Dormice
Photo by Michael Woods

All that Glitters, is it Gold?

An Appraisal of the Comments Made in the Autumn Statement 2011

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The Prologue

The Autumn Statement by the Chancellor of the Exchequer is a legal obligation of the Industry Act 1975, which requires the Government to publish twice annual economic forecasts. It is not normally an event that causes nature conservation organisations to react, indeed, it probably barely registers a comment. Not so in November 2011. A single sentence within a statement that contains 6,832 words resulted in opprobrium across a wide spectrum of audiences that included the RSPB, Wildlife Trusts, environmental commentators and the general media. It was as if the very existence of nature conservation in the UK had been threatened.

But was the reaction justified? The purpose of this article is to consider the implications of the Habitats and Birds Directives review[1], which is scheduled to be published by 21st March 2012 (the Budget) and whether or not changes could realistically be implemented. It is hoped that the article presents the case in a balanced way.

The Directives

The requirements of the Conservation of Wild Birds Directive 1979[2] (the 'Birds Directive') is implemented by the Wildlife and Countryside Act 1981, which includes for the designation of sites considered to be of particular importance to bird populations (Special Protection Areas (SPAs)). The Conservation of Natural Habitats and of Wild Fauna and Flora Directive 1992 (the 'Habitats Directive') is transposed into UK law by the Conservation of Habitats and Species Regulations 2010[3] (the 'Habitat Regulations'). The 2010 Regulations cover the legislation dealing with European Protected Species (EPS), designated sites (Special Areas of Conservation (SACs)) and the assessment of the implications of plans and projects on either SPAs or SACs; otherwise known as a Habitat Regulation Assessment (HRA).

The Statement

The Autumn Statement[4] was delivered by the Right Honourable George Osborne MP, Chancellor of the Exchequer, on 29th November 2011. There was no particular hint as to what was about to come, other than a well-informed environmental commentator, Mark Avery (ex-RSPB Conservation Director) writing on his blog (*http://markavery.info/blog/*) that the Regulations might be mentioned. Sometimes, important political announcements are hinted at through 'leaks', or 'sources', so it could be considered that the sentence that resulted in the subsequent uproar was considered insufficiently controversial to warrant any mention, or perhaps HM Treasury assumed ecologists and environmentalists wouldn't be listening. It turned out that ecologists and environmentalists were listening; and the sentence which got everyone's attention?

"And we will make sure that gold-plating of EU rules on things like habitats [sic] aren't placing ridiculous costs on British businesses."

Alongside the Autumn Statement, the Government published the National Infrastructure Plan (NIP) (HM Treasury 2011), where it too makes reference to the review. The NIP states that the Directives should *"...not lead to unnecessary costs and delays to development, while continuing to support the Directives' objectives. The Government... is committed to tackling blockages for developments where compliance is particularly complex or has large impacts."* It goes on to state that whilst recognising that the Directives protect Europe's most precious ecosystems, and they are committed to them, the Government is *"...keen to ensure that compliance with the Directives does not lead to unnecessary costs and delays in the delivery of important, sustainable infrastructure projects, such as offshore wind developments."*

Information on the proposed review can be read on Defra's website[5]. Based on the terms of reference, the review is going to be detailed and comprehensive. For example, it will review topics such as risk of significant effect, risk of adverse effect on integrity, mitigation solutions and compensatory measures (to name a few) in relation to case-law and how this relates to compliance costs and delays; how the statutory authorities apply the legislation (too rigorous or too lenient); and lessons that can be learned from other EU Member States.

The Response

Grave concerns have been expressed by various organisations that the strict protection afforded to habitats (SPAs and SACs) will be watered down and that EPS (*e.g.* great crested newts *Triturus cristatus*, pipistrelle bats *Pipistrellus* spp. and hazel dormice *Muscardinus avellanarius*) will face similar reductions in protection from irresponsible or harmful development. Is this likely to happen?

The first observation to make is that the Habitats Directive was first transposed into UK law by the Conservation (Natural Habitats, &c.) Regulations 1994, which have been subsequently amended on no less than seven occasions (in 1997, 2000, 2004, 2007, 2008, 2009 and 2011) if you include the devolved administrations. Some of these amendments have arisen as a consequence of amendments to the Directive itself or to address minor legal technicalities. However, the 2007 amendment, relating to Appropriate Assessment, was a result of a European Court of Justice (ECJ) decision (C-06/04)[6] against the UK Government in how it transposed an element of the Habitats Directive into domestic law. Therefore, whilst the Government has expressed a wish to review how the Directive is applied through domestic law, it will have to retain legal integrity. In other words, any change in the way the Regulations are **applied** must avoid conflicting with previous ECJ decisions; otherwise there is a significant likelihood that the UK Government will face challenges in the courts. The Government may well discover that its ability to change the way the Regulations are applied could be very limited.

Another element that was asserted by George Osborne was that the Habitat Regulations are gold-plated and place ridiculous costs on business.

The assertion that European Union (EU) Directives (the 'rules') are gold-plated in the UK is not new. Indeed, the last Chancellor of the Exchequer, Alistair Darling MP, requested a review in the 2005 pre-budget statement (the then equivalent of the Autumn Statement) to examine and report on the extent to which EU legislation placed unnecessary regulatory burdens on the UK. The results were published in November 2006; the resulting report is commonly referred to as the Davidson Review (Davidson 2006). The review defined gold-plating in four ways: extending the scope; abstaining from derogations; enhanced sanctions; or early implementation. In summary, the review identified that stakeholders' perceptions of gold-plating were often misplaced, for example:

- complaining about issues that were not related to over implementation (including the EU legislation *per se* (*i.e.* the fact that legislation existed) or confusing domestic laws with EU legislation);
- the UK over-implements compared with other EU countries. No evidence to support this allegation was identified; and
- contradictory evidence from the World Bank and Organisation for Economic Co-operation and Development (OECD), which described the UK as having one of the most favourable regulatory environments for doing business in the EU

In summary, the review concluded that whilst there were instances where gold-plating had been undertaken (*e.g.* consumer sales, financial services, transport and waste legislation), no reference was made to either the Habitats or Bird Directives. Thus the assertion made by Osborne is counter to a detailed review instigated by his immediate predecessor. Furthermore, a specific study on the question as to whether the Habitats or the Bird Directives are gold-plated has been reported by Morris (2011) in a peer-reviewed journal. In it, he concludes that where the UK has sought to minimise the impacts of the Directive, the Government has been required to review its decision(s) and enforce more rigorous and, therefore, more restrictive implementation. In other words, previous attempts to amend the Directive(s) implementation have fallen foul of the ECJ. And the UK is not alone in this. France, Spain, the Netherlands and Italy have all had to amend their domestic legislation to reflect the meaning of the Directives. Morris (2011) further concludes that the *"…Habitats Directive has established a common template for assessment of nature conservation impacts and has required competent authorities to justify particular judgements. This challenges people and organisations that have been used to much less rigorous or onerous processes and consequently there will be inevitable voices of dissent. This dissent has been highlighted by antipathy towards the Directive and allegations of 'gold plating'."*

So is there any scope for a review? I would argue, in certain situations, there is. Take the great crested newt as an example.

Great crested newt
Photo by Richard Wilson

If there is one EPS that attracts negative press attention, then this is it. And it is not a minor inconvenience.

Take this scenario: a housing developer wishes to build on a brownfield (or greenfield) site. Within the site there lies a single pond, unmanaged and unloved and unlikely to be there through natural processes in the near future. Accumulations of leaf litter and silt are slowly reducing the pond's ability to retain water during the spring and summer months. The presence of a small population (*i.e.* 10 or less) of great crested newts is recorded, along with other amphibian species through appropriate survey.

Under the current regime, the developer is faced with a comprehensive and potentially costly (in financial and temporal terms) exercise in obtaining an EPS licence from the statutory authority for consideration and approval. This can, and normally does, take up to 30 working days to obtain a decision but more information can be requested, which may inevitably further delay the issue of the licence. Once the licence is issued, the erection of temporary amphibian fencing (TAF), often extending for hundreds of metres and covering an area beyond where you might expect >80% of the population to reside (*e.g.* even in very sub-optimal terrestrial habitat) is imposed. A minimum of 30 and up to 60 (or even more) consecutive days are required to trap out the newts before the developer can get on to site; as set out in the *Great Crested Newt Mitigation Guidelines* (English Nature 2001). Development may be delayed by many months for what is arguably minimal additional benefit for the newts or biodiversity in general. And the relationship between the ecologists and the developer can quickly become strained with the inevitable reduction in good will. Occasionally, the press pick up on these issues and generate headlines that create a poor image for the ecology profession.

An alternative approach to the above scenario would be to take a more pragmatic view for appropriate sites with low, or the lower end of medium, great crested newt populations established through accurate and currently accepted survey methodologies. The work must still be documented so that the developer, local planning authority and the statutory nature conservation organisation are legally bound to ensure that what has been agreed to is undertaken. The receptor site, unlike the current regime that requires it to be in an area set aside within the development could, if this is not practical, or if a better solution is available, be located in an existing nature reserve as close as possible to the development site. If necessary, construction of pond(s) and suitable terrestrial habitat would still be completed before any translocation exercise.

However, the translocation exercise could be considerably briefer (*e.g.* 10-15 working days), maybe involving a period of trapping (*i.e.* TAF and bucket traps) and ending with a fingertip search of suitable habitat supervised by a licensed ecologist. This approach may not collect every single newt, but it will capture the greater percentage of the population, thus ensuring that the population survives beyond the construction phase of the development, maintains favourable conservation status and results in 'no net loss' of habitat, which is what the Habitat Directive aims to achieve.

However, this alternative approach may not be appropriate for every occasion, for example, on a site with a large population, in which case the regime currently in force should remain. Furthermore, this alternative approach should be better received by developers who may then be more willing to invest finance and time towards other ecological enhancements that would otherwise be ignored. This alternative approach has been suggested before (Watson 2008); thus, this is not promoting a new idea. It may be that with further refinement, it could contribute to the Government's Nature Improvement Areas promoted in the Natural Environment White Paper (HM Government 2011) by allocating funds, time and good will that would otherwise be lost in spending it on collecting every last newt pre-construction.

Possible Motivation?

There is, perhaps, a tantalising glimpse elsewhere in the Autumn Statement as to the motivation behind this review. In the Autumn Statement, George Osborne stated that the Government's plans to revisit airport capacity: "*...and we will explore all the options for maintaining the UK's aviation hub status, with the exception of a third runway at Heathrow*", which inevitably raised comparisons with the proposed Thames Estuary Airport (TEA). If this were the case, and the TEA proceeded to the planning submission stage, an Appropriate Assessment would be required as it would be within close proximity to, or in the Thames Estuary and Marshes SPA, Benfleet and Southend Marshes SPA, and Medway Estuary and Marshes SPA to name but three European Protected Sites. Whilst the Government could always revert to the 'imperative reasons of overriding public interest' (the IROPI test), if granted permission, this would require significant and expensive compensatory measures, especially as any Appropriate Assessment would potentially involve consideration of non-UK protected sites (*e.g.* Banc des Flandres Site d'Importance Communautaire, Nord-Pas de Calais, France). How compensation could be achieved, given that the intention of the Directives is to achieve no net loss, is beyond the scope of this article, other than to say that it would be extremely complex. One aspect that would need to be considered in practical terms would be whether compensation could be achieved in England alone. If not, would compensation measures across international boundaries be required? In other words, would land need to be identified in northern France, Belgium or the Netherlands; and if so, would this comply with the Directives, and if yes, would the French, Belgian and Dutch governments find this politically acceptable? I am not aware that this has been undertaken, nor tested in the ECJ. Finally, any decision would be required to comply with the Waddenzee Case[7], whereby the competent authority must be certain, beyond all reasonable scientific doubt, that the proposed project (in this example the TEA) would have no significant effect on any European site's integrity. Could 'certainty' in all likelihood actually be achieved, given the complexities?

Conclusions

The outcome of the review is scheduled to be published in March 2012 in time for the Budget. The review will address examples presented in this article and it is not possible to predict the outcome at the time of writing (early January 2012). However, Morris (2012) in this issue of *In Practice* presents a dozen key principles that decision-makers are currently required to consider. It will be interesting to compare the outcome of Defra's review with the principles presented in Roger Morris' article, in addition to domestic and ECJ case-law. All those who engage in the planning system, be they developers, planners, ecologists, lawyers or conservation practitioners, should be awaiting its publication with keen interest. In this Olympic year, will our highly protected sites retain their gold status?

Notes

1. The review, according to Defra's website (*http://www.defra.gov.uk/news/2011/11/29/habitats-and-birds-directives/*; last accessed 15th December 2011), will be applied to England only.
2. Council Directive of 2 April 1979 on the conservation of wild birds (79/409/EEC); available online at *http://eur-lex.europa.eu/LexUriServ/site/en/consleg/1979/LI/01979L0409-20070101-en.pdf*; last accessed 15th December 2011.
3. Strictly speaking, the entire 2010 Regulations apply to England and Wales only. Those parts of the 2010 Regulations which deal with reserved matters apply to Scotland, otherwise the Conservation (Natural Habitat, &c.) Regulations 1994 (as amended) continue to apply in Scotland. However, the 1994 Regulations and subsequent amendments have been repealed in England and Wales. The Conservation (Natural Habitats, &c.) Regulations (Northern Ireland) Order 1995 continues to apply in Northern Ireland.
4. The text is available online here: *http://www.hm-treasury.gov.uk/press_136_11.htm*; last accessed 15th December 2011.
5. The terms of the Defra review are available here: *http://www.defra.gov.uk/news/2011/11/29/habitats-and-birds-directives/ and here: http://www.defra.gov.uk/rural/protected/habitats-wildbirds-review/*.
6. Commission v United Kingdom, 20th October 2005. The text of the judgement is available here (*http://curia.europa.eu/juris/document/document.jsf?text=&docid=60655&pageIndex=0&doclang=EN&mode=doc&dir=&occ=first&part=1&cid=1211672*); last accessed 21st December 2011.
7. C-127/02 – Landelijke Vereniging to Behoud van de Waddenzee and Nederlandse Verneging to Bescherming van Vogels v Staatssecretaris van Landbouw). The text of the judgement is available here: (*http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002CJ0127:EN:HTML*); last accessed 21st December 2011.

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