the basis that it turned upon the particular procedure prescribed in the Directive by which the public had to be given an opportunity to express its opinion on the environmental issues which the development gave rise to. I can see that there may be a factual distinction on these lines, but the underlying reasoning supports the taking of the steps prescribed to protect the environment rather than *ex post facto* justifications. In my view, Lord Hoffmann's statement of the law is applicable to the facts of this case. It follows that in my view, the Claimants get over the second hurdle on Ground G as well.

117. Finally in this context, I should deal with Natural England's submissions as regards Waveney District Council. It said that there was no reason why English Nature should have regarded the sea defence as anything other than unlawful and as something that was required to be removed in order to comply with European law. It forcefully criticised the stance taken by the District Council in this regard, submitting that it is under an obligation by virtue of Article 10 of the

Treaty to remedy breaches of Council Directive 85/337/EEC by enforcing the requirement to obtain development consent for the sea defences by serving an enforcement notice or otherwise requiring their removal in its absence.

118. It is evident that the District Council has found itself in a difficult position in this matter, and in its various submissions it has been at pains to demonstrate that it has acted at all times lawfully. It has not granted planning permission for the Claimants' operations; but says it both considered the question whether an environmental impact assessment was necessary before it could consider whether or not to do so, and concluded that it was, and adopted a scoping opinion. It commissioned the special report on the effects of the Claimant's operations on coastal processes from its consultants Halcrow Group Ltd that said that the least damaging option was to leave the sea defences in place. It further submits that enforcement action against Mr Boggis and the other residents of Easton Bavents would be contrary to common sense in circumstances in which he ceased his operations on the SSD in 2005, and as things stand at the moment, it is only a matter of a relatively short period before the sea defences are washed away. In any case, on this application the question of the lawfulness of the District Council's position does not directly arise, and I do not decide it. But I do not think it can be said to have acted unreasonably in the very unusual circumstances.

119. Underlying Natural England's submissions is the proposition that the time for an appropriate assessment was when the sea defences were put in place, and that to hold that it was itself under an obligation to do so is "to stand the precautionary principle (on which the Claimants purport to rely) on its head". I have no difficulty with the first part of this proposition, but do not accept the conclusion. English Nature's obligation to comply with Article 6(3) was an independent obligation in my view. The lawfulness of the building of the sea defences, and the position of Waveney District Council in that respect, might be very relevant in that assessment, but would not in my judgment dispense with the necessity of an appropriate assessment if otherwise required.

Conclusion

120. In summary, as regards Ground A, I am satisfied that the notification and subsequent confirmation of the SSSI as it applied to the disputed area at Easton Bavents was not *ultra vires*. English Nature could lawfully notify and confirm the SSSI including this area for the reasons which it gave, and in doing so, it took a legitimate approach to the purpose of conservation. The claim in respect of Ground A fails.

121. As regards Ground G, English Nature confirmed the notification of the SSSI on the basis of a Report in which its officers had made it clear that English Nature was unlikely to consent to the sea defences in their current form. To that extent, in my view, the notification and confirmation of this SSSI included a formal statement of an intended course of future action, and was in that respect (but that respect only) a "plan" within the meaning of Article 6(3) of Directive 92/43/EEC (the Habitats Directive). As such, Article 6(3) required it to be subject to an appropriate assessment of its implications for the Benacre to Easton Bavents Special Protection Area (SPA) in view of that site's conservation objectives. This did not take place. On the evidence before the Court on this hearing, the risk of a significant effect on the SPA's conservation objectives cannot be objectively excluded: see the decision in the *Waddenzee* case (Case C-127/02, 7 September 2004) at paragraph 44. In any event, the Court is not entitled retrospectively to dispense with the requirement of an appropriate environmental assessment on the ground that the outcome would have been the same: *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603, at p. 616.

122. To that extent, the claim on Ground G succeeds. As regards the area of the land at Easton Bavents within this ruling, I refer to paragraph 12 above. It does not apply to the rest of the SSSI which has never been in dispute. It follows that my conclusion on this Ground is that the notification and confirmation of the SSSI was unlawful so far as it applied to the area on the

seaward side of the Easton Bavents cliffs where the sea defences are situated, and the land behind the cliffs, but was otherwise lawful.

123. I would add that it was evident during the hearing that the only issue of substance between the parties is the sea defences. Mr Boggis told me that he would have no reason to continue to litigate if he was able to maintain them. Following the upholding of Mr Charlie England's appeal in March this year, the dynamics of the situation would appear to have changed. So far as s. 28 of the Wildlife and Countryside Act is concerned, consent now exists for *part* of the defences, albeit a small part. Perhaps nothing more can be done, but it would be sensible if yet further efforts were made to see whether a compromise can be reached as regards the rest of the sea defences. I appreciate that Natural England is not the only agency involved in this regard, and others must be prepared to play their part. I make it clear that no criticism is intended of Natural England. It has been trying to do its duty to preserve the scientific value of the site at Easton Bavents. But without some form of defence, the Claimants' homes will soon be swept away by the sea, and their very human predicament must be taken account of too.

124. As I have said, the claim succeeds to the extent that I have indicated. I am grateful to counsel, solicitors, and the parties for their assistance, and will hear submissions on the appropriate order following this decision.