

Status:  Positive or Neutral Judicial Treatment

***515 R. (on the application of Buglife—the Invertebrate Conservation Trust) v Medway Council**

Queen's Bench Division (Administrative Court)

30 March 2011

[2011] EWHC 746 (Admin)

[2011] Env. L.R. 27

H.H. Judge Thornton QC

March 30, 2011

Conservation; Environmental impact assessments; EU law; Insects; Judicial review; Limitation periods; Planning permission; Time limits

H1 EU law—Environmental Impact Assessment—outline planning approval—whether EIA undertaken adequate—whether use of planning conditions to secure further information and approval permissible—whether EIA process “single” or “multi stage”—whether proceedings filed “promptly” under CPR 54.5—whether principle of legal certainty requiring unqualified period of three months to bring proceedings—application of “Uniplex” decision to EIA Directive

H2 The claimant (“B”) sought permission for judicial review of the grant of outline planning permission by the defendant (“M”) for the development of a very large scale Business Park. The basis for the challenge was alleged breaches of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999. B submitted that the developer’s Environmental Statement (“ES”) had not contained sufficient details and data relating to the invertebrate population and habitat of the site to enable M to consider the adverse effects that the proposed development would have on the site’s invertebrate population and its supporting habitat, as adequate surveys of the site had not been completed before the ES was finalised. In consequence, M was argued to have granted outline permission for a development which failed to provide sufficient compensatory and ameliorative measures to counteract the impact that it would have on the site’s invertebrate population. The site and proposed development had unusual and complex features, including heavy contamination of the site, which had made it very difficult to prepare a full ES, with the result that it had only been possible to provide an interim Environmental Impact Assessment during the application process. The speed of that process had also been influenced by the deadlines for securing certain government infrastructure funding.

H3 M granted outline permission subject to a number of negative conditions, in relation to the invertebrate and habitat features of the site, which prohibited the start of each phase of the development until specified steps associated with the development, survey work and the revision of the master-plan, had been undertaken and approved. It argued that EIA obligations had been completed with the EIA undertaken prior to the grant of outline permission and that the ES prepared had ***516** been sufficient for the purposes of a “single-stage” EIA process. M might require a further EIA, but only if a detailed application was made for a development which amounted to a change in the scheme of development that had been granted outline permission. Subject to that qualification, M argued that the necessary further surveys, mitigation details and siting and design work were all appropriately and lawfully subject to control through the conditions imposed, without the requirement for additional EIAs. B argued that it should be permitted to seek to review the grant of outline planning permission on four separate grounds: (1) that the ES was inadequate; (2) that the planning permission wrongly allowed for deferral of essential environmental information until a later stage of the development; (3) that M had failed to provide it with the required Environmental Information in conformity with the mandatory rules as to publicity; and (4) that the conditions were unlawful in that they removed from the EIA process the assessment of the mitigation measures required in the light of the substantial effects that the development would have on the environment, and that there was a failure to consider alternative sites.

H4 Outline permission had been granted on March 31, 2010 and the claim form was filed on

June 29, 2010. M argued that permission should be refused because B had failed to comply with CPR r.54.5 in that, although the claim was filed two days within the three-month time limit running from the date of the grant of outline permission, the proceedings had not been filed “promptly”. No specific instance of prejudice resulting was provided. B contended that it had an unqualified entitlement to a period of up to three months before it had to file its claim, relying on the decision of the ECJ in [Uniplex \(UK\) Ltd v NHS Business Services Authority \(C-406/08\) \[2010\] P.T.S.R. 1377; \[2010\] 2 C.M.L.R. 47](#) ; a decision relating to the Procurement Directive 89/665. M submitted that the [Uniplex](#) decision was confined to the relevant time limits imposed for proceedings associated with the Procurement Directive. Moreover, the provision that was challenged in that case was one contained in the Regulations promulgated to give effect to the Procurement Directive in domestic law, whereas in the present case, the challenge was to a particular application of a general provision relating to all judicial review proceedings.

H5 Held:

H6 (1) The [Uniplex](#) decision applied general and core principles of Community Law which were applicable to all directives. The requirement of certainty and the application of that requirement to limitation periods imposed on those seeking to enforce their rights arising under the directive in a national court had general application to such enforcement proceedings arising out of any directive. In those circumstances, it was clear that there was a failure of the legislature to transpose the Directive 85/337 into domestic law in a way which avoided uncertain time limits arising from the requirement of “promptness”. That requirement was not now enforceable in English courts following the [Uniplex](#) decision.

H7 (2) In any event, on the facts of the present, unusual, case B had filed the claim “promptly”. Taking account of B’s reliance on the applicability of the [Uniplex](#) decision, the accelerated ES process, the assistance provided by B to the developer, the limited prejudice shown and the public importance of the application, discretion would be exercised, if it were necessary, to conclude that proceedings had been started promptly even though that start was two days short of the permitted three-month period. *517

H8 (3) The position regarding the single stage EIA and use of conditions was untenable. The Environmental Information, let alone the ES, had not provided sufficient details of the development, the species or habitats, provided only outline details of the proposed mitigation, provided no ecology masterplan and left the preparation of those details to be the subject of conditions even though they were all details which B had been entitled to be consulted about through the EIA process. Overall, the approach had failed to take account of the way that the development had proceeded from its inception. The planning and preparations that had been undertaken had all inexorably been directed to a “multi-stage” EIA process. The development application for, and the grant of, outline planning permission provided for the continuation of that process and, given the change in the Regulations which took effect in 2008, the law now permitted development substantially affecting the environment to proceed on that basis.

H9 (4) The four grounds of challenge were all premised on the assumption that there were to be no more EIAs and that M would not be able to refuse permission for any detailed application even if appropriate mitigation was not possible. Those grounds would all be tenable and arguable if those two premises were correct. Permission would, however, be refused as the grounds did not arise in the light of the conclusion that the wording of the outline planning permission required the development to be subject to a “multi-stage” EIA process. That process would incorporate at each detailed planning application stage a requirement for the submission of an ES containing the details which had not been provided. M would need to take all those matters and the ES in which they were set out into consideration when approving both the matters required to be approved by the conditions in the outline permission and the detailed application itself. However permission would be refused on the express basis that each stage of the reserved matters approval process would be preceded by a fresh ES and that M could not approve any of the matters reserved for approval by the outline permission conditions, nor the detailed application, unless it had first taken all the Environmental Information arising from that application into consideration.

H10 UK cases referred to:

[R. \(on the application of Barker\) v Bromley LBC \[2006\] UKHL 52; \[2007\] Env. L.R. 20](#)

[R. v Rochdale MBC Ex p. Milne \(No.1\) \[2000\] Env. L.R. 1 QBD](#)

H11 EU cases referred to:

[Commission of the European Communities v United Kingdom \(C-508/03\) \[2006\] E.C.R. I-3969; \[2006\] Q.B. 764; \[2007\] Env. L.R. 1](#)

[R. \(on the application of Wells\) v Secretary of State for Transport, Local Government and the Regions \(C-201/02\) \[2004\] E.C.R. I-723; \[2004\] Env. L.R. 27](#)

[Uniplex \(UK\) Ltd v NHS Business Services Authority \(C-406/08\) \[2010\] P.T.S.R. 1377; \[2010\] 2 C.M.L.R. 47](#)

H12 Legislation referred to:

[Senior Courts Act 1981 s.31](#)

[Directive 85/337 \(EIA\)](#)

[Directive 89/665 \(Procurement\)](#)

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UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 (Aarhus Convention)

[Town and Country Planning \(Environmental Impact Assessment\) \(England and Wales\) Regulations 1999 \(SI 1999/293\) reg.3, Schs 1, 2, 4](#)

[Public Contracts Regulations 2006 \(SI 2006/5\)](#)

[Town and Country Planning \(Environmental Impact Assessment \(Amendment\) \(England\) Regulations 2008 \(SI 2008/2093\)](#)

H13 Representation

R. McCracken QC and R. Clutton, instructed by Richard Buxton, appeared on behalf of the claimants.

N. Cameron, instructed by Medway Council, appeared on behalf of the defendant.

R. Warren, instructed by DLA Piper LLP, appeared on behalf of the First Interested Party.

The Second Interested Party was not represented at the hearing.

Judgment

I certify that this judgment both purports to establish a new principle (concerning time limits for starting judicial review proceedings and the effect of the ECJ's decision in [Uniplex](#)) and to extend the present law (concerning multi-stage EIAs provided for by the [Town and Country Planning \(Environmental Impact Assessment \(Amendment\) \(England\) Regulations 2008](#)). This statement is made pursuant to paras 6.1 and 6.2 of the [Practice Direction \(Citation of Authorities\) \[2001\] 1 W.L.R. 1001](#) CA.

H.H. Judge Anthony Thornton QC:

A. Introduction

1 This is a renewed application for permission to apply for judicial review. The subject-matter of the application is the grant of outline planning permission by the defendant ("Medway") to the first interested party ("NGPH") dated March 31, 2010 to develop the Grain Business Park with up to 464,685sq m of built employment floorspace on a site owned by NGPH. The judicial review is sought by Buglife—The Invertebrate Conservation Trust ("Buglife"). The claimant is a charity whose principal object is the protection and preservation of natural invertebrate fauna and their conservation in the wild.

2 Buglife seeks an order quashing the grant of outline planning permission. It contends that there is an unacceptable risk that the permitted development will cause significant adverse impact on the important invertebrate interest on the site and on the habitat that sustains it. Buglife contends that this permission decision was flawed. NGPH was required by law to undertake an Environmental Impact Statement ("EIA") and to provide Medway with an Environmental Statement ("ES") that contained sufficient details and data relating to the invertebrate population and habitat of the site to enable Medway to consider the adverse effects that the proposed development would have on the site's invertebrate population and its supporting habitat. However, adequate surveys of the site were not completed before the ES was finalised. In consequence, the details and data of the invertebrate population and the site's habitat that the EIA contained were wholly inadequate. ***519** This has led to Medway granting outline permission for a development which fails to provide sufficient compensatory and ameliorative measures to counteract the impact that it will have on the site's invertebrate population.

3 Buglife's application also raises as a discrete issue the question of what test or approach the court should adopt when considering whether or not the EIA submitted by NGPH contained sufficient details and data. It also raises two further discrete procedural issues. These are firstly whether permission should be refused as having been applied for too late and secondly whether, if permission is granted, Buglife is entitled to the benefit of a Protective Costs Order ("PCO") and, if so, on what terms.

4 I will deal with this permission application in the following sections:

B. Background facts.

C. Discussion of background facts.

D. Joinder of Natural England as second interested party.

E. Alleged delay in issuing judicial review proceedings.

F. Relevant law.

G. Summary of Medway and NGPH's EIA obligations.

H. Approach of the Court when an EIA is challenged in judicial review proceedings.

I. Buglife's grounds.

J. NGPH and IP's defence grounds.

K. Conclusion.

B. Background facts

(1) Introduction

5 The application site ("AS") is situated on the eastern end of the Isle of Grain close to the Medway Estuary and it has been unused for several years. It currently represents one of the largest undeveloped brownfield sites in the South of England. It had been identified some time ago by the claimant ("Buglife") as having great importance as a site for the encouragement of rare and endangered invertebrates and as an Open Mosaic Habitat on Previously Developed Land ("OMHPDL") with importance to the development and sustainment of both reptiles and invertebrates.

6 The AS comprises approximately 164 hectares of predominantly vacant, previously developed brownfield land within an overall Grain site of 520 hectares. The Grain site is one of the largest brownfield sites in the south-east of England and it originally formed part of the Kent Oil Refinery that was established by BP in 1953. By 2009, the AS had been vacant for 25 years and had been able to develop a mosaic of habitats in that time. The overall site was sold by BP to British Gas in 1986 and it subsequently passed to the NGPH. The AS is of considerable ecological interest not only for its invertebrate population but also for its diverse populations of birds, water voles, otter, reptiles, badgers, bats and protected plant species.

7 All parties now recognise that, in general terms, the invertebrate fauna of the site are of national importance and that parts of the site qualify as an OMHPDL. In consequence, the AS supports a diverse and high-quality invertebrate assemblage that includes the Brown-banded Carder Bee, a UK BAP Priority Species and many *520 other invertebrates, some of which are very rare. ¹ This judicial review application is concerned with whether Medway complied sufficiently with the [EIA Regulations](#) ² and the underlying EIA Directive governing this outline planning application. These provisions required Medway to have received sufficient information and data about all relevant environmental factors relating to the site prior to taking the requisite planning decision. This information is to be received and considered by Medway as the appropriate Planning Authority in the form of an ES and any accompanying Environmental Information which must be obtained and presented in the manner prescribed by the legislation. Medway have a statutory obligation to ensure that a relevant planning decision is not taken until the prescribed statutory procedures relating to the obtaining of the ES have been followed. It must then take the environmental information submitted to it into account when making that decision.

8 The intention of these requirements is to ensure that Medway took a decision that, so far as possible, protected and enhanced the natural environment including, in this case, invertebrates and their habitat, having evaluated and taken into consideration both the adverse effects of the proposed development on those features and the adequacy of the proposed amelioration and compensation measures to counter those adverse effects. It is also a specific and significant intention of the legislation that planning decisions are ones that should involve the public and the wider community who should be provided with an adequate opportunity to make an informed input into planning decisions affecting the natural environment before they are taken.

(2) Brief relevant history of the planning application

9 Pre-ES surveys and consultations. National Grid had, since 1991, commissioned a suite of ecological surveys of the entire Grain Site, one of which, a general invertebrate survey carried out by Kent Wildlife Trust in 1997, identified the application site ("site") as being one that contained exceptional invertebrate fauna. It also identified 51 nationally rare or notable status specimens which included true flies, bush crickets, butterflies, bees, moths, bugs and 38 beetles. These surveys also included general invertebrate surveys which were carried out by the Institute of Terrestrial Ecology which did not give any detailed information about the invertebrate assembly on the AS.

10 In 2006, Buglife produced a report "All of a buzz in the Thames Gateway" which identified the Isle of Grain site as having "high potential" for invertebrates. Such sites are recommended by PPS9 ³ as being ones for which any development proposals affecting them should be accompanied by appropriate invertebrate surveys which should concentrate on the key invertebrate groups and UKBAP priority species. ***521**

11 NGPH decided to develop a business park on the site in about April 2005. This decision was taken to further its strategic objective of maximising the value of its property holding by either operational activities or by the sale or letting of development land with the benefit of planning permission. Planning Perspectives were appointed as planning consultants and RPS as ecology consultants and DTZ as development and marketing consultants. In January 2010, Dr Kirby was appointed to provide specialist entomological advice.

12 RPS had been undertaking intermittent survey work on the Grain land holding since 2002. From about 2006, they chaired regular liaison meetings comprising the group of ecologists working on Grain Peninsular projects for NGPH and other neighbouring site owners. These meetings shared ecological information which RPS collated and stored on a GIS database for the Isle of Grain. RPS also met with representatives of Natural England, the Environment Agency and Kent Wildlife Trust, but not with Buglife, to discuss all aspects of the ecological impact of the proposed development. These further meetings were held as part of, or as an adjunct to, the liaison meetings with the wider community of ecologists working on the Isle of Grain.

13 In relation to invertebrates, the planning team lacked detailed data about the invertebrate population on the site and its supporting fauna and habitat. This was, at least in part, because the site was a very difficult one from which to obtain survey data. It is heavily contaminated with dumped asbestos, oil that has been poured onto it and a variety of other contaminants. Any invertebrate survey would have involved the use of the extensive protective measures and chaperoning as required by the asbestos regulations. These measures were particularly required as the necessary survey work would involve dragging nets and other traps through the extensive undergrowth so that the surveyors would come into direct contact with contaminants at or close to ground level. Moreover, the site is a very large one and its habitat and invertebrate population is subject to continuous and rapid change over time. Finally, a full invertebrate and habitat survey of this site would involve at least five surveys between May and September but preferably seven surveys between April and October. All of these surveys would have needed to be carried out in the same year. The optimal survey period is in May and June. A final constraint was that this survey work would be needed for a proposed development which it was always envisaged would be implemented over a minimum 10-year period in at least four successive phases with a gap of between two and three years between each phase.

14 RPS developed a survey strategy for undertaking the necessary series of surveys and other technical work that would be needed so as to identify the site's habitats and invertebrate presence, the effects of the proposed development and the remediation and amelioration measures that would be needed. The strategy that was evolved in liaison meetings held between 2006 and 2009 is described in a memorandum prepared by RPS and submitted by NGPH to Medway in January 2010. This agreed strategy was dictated by the very large area of the site, the considerable significance of its mosaic habitat and invertebrate population, the absence of recent detailed survey data, the asbestos and other contaminants located on the site and the phased and extended development process that was to be undertaken.

15 The survey strategy that was evolved was as follows: ***522**

(1) Introductory phase: A scoping survey would first be carried out.

(2) Phase 1: Using the scoping survey as a guide, all necessary surveys would be undertaken to determine the overall nature and value of the invertebrate fauna and of the on site invertebrate species. This would be used to prepare an ecology masterplan. This would provide for the preservation of invertebrates and habitats on and off site that would be adversely affected by the development and for the compensatory measures to be taken to compensate for the loss of invertebrates and habitats as a result of the development.

(3) Phase 2: Further detailed surveys would be carried out at appropriate times to enable a structured and comprehensive plan to be prepared for each of the proposed four phases of the development. Surveys would be undertaken prior to undertaking the particular development resulting from that individual phase.

16 The intention to carry out the ecological planning in two discrete phases, being Phases 1 and 2, was reported on by both RPS and Planning Perspective in a number of documents as can be seen from these quotations:

(1) From RPS's document "Response to Kent Wildlife Trust Objection" dated November 3, 2009:

"As with previously approved developments in the vicinity of the Application Site, detailed invertebrate surveys will be carried out where and when specific proposals are brought forward."⁴

(2) From RPS's undated December 2009 memorandum:

"Initially surveys should be undertaken to determine the overall nature and value of the invertebrate fauna. There would then be a need to condition detailed surveys in good time to enable a structured and comprehensive plan to be prepared prior to specific developments being undertaken."

(3) From Planning Perspective's letter to Medway dated December 21, 2009:

"... at the detailed reserved matters stage ... we will know exactly what the built form of the area will be and the detailed ecological survey work for each phase will have been carried out in advance of any development commencing on site."

(4) From the Officers' Report and Recommendation to Medway:

"During the assessment of the planning application, those consultees with expertise in ecology have identified areas of concern in relation to the information submitted. In response to the concerns, the applicants have worked closely with Natural England to address and overcome the issues raised. During this process, it has been acknowledged by all *523 parties that the best practice would ensure that any additional survey work would be undertaken prior to the granting of any planning permission."⁵

17 Mitigation measures were discussed in general terms. It was agreed that, as a minimum, 25 per cent of the available area would be needed to be assigned to the ecological strategy that would be devised. This strategy would have to be fed by the survey data to be obtained from the two-phase survey strategy that had been agreed upon.

18 Ecology masterplan. An integral part of the mitigation strategy to be incorporated into the development involved the preparation of an ecology masterplan. This would be based on the invertebrate, flora and fauna surveys that it was agreed would be undertaken. The aim of the masterplan was to ensure that there was no or only minimal net loss of species as a result of the implementation of each phase of development, that opportunities would be created to achieve an overall enhancement of invertebrate life. The plan would be based on a five-part strategy:

- (1) Avoidance, involving the identification of ways of avoiding the loss of high quality habitat, particularly OMHPDL, using altered building layouts and additional drainage.
- (2) Mitigation, involving the relocation of medium to low habitat loss on the site by such measures as rabbit maintenance and the reconfiguration of parts of the proposed development. A detailed mitigation plan would be agreed and included as part of the ecology masterplan.
- (3) Compensation, involving the provision of compensation land outside the site AS but within NGPH land.
- (4) Enhancement of habitat on the site. This would enable medium to low quality habitat areas to be transformed into very high quality habitat in an appropriate habitat mosaic. This would be achieved by good husbandry to be achieved by devising and implementing high quality good husbandry methods, by altering the balance between scrub, herbaceous-grassed areas and bare ground and by creating habitat by appropriate alteration of existing topography, and post-construction surveillance including on-going survey work.
- (5) Consultation with appropriate bodies and experts and liaison with the Isle of Grain Ecologists Liaison meetings and post-construction on-going regular surveys and surveillance work.

These ecology masterplans would be built up into a Grain Business Park Ecology Management Plan to carry forward a programme of sustaining the existing invertebrate population and habitat mosaic.

19 Scoping survey. The scoping phase of this strategy was achieved when RPS appointed an expert entomologist, Dr Kirby, to undertake the necessary scoping survey work. He undertook an invertebrate potential habitat walk-over survey of the southern section of the overall NGPH Grain site, which included the application site, in a one-day site visit in late August 2008. He divided the area he was scoping ⁵²⁴ into parcels and during his walk-over he sought to assess the site's potential habitat. Based on his professional opinion, Dr Kirby assessed interest levels of each parcel, features of note, multiple habitats and features of high potential.

20 CIF funding. There was no immediate need to embark on Phase 1 since, until July 2009, both NGPH and Medway's position was that there were "no plans for any immediate planning application".⁶ However, in that month, an opportunity was identified for Medway to obtain a grant from the Government, payable out of the Communities Infrastructure Fund ("CIF"). The CIF provides funding to assist in appropriate development projects by improving the transport infrastructure linking the project to the wider community. This particular grant would improve and expand the adjoining Grain Road so as to improve access to the proposed Grain Business Park. However, the funding would only be available to benefit current development and it would have to be taken up in the current financial year ending in April 2010. The funding would therefore be dependent on the grant of outline planning permission for the Grain Business Park development before April 2010. Medway regarded this funding as providing a "once-in-a-lifetime" opportunity to develop the site.⁷ The officers' report makes it clear that Medway was determined to obtain this funding and was not prepared to allow the completion of outstanding necessary invertebrate survey work to stand in the way of getting it.

21 This last-minute notification of the possibility of CIF funding and Medway's decision to seek to

obtain it left NGPH with only about two months to prepare the necessary EIA to accompany the outline planning application for the Grain Business Park. This application had to be lodged with Medway in early September 2009 so as to leave time for the necessary three-month consultation period and for any revisions or amendments to be worked on before the application went to Medway for a decision by the end of March 2010. The planned Phase 2 survey work was needed since the results of this work would form an integral part of the necessary EIA that would have to be submitted with the planning application.

22 2009 survey. Given the time constraints, the Phase 2 survey work had, therefore, to be confined to a one-day survey that was carried out in late August by Dr Kirby. The survey was, in consequence, wholly inadequate and fell far short of the intended Phase 2 survey. Dr Kirby chose 11 parcels from the 2008 scoping survey, covering a broad habitat range and a wide geographical spread. Only parcels identified as being of grades 1–3 interest by Dr Kirby's scoping survey were chosen, those of grades 4 and 5 were excluded. Sweep-netting, vegetation beating, suction sampling, direct observation and active search survey methods were used and representative samples of most recorded species were removed for analysis. The survey concentrated on those groups likely to be most informative as to conservation interest.

23 This survey was described by NE in its initial objection to NGPH's planning application as being based on a data-impoverished sub-selection of areas. Moreover, it was undertaken in late August. This was much later in the year than May and June when such surveys should be undertaken in conformity with good practice.⁸ The objection identified the need for sufficiently comprehensive invertebrate survey work to inform the data contained in the ES. The survey work failed to achieve these requirements. ***525**

24 ES. The ES is a detailed and impressive document. It covers the many different ecological aspects of the site. This judicial review application is only concerned with the parts of the EIA that address invertebrates albeit that that is one of the principal topics that it covers. The EIA is required to cover and address a number of matters of which four are relevant to Buglife's challenge. These four matters, and a brief summary of the EIA's coverage of them, are as follows:

(1) The data required to identify and assess the main effects which the project is likely to have on the environment.⁹

(a) **Invertebrates.** The data that was provided was inevitably limited given the brief and impressionistic survey work that had previously been undertaken. A plan "Invertebrates" highlighted in coloured areas the existence and approximate location of the scoping grades of interest of invertebrates taken from the 2008 scoping survey.¹⁰ This survey work was summarised. The EIA recorded that:

"On the basis of geographical location and the quality and extent of habitats on the wider Grain site, it was considered likely, after survey of invertebrate potential and examination of past records in 2008, that the wider Grain site would prove of national importance for its invertebrates. The 2009 survey results support this preliminary assessment. The 2009 records alone arguably fall short of providing definitive proof of this status, but even a conservative extrapolation to what remains unrecorded puts the evaluation beyond reasonable doubt. The invertebrate assemblage is considered to be of National Importance."¹¹

The EIA recorded that the 2009 survey was able to identify 258 of the invertebrate species that were then on site. These included 13 Red Data Book, 23 Nationally Scarce and four BAP species. The other species of conservation concern were of particular note, particularly the Brown-banded Carder Bee, *Bombus Humilis*. The other BAP species were a small black hoverfly, *Paragus Albifrons*, a lesser crane-fly, *Dicranomyia Dancia* and the Star-wort, *Cucullia Asteris*.

(b) **Habitat.** A coloured-in plan showed the approximate location of different habitat-types that were stated to have been taken from a unidentified survey undertaken in 2006.¹² There was no other significant data provided that described the habitat of the site.

(2) A description of the aspects of the environment likely to be significantly affected by the development, including, in particular, ... population, fauna, ... material assets ... and the inter-relationship between the above factors. ¹³ No further description was given than the description of the data summarised in para.24(1) above. The entire assemblage and the entire area of the habitat, *526 save the random and evidently small areas of low interest were likely to be significantly affected as was the potentially symbiotic inter-relationship of these two.

(3) A description of the likely effects of the development on the environment ... and the description by the applicant of the forecasting methods used to assess the effects on the environment. ¹⁴ The only effects that were addressed related to the *Bombus Humilis*, where the effect was likely to be of major negative significance, *Paragus Albifrons*, of minor negative significance, *Dicranovia Danica*, not significant and *Cucullia Asteris*, minor negative significance.

(4) A description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment. ¹⁵ The only mitigation measures identified were for *Bombus Humilis*. The proposed measures were to sow areas of suitable grassland and the management of linking corridors of low open-structured vegetation.

25 The ES made no reference to the survey, ecology and mitigation strategies discussed over a period of years by the pre-application liaison meetings. There was no reference to any provision of off-site mitigation areas to compensate for any deleterious effects on the site's fauna of the development or to any further surveys that would be carried out before individual development phases were undertaken before any application for detailed reserved matters approval was submitted to Medway. Instead, the relevant masterplans submitted with the EIA showed limited mitigation areas, the two most relevant to invertebrates being those designated "species rich grassland" and "scrub/grass mosaic". The masterplans also showed the development as being carried out in four separate development zones but there was no statement that further surveys would be undertaken before each of these zones was developed ¹⁶ or that the masterplan could be subject to variation by altering the layout, size or number of development zones if such was needed to enable an appropriate ecological masterplan to be achieved. Indeed, no ecology masterplan was prepared or incorporated into the EIA.

26 These omissions were in stark contract to the proposed method of implementing the development with the use of a two-phase survey methodology, the development of an ecological masterplan and detailed on and off-site mitigation measures that had been recommended by the liaison group prior to the preparation of the EIA. Indeed, the EIA when first submitted was clearly devised in the light of the perceived need to accelerate the timescale within which it would be prepared which did not allow for phase 1 of the survey strategy to be undertaken.

27 The EIA was submitted with NGPH's planning application on September 30, 2009. This was subject to an eight-week statutory consultation period. The second interested party, ("NE"), a statutory consultee who had also been involved in pre-application discussions for a lengthy period, was sent a copy of the application and the EIA. Buglife is a national charity based in Peterborough. It has had a known interest in the site for some time and had jointly published with NE the 2006 report "All of a buzz in the Thames Gateway" that had made express reference to the Isle of Grain site. Buglife was not sent a copy of the application or the EIA and was *527 not aware of the application until November 23, 2009, three days before the public consultation period ended. Kent Wildlife Trust, part of the National Wildlife Trusts with a local environmental group with a particular interest in birdlife, reptiles and invertebrates on the Grain Peninsula, became aware from an early stage in the consultation process of the application.

28 **Objections to ES.** All three bodies submitted detailed and forceful objections to the application and all were highly critical of the perceived shortcomings of the contents of the invertebrate sections of the EIA. There objections may be summarised in this way:

(1) The EIA contained wholly inadequate survey information which, given the nationally important habitat and invertebrate assemblage, placed the on-site biodiversity features of

the site at risk.

(2) There was no time to undertake appropriate survey work since the Planning Committee was due to meet shortly and such work needed to be carried out during the optimum time in the late spring and early summer months.

(3) The EIA contained a notable omission in not identifying the OMHPDL features of the site, in not referring to or identifying the mosaic and extensive nature of high-quality habitat on the site.

(4) There was no proper analysis of the potentially deleterious consequences of the development on the site's ecology.

(5) No compensation measures were identified and no mitigation was provided for. Detailed on-site long-term enhancement programme coupled with extensive off-site additional provision of land that would support habitat growth were required.

(6) Particular attention was required to identify the extent to which the Brown-banded carder bee was found on site and was supported by the current habitat. This species required extensive conjoined areas of appropriate habitat to survive and thrive and there did not appear to be any realistic prospect of such compensation being provided. A rare and declining species was, therefore, in danger of disappearing from the site unless particular and extensive compensatory measures were taken.

29 These objections were notified to Medway as follows: on October 20, 2009, by Kent Wildlife Trust; on December 11, 2009 and February 15, 2010 by Buglife and in a series of exchanges that culminated in a detailed and trenchant letter and accompanying annex on February 3, 2010 by NE. ¹⁷

30 **NGPH's response.** NGPH reacted with great speed. In early November 2009, Planning Perspectives and RPS were instructed to address these concerns as a matter of urgency. In early January, Dr Kirby was also instructed to provide an expert entomological input. These consultants responded in the following documents which were sent to Medway. The evidence does not show when these documents were first seen by each of the three consultees nor how and when they were brought to their attention. The documents were:

(1) November 3, 2009. The three RPS ecologists who had been directly involved with the site prepared a seven-page memorandum entitled "Response to Kent Wildlife Trust Objection". *528

(2) December 17, 2009. RPS produced a masterplan. This was the first to be produced that located a potential mitigation area off-site. It was 10.9 ha in size and was located immediately adjacent to one corner of the site. The data source for this area was stated to be "RPS 2008".

(3) December 21, 2009. Planning Perspectives sent a three-page letter to Medway enclosing a five-page memorandum from RPS. The letter referred to the off-site mitigation area shown on RPS's recent masterplan as intending "to demonstrate potential available off-site mitigation land".

(4) January 26, 2010. Dr Kirby prepared a two-page summary document entitled "Mitigation, compensation and enhancement proposals for invertebrates" which endorsed RPS's memorandum, describing it as a route to the long-term maintenance of a diverse and high-quality invertebrate assemblage on the site.

31 These documents, taken together, outlined a response to the concerns of the consultees which can be summarised as follows:

- (1) The application site was of national importance both in terms of its invertebrate assemblage and its mosaic habitat.
- (2) There was a lack of survey data for invertebrate populations that should have been collected and assessed within the ES.
- (3) The extent and true significance of the interest could not be determined and assessed without further survey work.
- (4) The strategy for the preparation of an ecology masterplan had been agreed with NE and the Environment Agency prior to the submission of the ES as a two-phase process in which initial surveys would be undertaken to determine the overall nature and value of the invertebrate fauna (phase 1) followed by detailed surveys of the fauna and invertebrate assemblage and a structured and comprehensive ecology plan for each zone when each specific development was being undertaken (phase 2).
- (5) This two-phase strategy was essential because the site was subject to rapid changes from natural causes and estate management decisions. Moreover, the high asbestos contamination precluded detailed survey work in advance of the development of any particular zone.
- (6) Modifications will be made to the long term strategy for invertebrates if required through appropriate mitigation plans when detailed planning permission is sought for each stage.
- (7) 64.7ha of on-plot habitat and 10.9ha of off-plot land would be provided as mitigation land. The actual level of off-site mitigation that would be necessary would be determined at the various detailed reserved matters stage. There is a substantial area of land in NGPH's ownership pledged for compensation purposes if it is needed.
- (8) Some changes in the fauna must be expected and there is an element of inevitable uncertainty as to the final outcome both in terms of possible loss of uncommon species and a reduction in the total area and a fragmentation of brownfield habitats. This is inevitable, particularly given the great size of this site and the lengthy timescale of its overall development.
- (9) Overall, sufficient is known of the site to enable an assessment to be made that it will be possible to achieve the long-term maintenance of a diverse *529 and high-quality invertebrate assemblage and the enhancement most wildlife features.

32 These proposals presented a very different statement in relation to invertebrates and the site habitat to that set out in the EIS. They were discussed in detail in meetings that were held with NE and a separate meeting was held between Buglife and NGPH and RPS (NGPH's ecological consultant). Furthermore, a significant number of documents were produced, most being amendments to documents produced a few days earlier. The purpose of these documents was to expand the proposals for mitigation both on and off-site and to provide additional, albeit limited, data as to the location, size and composition of the existing habitat with the use of aerial photography. Since this work was being undertaken in February, the extent of this habitat data enhancement was limited.

33 The result of this activity was the submission of further Environmental Information to Medway

which included the following:

(1) A report entitled “An assessment of the impact of the proposed Grain Business Park on the invertebrate fauna of the Application Site and proposed mitigation, compensation and enhancement” prepared by RPS. The report went through three editions, the final edition being dated February 17, 2010.

(2) A report entitled “Mitigation, compensation and enhancement proposals for invertebrates Further considerations” prepared by Dr Kirby and dated February 17, 2010.

(3) Five plans being a Masterplan showing phases of development and plans showing the distribution and extent of invertebrate habitat, off-plot and on-plot habitat and areas adjacent to the site available for compensation of invertebrate habitat, additional ecological offsetting land with invertebrate habitat gradings and high quality invertebrate habitat to be retained within the application site.

34 NE’s withdrawal of its objection. In the light of the very different development strategy presented by these proposals, NE was able to abandon its objection to NGPH’s application. In the discussions leading to that withdrawal, NE was insistent that appropriate safeguards would exist to ensure that the development finally permitted would be tailored as necessary to produce the favourable outcome predicted by NGPH’s experts and that that process would be achieved by all necessary surveys and the production of revised masterplans and ecology statements at each future development stage.

35 NE’s position was summarised in this letter that it sent to Medway dated February 22, 2010:

“We have been in discussion with the applicants who have provided additional areas of mitigation land outside the application site with an assessment of its’ current potential as invertebrate habitat. This provides for up to approximately 65 ha of habitat outside the application site together with the existing proposals for 69 ha of habitat within the application site (excluding brown roofs).”

It is our opinion that this increased mitigation package should be sufficient to preserve the biodiversity interest of the site and therefore we are minded to withdraw our objection, in principle, if the following are secured by suitably worded conditions and/or S106 agreement:

***530**

- No development work to take place on site until a full invertebrate survey of the application site and all off-site habitat parcels is completed. Survey methodology to be agreed in writing with Medway Council under advice from Natural England;
- No development work to take place until the site Masterplan has been reviewed in the light of the survey results and to include identification of habitats of high invertebrate quality to be maintained on site (minimum 20 ha) and connected to a broader network of habitat in order that their functionality can be expected to be maintained. The Masterplan to be agreed in writing with Medway Council under advice from Natural England and other acknowledged experts, e.g. Buglife;
- No development work to take place until a revised habitat survey has been undertaken to identify the areas of land within the application site and the mitigation land that can be classified as Biodiversity Action Plan habitats including the category “Open Mosaic Habitats on Previously Developed Land”. The results to quantify the area of BAP habitat to be lost to development and the areas of BAP habitat to be created as part of the mitigation plan;
- No development work to take place until submission of a long term ecological management plan for the mitigation areas (within and without of the application site) has

been submitted to and approved in writing by Medway Council under advice from Natural England and other acknowledged experts. The plan to include the provision for the creation of new habitats as required under the Masterplan. The phasing of the development to take into account the need for new habitat areas to be created in order to accommodate identified species' interest before existing habitats are destroyed;

- The off-site mitigation areas comprise approximately 65 ha. This to include areas ABCD1 and D2 shown on fig.3 (Revision 3) from the report dated February 17, 2010 by RPS entitled An assessment of the impact of the proposed Grain Business Park on the invertebrates and reptile fauna and flora of the Application Site and proposed compensation and enhancement (Second Revision) together with the land identified in the attached plan.

We will also require conditions to secure the protection of the other protected species identified in our letter dated February 3. These are set out in Annex One. ¹⁸

...

“Natural England has no objection to the proposed development in respect of these protected sites. It is our view that, either alone or in combination with other plans or projects, this proposal would not be likely to have a significant effect on the above sites and the permission may be granted (subject to other planning considerations and the conditions mentioned elsewhere in this letter) under the terms of the Habitat Regulations.”

36 NE sent a second letter to Medway on March 8, 2010 which added this passage to the reasons for its withdrawing its objection to the outline application: ***531**

“An assessment of the compensation habitat was provided which shows that the majority is of low potential value for invertebrates. The entomologist Peter Kirby has provided a report dated 17 February 2010 on the potential of the compensation land to mitigate loss of habitat on the application site. While it is acknowledged that the land may require considerable modification, it does allow a lot of flexibility of enhancement. There can be no doubt that the inclusion of the additional land adds significantly to the long term security of many elements of the invertebrate assemblage.

The above provides assurance that the impact within the development site can be minimised and that there is sufficient land outside the site to create new habitat of invertebrate interest to compensate for unavoidable habitat loss within the development site. This gives us confidence that the overall Grain site should be able to maintain a wide range of scarce and rare invertebrate species and that its management and future have been secured.”

37 Buglife’s continuing objection. It is unfortunate that Buglife was not involved in three-way combined discussions taking place in a collective dialogue with NGPH’s and NE’s experts and Medway Council. A meeting was held on January 21, 2010 between these bodies to discuss the concerns raised by all three consultees who had submitted objections in order to seek a possible way forward. Buglife was, instead, confined to a meeting with NGPH at which NGPH tried to address Buglife’s concerns. Moreover, Buglife was not sent a complete and composite set of the documentation supplied as Environmental Information by NGPH to supplement the EIA. Most, but not all of this documentation was placed on the Medway website and Buglife was able to consider it, albeit in a great hurry a few days before the application was to be considered and decided by Medway’s Planning Committee on March 10, 2010. Buglife submitted a further objection in a letter dated March 2, 2010, having had sight of most of the additional information for only a very limited amount of time.

38 Buglife’s continuing objections may be summarised in this way:

- (1) There was insufficient evidence available to permit any meaningful conclusions to be drawn as to the detailed impacts of the proposed development. Moreover, NE’s conclusion that the increased mitigation package should be sufficient to preserve the biodiversity

interest on the site is not scientifically sustainable. Thus, outline permission should not be granted until detailed surveys and an ecological plan had been prepared and agreed.

(2) If permission was granted on the basis of NE's suggested conditions, the legal basis of that permission must be clarified. The officer's report and Medway's subsequent decision should be clearly stated to be on the basis that the final decision relating to the mix, area and distribution of habitat and to the mix area and distribution of the development within the outline planning area would be determined at the reserved matters stage of the planning process when the planning applications for the detailed reserved matters were submitted and approved. These subsequent applications should be subject to the Regulations and the submission of further EIAs.

39 Planning officers' report. Medway's Planning Officers prepared a report which is a very detailed document and which recommended approval of the application *532 subject to conditions which included, in broad terms, the conditions put forward by NE as the basis of its withdrawing its objections. The report fairly summarises the history of the planning application and recommends that approval be granted with the conditions recommended by NE. The report advised that NE had advised, as had NGPH's experts, that the proposed increased mitigation package should be sufficient to preserve the biodiversity interest of the site.

40 However, possibly because of the need to hurry the preparation of the report in time to allow it to be considered by committee members prior to the meeting at which the decision to be taken before the end of March 2010, the report does not summarise or respond to Buglife's recent renewed objection. In particular, the committee were given no advice as to whether the EIA sufficiently complied with the Regulations. Furthermore, it did not report or offer any advice about Buglife's contention that outline permission should be granted in a way that would require NGPH to submit further EIAs with each reserved matters application and that the size, mix, area and distribution of the development would be subject to revision if the ecological masterplan could not be achieved without such a revision.

41 Moreover, the advice concluded with this passage;

"PPS9 suggests that it would be good practice to address biodiversity and geological conservation as completely as possible in the design of the development approved. However, it will often be necessary to secure further matters through the imposition of conditions and/or obligations and in some cases 'Grampian-type' conditions may be imposed which limit progress on a development until certain measures to protect or secure biodiversity or geological interests are in place. Grampian or negative conditions should not be used where there are no prospects at all of the action in question being performed within the time-limit imposed by the permission.

In this case, the applicants have undertaken an EIA of the site and submitted an ES with the planning application. During the assessment of the planning application, those consultants with expertise in ecology have identified areas of concern in relation to the information submitted. In response to the concerns, the applicants have worked closely with Natural England to address and overcome the issues raised. During this process, it has been acknowledged by all parties that best practice would ensure that any additional survey work should be undertaken prior to the granting of any planning permission. However, in this unique situation in that a 'once-in-a-lifetime' opportunity presents itself to see the allocated site developed for employment purposes and directly linked to that, for Medway Council to address road safety along the Grain Road through Community Infrastructure Funding and with a s106 contribution from National Grid arising as a result of the development. The problem faced is the timescale in which the CIF money needs to be spent.

What should be made clear at this point is that Medway Council, as a competent Local Planning Authority, is not prepared to set aside issues at the cost of significant ecological value in order to achieve the 'once-in-a-lifetime' opportunity ¹⁹. As such, through discussions with Natural England, an agreed approach has been taken. National Grid are owners of a vast area of land at *533 the Isle of Grain and a significant area of that land has been committed to provide ecological conservation land should the need arise as a result of the further survey work that is

required. Due to the fact that the application is for outline permission with all matters reserved, therefore no layout is fixed and the significant proportion of land being offered off-site in addition to the mitigation land being offered within the site, it is felt that there is clearly a prospect of being able to achieve appropriate off-site mitigation (should it be necessary) and therefore the use of conditions and a legal agreement is an acceptable approach in this case.”²⁰

I will discuss the significance of this passage later.²¹

42 Grant of outline planning permission. Medway granted outline permission subject to conditions in a decision dated March 31, 2010. The permission provided for “the development of **up to** 464,685 square metres of built employment floorspace... and **up to** 245 square metres of floorspace for a business park management centre ... with associated infrastructure, landscaping, carparking and access.” (emphasis added). The development is not to commence later than 10 years from the date of the outline planning permission. It is to be undertaken in substantial accordance with the details contained within the Environmental Statement dated September 2009 accompanying the planning application or in accordance with any written approval or modification agreed by the Local Planning Authority during any subsequent reviews. The stated reason for this requirement was:

“To ensure that the development is implemented in a manner that accords with the assessment of its environmental implications as detailed in the Environmental Statement accompanying the submitted planning application and to ensure the development is in accordance with the strategic objectives of Policy S13 of the Medway Local Plan 2003.”

43 The conditions required the following to be submitted by NGPH for written approval prior to the submission of any reserved matters application or the start of any site preparatory works not agreed by Medway:

- (1) A revised habitat survey.
- (2) Details of the methodology for an invertebrate survey of the entire application site and all of the off-site habitat parcels.
- (3) The invertebrate survey was to be carried out in accordance with the approved methodology.
- (4) A long-term ecological monitoring and management plan for the ecological mitigation areas both on-site and off-site.
- (5) The first review of the masterplan that has taken account of the revised habitat survey results and the full invertebrate survey results and which identifies a minimum of 20 ha of habitat of high invertebrate quality to be maintained and connected to a broader network of habitat or any such alternative amount of land.

Reviews of the ecological management plan are to be submitted every two years or at such greater frequency as may reasonably be requested by Medway. *534²²

44 **Post permission survey and related work.** Work then started to prepare the pre-detailed submission documentation. A draft method statement for the Invertebrate surveys was sent by RPS to NE for review on April 8, NE then passed this onto Buglife and some of their comments were incorporated into the final document which was agreed by NE on June 3, 2010 and submitted to Medway on August 4, 2010. The method statement was approved by Medway on September 6, 2010. Surveys were to be carried out between April and September 2010 and RPS produced an interim review on September 2, 2010. A UK BAP habitat survey method statement was produced on September 16, 2010 and revised in November 2010.

45 **NGPH's application to partially discharge condition.** Following the preparation of a

methodology for the manner in which the required invertebrate surveys would be carried out, NGPH through Planning Perspectives submitted it to Medway for its approval as required by condition 55 of the outline planning consent. This approval application was submitted on August 5, 2010 and Medway approved the proposed methodology in a letter to Planning Perspectives dated September 6, 2010. The letter informed Planning Perspectives that the invertebrate survey should be implemented in accordance with the approved methodology prior to the submission of any reserved matters application.

C. Discussion of factual background

46 The site and the proposed development present unusual and complex features which made it very difficult to prepare a full ES. It was, in consequence, the considered view of NGPH's and NE's experts that it was only possible to provide an interim EIA in September 2009 when the ES was finalised of the main effects of the development on the site's invertebrate assemblage and mosaic habitats and of the necessary compensatory measures needed to prevent, reduce and offset those effects. This was, in general terms, because of the nature and timescale of the proposed development and the site's particular ecology physical features.

47 **Site's ecology.** The site is within the Thames Gateway which is a nationally important area for invertebrates, especially on its brownfield sites. The site is itself a brownfield site and comprises grassland, scrub, swamp, open water and hardstanding. It also contains three waterbodies and 7.1km of ditch. It is in close proximity to six sites of ecological importance being the Medway Estuary and Thames Marshes Ramsars, Special Protection Areas and Sites of Special Scientific Interest. A significant part of the site is considered to be OMHPDL which is on the UK Biodiversity Action Plan ("BAP") priority list and the whole site is considered as having high invertebrate biodiversity potential. Four invertebrate species, particularly the Brown-banded Carder Bee, are BAP species. Buglife has identified the site as having the potential to be the second most significant site in Kent for rare and endangered invertebrates.

48 Any planning decision concerning the site should take account of the recommendations contained in PPS9: *Biodiversity and Geological Conservation*, ²³ particularly given its mosaic habitat, nationally important invertebrate assemblage and its BAP features. Of particular note are the key principles that local planning authorities should adhere to so as to ensure that the potential impacts of planning *535 decisions on biodiversity and geological conservation are fully considered. These principles include the need for planning decisions to be based on up-to-date information about the environmental characteristics of their areas, to aim to maintain and enhance, restore or add to biodiversity interests and to conserve and enhance them. In the absence of suitable alternative sites, local planning authorities should:

"... ensure that before planning permission is granted, adequate mitigation measures are put in place. Where a planning decision would result in significant harm to biodiversity and geological interests which cannot be prevented or adequately mitigated against, appropriate compensation measures should be sought. If that significant harm cannot be prevented, adequately mitigated against, or compensated for, then planning permission should be refused."

In relation to previously developed land, PPS9 recommends:

"... where such sites have significant biodiversity or geological interest of recognised local importance, local planning authorities, together with developers, should aim to retain this interest or incorporate it into any development of the site." ²⁴

49 The conservation and enhancement of invertebrate interest is regarded as being of great importance because of the need to preserve significant biodiversity, because of the rarity of many invertebrate species and the ever-declining range of species and sizes of species populations and because of the essential role they play in supporting life in all its forms. A relevant example is the bee in all its forms which is regarded as playing a major, if not essential, role in assisting in the pollination of many plants. Invertebrates thrive, in particular on a diverse or mosaic habitats, particularly those found on brownfield sites. These habitats are also of intrinsic interest as well as being of interest as the means whereby invertebrate assemblages are maintained and developed. It follows that the existing diverse habitat should be preserved both as a means of

preserving the site's invertebrate assemblage and as a discrete end in itself.

50 The habitat is diverse and, being a brownfield site, uncultivated. There is no specification that, if produced, will provide a rich support for invertebrate life, particularly as a significant assemblage contains so many different species. A varied and mosaic habitat cannot readily be cultivated, it has to be developed with careful controls on the surrounding environment and, given the ever-changing naturally occurring landscape, the detailed composition of a mosaic habitat is subject to rapid seasonal change. Thus, any prediction as to the effect of development on existing habitat and on the ability to encourage damaged habitat being reproduced in a different location to compensate for damage in its present location is bound to be tentative and uncertain, the more so if based on other than full contemporary data. That data should be drawn from the site as a whole and should seek to identify the make-up and location of the various habitats and their constituent parts of the habitats across the whole site.

51 The same is true for invertebrate species. In their case, not only is up-to-date data required to identify the make-up, location and extent of the assemblage *536 population but it is required over time so that changes can be monitored. make a meaningful prediction, that data must be comprehensive and carefully.

52 The necessary surveys must be taken on various occasions in the relevant months of the year and decisions taken and development implemented whilst the surveys are still contemporary. This is possible on a relatively small site but is not possible across a site as large as the site in question. This is because it is necessary to develop the site in stages so that the effect of the development can be monitored and any adjustments made if those effects are more deleterious or the mitigation measures less effective than predicted. In an extreme case, the development can be stopped before all stages are complete if it can be seen that, notwithstanding all reasonable precautions and measures being taken, the assemblage or the habitat or both are being substantially and irreparably damaged. In those circumstances, the site needed to be developed in stages and, before each stage was started, a further set of surveys would be required to ascertain the up-to-date position on the site, to check, and if necessary to modify, the compensation measures and to re-site or vary the size, layout or design of that phase of the development. This would partly be needed because of the uncertain consequences of fragmenting habitats, an inevitable consequence of the proposed development.

53 **Brown-banded Carder Bee.** These constraints on the development of the site were particularly needed for the Brown-banded Carder Bee ("BbCB"). No lesser scientist than Albert Einstein is reputed to have said: "If the bee disappears from the surface of the earth, man would have no more than four years to live. No more bees, no more pollination ... no more men!"²⁵

54 The BbCB is a brightly yellow/orange furred bumblebee and is one of a number to have undergone a dramatic decline in recent years. It was formally widespread in English southern counties and was recently recorded in the Scottish border but it has since been lost from most of this range. Agricultural intensification is the likely cause of this decline. The BbCB requires large areas of flower-rich dry grassland to be supported in viable long-term populations and most remaining populations are located in extensive areas of open grassland in coastal areas of southern and western England. Nests are made on the surface of the ground in moderately tall, open grassland and a wide range of plants are visited for nectar. Pollen is collected preferentially from members of the *Fabaceae*, *Laminaceae* and *Scrophulariaceae*.

55 Buglife stated in its submission dated December 11, 2009 that invertebrate surveys should be carried out between April and September, with a minimum of three to seven visits. However, larger more complex sites (such as the Grain Site) would require more visits. They said that if UK BAP species are potentially present, a full survey should be carried out to confirm this, and if present they should be considered in the impact assessment and mitigation measures. The surveys up to the date of the submission of the ES had been at the wrong time of the year so that the nature and extent of the BbCB population on site and the nature and extent of the mosaic habitat needed to support that population were then unknown. The various ecologists who had considered the BbCB on this site agreed that the bee requires a significant area of good matrix habitat to survive. What was not known was the extent to which that bee, and possibly the Shril carder-bee which might *537 also be present on site, relied on the site for support since the Thames Gateway supports one of the most important meta-populations of these two species. Buglife considered that very large areas of the site might be needed to support the BbCB which would not be available once the site was developed as proposed. However, Dr Kirby considered

that there were several areas large enough to support the BbCB, including some being provided as compensation land, and there would be linkages between them. However, the appropriate habitat character would need to be retained or created. If this was achieved, he felt confident that there was every reason to hope for success in achieving the long-term retention of the BbCB.

56 Site's physical features. The site is heavily contaminated with discarded surface asbestos, oil and other contaminants. The asbestos, whose extent is unknown and which might also be partially buried, is largely located on the ground surface and is a relic of the site's previous use in the 1950s as an oil refinery and, possibly, discarded lagging from the Power Station located on the Isle of Grain. The oil, also a legacy from previous oil refinery use, has, in places heavily impregnated the ground. There are other contaminants located randomly over the site. In order to undertake a full survey, extensive precautions are needed. The survey methodology that has recently been prepared provides for an approved chaperone who will clear the routes being surveyed. This work will need to be undertaken in conformity with the asbestos regulations. The cleared routes will be used for repeat access to a specific sampling area. There is also the need to dig pitfall traps to depths of 10cm and care will be needed to avoid or carefully and safely displace the soil in the pits prepared for the traps. The cost of undertaking this work prior to the start of the development was regarded as disproportionate. In any event, the contaminants will have influenced both invertebrate and habitat development and the effect of removing and disturbing the contaminants in one area during development could adversely influence the ecology of the site which would only be identified in subsequent surveys.

57 A further difficulty is that extensive areas of the site in recent years have been sprayed. In some areas, pesticide was sprayed to control an outbreak of Brown-tail moths. Further, the whole of one of the four development areas, area D, has been sprayed with picloram and glyphosate for weed control purposes. A full survey of these areas must await the declining influences of these sprayed chemicals.

58 Nature and timescale of proposed development. The development is seen by Medway as being of considerable significance for the economy of the Thames Gateway in providing a much-needed servicing centre for the Gateway, significant employment opportunities for the area and the bringing back into economic use of a large redundant site that has previously been used for industrial purposes. The site occupies a strategic location within the Thames Gateway. The development is intended to provide a hub for port-related activities and for the extensive commercial amphibious traffic in the Thames Gateway. These will principally be the provision of a reception, handling and distribution centre for containers and for the servicing of equipment used in the off-shore wind farms being developed in the Thames Estuary. There will also be scope for other employment generating commercial activities that will generate additional employment opportunities in an area of high unemployment. To that end, the proposed development is intended to create up to four thousand additional jobs. The development is to take place over a period of 10 years and in distinct and successive phases. The current masterplan provides for four separate phases and it is clear from the terms of the conditions ***538** imposed into the outline planning consent that these phases are to be undertaken in sequence with gaps of up to three years between each phase. It follows that the grant of detailed planning permission for the last phase of the development could occur nearly 10 years after the grant of outline planning permission for the development as a whole.

D. Joinder of NE as Second Interested Party

59 NE applied at the hearing for permission to be joined as an interested party. NE must be served by every planning authority with a copy of every ES that is served on that authority. This is to enable NE, as a statutory consultee, to comment on any proposed development affecting the environment so that every development of that kind can be made subject to the scrutiny of that specialist body that has a statutory duty to safeguard and conserve the environment. In those circumstances, and given its detailed involvement in this EIA process, I granted permission without any hesitation. NE did not instruct anyone to represent it at the oral hearing and did not submit any written observations but its solicitor was present in court throughout the hearing.

E. Alleged delay in issuing judicial review proceedings

60 Both Medway and NGPH contended that permission should be refused because Buglife failed

to comply with [CPR 54.5](#) in that although the claim was filed two days within the three-month time limit running from the date of the grant of outline permission, the proceedings were not filed promptly. Permission was granted by Medway on March 31, 2010 and the claim form was filed on June 29, 2010. Both relied on a delay of some weeks that each contended had occurred and both pointed to both [CPR 54.5](#) and to [s.31\(6\) of the Senior Courts Act 1981](#) which permits a court to refuse to grant permission to make the application if it considers that there has been undue delay in Buglife's making the application. Medway pointed to the six-week time limit imposed on appellants wishing to challenge a planning inspector's decision using the statutory appeal procedure as a guide to the length of time that should be considered as reasonable. Buglife started its application nearly 12 weeks after permission had been granted. I do not consider that a time limit for an appeal is particularly relevant since an appeal is a second stage determination whereas judicial review of a planning permission is a first stage in a court challenge. NGPH pointed to the prejudice it had suffered in being unable to make an effective start in its marketing campaign for take up of space in the Business Park. However, no specific instance of prejudice, as opposed to a generalised assertion of prejudice, was provided as evidencing prejudice of this kind.

61 Buglife contended that it has an unqualified entitlement to a period of up to three months before it must file its claim. It relies on the recent decision of the ECJ in [Uniplex \(UK\) Ltd v NHS Business Services Authority \(C-406/08\) \[2010\] P.T.S.R. 1377; \[2010\] 2 C.M.L.R. 47](#), ²⁶ a decision relating to the [Public Contracts Regulations 2006](#), made to give effect in domestic law to the [Procurement Directive 89/665](#). The 2006 Regulations, provide that proceedings arising out of the Directive and the Regulations must be brought promptly and in any event within three months ***539** from the date when grounds for bringing the claim first arose. There was a challenge to the lawfulness of the requirement for proceedings to be brought promptly. It was contended that that provision infringed the requirement of Community law that limitation periods should be sufficiently precise, clear and foreseeable to enable individuals to ascertain their rights and obligations. The ECJ accepted that contention and held that:

"41 A national provision such as Regulation 47(7)(b) of the 2006 Regulations ... gives rise to uncertainty. The possibility cannot be ruled out that such a provision empowers national courts to dismiss an action as being out of time even before the expiry of the three-month period if those courts take the view that the application was not made 'promptly' within the terms of that provision.

42 As the Advocate General observed in point 69 of her Opinion, a limitation period, the duration of which is placed at the discretion of the competent court, is not predictable in its effects. Consequently, a national provision providing for such a period does not ensure effective transposition of [Directive 89/665](#)."

62 Medway and NGPH contended that the [Uniplex](#) decision was confined to the relevant time limits imposed for proceedings associated with the Procurement Directive whereas these proceedings are associated with the EIA Directive. Moreover, the provision that was being challenged was one contained in the Regulations promulgated to give effect to the Procurement Directive in domestic law. In this case, the challenge is to a particular application of a general provision relating to all judicial review proceedings. Moreover, the Environment Directive only contained very a very general requirement on Member States to give effect to the directive in their respective domestic laws.

63 I cannot accept the limitation of the [Uniplex](#) decision contended for by Medway and NGPH. The decision applied general and core principles of Community Law which are applicable to all directives. The requirement of certainty and the application of that requirement to limitation periods imposed on those seeking to enforce their rights arising under the directive in a national court has general application to such enforcement proceedings arising out of any directive. In those circumstances, it is clear that there was a failure of the legislature to transpose the Environment Directive into domestic law in a way which avoids uncertain time limits arising from the requirement of promptness. That requirement is not now enforceable in English courts following the [Uniplex](#) decision.

64 In any event, I am satisfied on the facts of this unusual case that Buglife did file the claim promptly. I take account of the lack of full consultation with Buglife in the weeks prior to the

granting of planning permission in that Buglife was not invited to participate in four-way discussion with NE, Medway and NGPH. During that period, the ES went through a process of rapid and repeated change and Buglife was then given inadequate notice of the EI that resulted from that change. This undue haste arose because of the perceived need for haste due to the constraints of the CIF funding ²⁷ and it left Buglife with a knowledge gap about the proposed development which it needed to fill in before being able to decide whether or not to initiate proceedings. Furthermore, Buglife was, from soon after the grant of outline permission, actively involved in assisting NGPH's consultants in devising *540 a survey methodology. This was of considerable benefit to NGPH but it involved a drain on Buglife's limited technical resources.

65 Thus, taking account of Buglife's reliance on the applicability of the [Uniplex](#) decision, the accelerated ES process due to the decision to accept CIF funding, the assistance provided to NGPH, the limited prejudice shown to have resulted from the three-month delay and the public importance of this particular application, I exercise my discretion, if this is necessary, in concluding that these proceedings were started promptly even though that start was two days short of the permitted three-month period.

F. The relevant law

66 **EIA and ES.** EIAs were originally introduced as part of domestic planning procedures as a result of a development in European Community law brought about in 1985 by [Council Directive 85/337](#), The Assessment of the Effect of Certain Public and Private Projects on the Environment. The Directive came into force in 1988 and it is directly enforceable in the English courts. The mandatory requirements it introduces have been given effect to by a series of statutory instruments covering different specific projects. This development is governed by the Regulations that came into force on March 14, 1999, being the successor to earlier Regulations. The Regulations have been amended with effect from September 1, 2008 in a significant way that affects this development. ²⁸ The effect of these amendments is to permit, for the first time, phased provision of EIAs where these are necessitated by the phased nature of a particular development, unforeseen changes in the affected environment or by an erroneous failure to undertake and provide an EIA initially.

67 The principal issue in this application is whether this amended procedure applies to the Grain Business Park development.

68 **Objectives of the EIA process.** The principal objective of the Directive (as amended) was to further the objectives of the Aarhus Convention whose principal objectives were to improve public participation in the planning process in general and in planning decisions affecting the environment in particular. These objectives were to be satisfied by ensuring that the public, and particularly those affected by or concerned with the environmental impacts of development decisions, were provided with full information about such impacts in sufficient time to make a meaningful contribution to the assessment of those impacts and the shaping of mitigation measures to reduce or eliminate them.

69 **EIA development.** To achieve these objectives, the Directive and the Regulations that have implemented it into domestic law set out a procedure that must be followed for certain types of project before they can be given development consent. This is achieved in England by [reg.3](#) which provides:

“3 —

(1) This regulation applies—

(a) to every application for planning permission for EIA development received by the authority with whom it is lodged on or after the commencement of these Regulations;

... *541

(2) The relevant planning authority ... shall not grant planning permission or subsequent consent pursuant to an application to which this regulation applies unless they have first taken the

environmental information into consideration, and they shall state in their decision that they have done so.”

Thus, the Regulations apply to every application for planning permission for EIA development, including an outline permission and any subsequent detailed permission.

70 EIA development means development of the kinds set out in [Schs 1 and 2](#) of the Regulations and the Grain Business Park development qualifies as a [Sch.2](#) development because it is an Industrial Estate development project as defined in Pt 10(a) of [Sch.2](#) , it is in area well in excess of the statutory minimum of 0.5ha and it is, and has always been accepted by Medway and NPHL as being:

“... likely to have significant effects on the environment by virtue of nature, size or location.”

Since the development clearly is one which would have significant effects on the environment, there never was an issue as to whether or not the Regulations applied to this development. The applicants submitted a scoping opinion (MC/09/1149) on August 14, 2009 prior to submission of the outline planning application. This was approved by Medway on September 18, 2009. NE and KWT both commented regarding the need for a full invertebrate survey at the outset. Medway did not conclude that a multi-phased approach would be required.

71 **The ES.** The Directive and the Regulations seek to achieve this participation as follows:

(1) By requiring that an ES is undertaken by the developer prior to applying for planning permission. An EIA is, essentially the whole process that is required to be followed before the planning decision-making body may make a decision as to whether or not the development is allowed to proceed. The core component of this consultative process is the preparation of the ES. Thus, the process involves the systematic compilation of expert quantitative analysis and qualitative assessment of a project's environmental effects and the presentation of results in an ES in a way which enables the importance of the predicted results, and the scope for modifying or mitigating them, to be properly evaluated by the relevant decision-making body before a planning decision is taken. This EIA process must involve the participation of the interested members of the public and any consultee.

(2) What an ES should contain is provided for in [Sch.4](#) to the Regulations. The relevant provisions may be summarised as follows:

“1. Description of the development, including in particular—

(a) A description of the physical characteristics of the whole development and the land-use requirements during the construction and operational phases; ...

2. An outline of the main alternatives studied by the applicant and an indication of the main reasons for his choice, taking into account the environmental effects. *542

3. A description of the aspects of the environment likely to be significantly affected by the development, including, in particular, population, fauna, flora, soil, water, air, climatic factors, ... landscape and the inter-relationship between the above factors.

4. A description of the likely significant effects of the development on the environment, which should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term permanent and temporary, positive and negative effects of the development, resulting from

(a) the existence of the development;

(b) the use of natural resources;

(c) the emission of pollutants, the creation of nuisances and the elimination of waste,

and the description by the applicant of the forecasting methods used to assess the effects on the environment.

5. A description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment.
6. A non-technical summary of the information provided under paragraphs 1 to 5 of this Part.
7. An indication of any difficulties (technical deficiencies or lack of know-how) encountered by the applicant in compiling the required information.

Part II

1. A description of the development comprising information on the site, design and size of the development.
2. A description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects.
3. The data required to identify and assess the main effects which the development is likely to have on the environment.
4. An outline of the main alternatives studied by the applicant and an indication of the main reasons for his choice, taking into account the environmental effects.
5. A non-technical summary of the information provided under paragraphs 1 to 4 of this part.”

(3) The results of that assessment must be placed in an ES which must be prepared in the prescribed manner and which should include the prescribed contents. That ES must then be publicised available for consideration and comment by the public which is defined in the Regulations to include various statutory consultees including NE and, in the Directive, “the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures [and] non-governmental organisations promoting environmental protection”.

(4) The planning decision-maker may seek further information from the developer and any consultee may submit comments, information and representations about the ES. All this Environmental Information (“EI”) must be placed before the planning decision-maker. *543

(5) For any development application for which an ES must be prepared, the local authority or other decision-maker “shall not grant planning permission or subsequent consent pursuant to an application to which [the Regulations] applies unless they have first taken the environmental information into consideration and they shall state in their decision that they have done so”.²⁹

(6) The effect of the Regulations and the Directive is that the planning decision-maker must be provided with sufficient information at the earliest possible stage in the decision-making process to be able to take account of the environmental effects of the project.

72 The overall intention of this process is that the planning decision-maker will still take all relevant planning decisions, at both the outline and the detailed reserved matters stages but that, for EIA development, the decision-maker must have available to it the prescribed EI which has within it the informed feed back of affected and informed members of the public and the structured ES that the developer must provide. No relevant decision may be taken before the EI is before the decision-maker who must then take it into account in reaching his decision. The decision-maker is particularly concerned with the environmental effects of the development and must particularly take account of the effects of the development on the environment and of all mitigation that is or can be taken to eliminate or reduce those effects as much as possible. The decision-maker can then, if so minded, require modifications of the planning application in

question or even, in an extreme case, refuse permission. Alternatively, again in an extreme case, the local authority can decide to grant permission despite advice that the development will involve significant adverse unmitigated environmental impact. In all cases, however, the decision-maker must state that it has taken the EI into account and must, as with any competent decision-maker, give brief reasons for its decision including reasons for disregarding significant relevant advice or information pointing to an alternative decision.

73 Multi-stage projects. The Regulations, until they were amended in 2008, required the EIA to be undertaken at the outline application stage and they did not permit a further or staged submission of an EIA at the detailed application or reserved matters stage. This meant that it was not possible to insist upon the EIA process being fully undertaken for EIA development where it was not possible to obtain a fully particularised EIA at the outset of a project, where significant new information came to light or significant unforeseen changes in the development occurred after the grant of outline planning permission or the need for an EIA was overlooked before the original decision was taken.

74 These difficulties were explained in [R. v Rochdale MBC Ex p. Milne \(No.1\)](#).³⁰ In that case, a developer applied for outline planning permission to build a business park with a “bare outline” application which merely identified the development as being a “proposed business park consisting of general and light industry, offices distribution and storage, research and development with associated complimentary retail, leisure, hotel and housing land between [a location near Rochdale with an overall size of 213ha]”. An illustrative masterplan was included showing an assessed allocation of space under the various proposed uses with an estimated gross floor space and total overall built development hectarage. These were provided for ***544** illustrative purposes only. An ES and ecological survey was provided with the application. The local authority granted outline planning permission. The permission did not incorporate the masterplan into the description of the development but it imposed controls by way of conditions to ensure that the environmental impact would not be significantly different from that which was assessed in the ES. It was held that although the development was sufficiently described for the purposes of the Application Regulations, it was not sufficiently described for the purpose of [reg.3](#) of the Regulations because the ES had to assess the environmental impact of the proposed development and it was not sufficient for that purpose for a development for the assessment to be undertaken on the basis of an illustrative masterplan.

75 In the course of a lengthy judgment, Sullivan J. said this:

“... the specified information contained in an environmental statement is provided for the purpose of assessing the likely impact upon the environment of the development proposed to be carried out. It is, therefore, not surprising that the first item of specified information in para. 2 is:

‘... a description of the development proposed, comprising information about the site and design and size or scale of the development.’

Without such a description, the likely impact of the proposed development upon the environment could not begin to be assessed, and the underlying purpose of providing the information in the environmental statement would be frustrated. One is not seeking certainty as to the environmental effects of the project, which would be unattainable, one is merely seeking the specified information which will enable the likely significant effects to be assessed. ...

Whilst a bare outline application is permissible on a purposive approach to [reg.3](#) of the Applications Regulations, an environmental statement based upon such a application could not begin to comply with the requirements of [Sched. 3](#) to the Assessment Regulations, ... An outline application with only one or two matters reserved for later approval might enable the environmental statement to provide a sufficient description of the development proposed to be carried out ... subject to the proviso that the description in the outline application of the development proposed to be carried out must be such as to enable the environmental statement to comply with the requirements of [para. 2\(3\)](#) of [Sched. 3](#).

...

I realise that compliance with the requirements of [Sched. 3](#) presents particular problems for projects such as a business park, which are demand-led and which may be expected to evolve over many years. ... For such schemes the outline application procedure is particularly valuable.

...

Notwithstanding the difficulties of describing the design, size or scale of such a project, the Members of the E.C. concluded that if it was likely to have significant effects on the environment, development consent should not be granted until a prior assessment of those effects had been carried out. In so far as such an assessment requires a greater degree of particularity in the description of the development that is proposed to be carried out, greater particularity must be provided. Thus, applications for such projects have been *545 placed in a legal straightjacket. The reason for this is explained in [Directive 97/11](#): the environmental assessment procedure is a 'fundamental instrument' of the E.C.'s environmental policy.

[Article 5.1](#) of the Directive envisages that Member States may wish to make procedural arrangements for environmental information to be provided on a staged basis. That has not been done in the Assessment Regulations. ... It is no answer to say that some of the specified information will be provided in due course at the reserved matters stage. This, no doubt, reflects the role of an outline planning permission under the 1950 Act. Once outline planning permission has been granted, the principle of development is established. Even if significant adverse impacts are identified at the reserved matters stage, and it is then realised that mitigation measures will be inadequate, the local planning authority is powerless to prevent the development from proceeding.

Mr Straker [counsel for the local authority] laid emphasis upon the fact that the local planning authority felt that, in imposing conditions it had ensured that adequate power would be available to it at the reserved matters stage. That, in my view, is no answer. At the reserved matters stage there are not the same statutory requirements for publicity and consultation. The environmental statement does not stand alone. Representations made by consultees are an important part of the environmental information which must be considered by the local planning authority before granting planning permission. Moreover, it is clear from the comprehensive list of likely significant effects in para. 2(c) of Schedule C, and the reference to mitigation measures in para. 2(d), that it is intended that in accordance with the objectives of the directive, the information contained in the environmental statement should be both comprehensive and systematic so that a decision to grant planning permission is taken in 'full knowledge' of the projects likely significant effects on the environment. ... a decision to defer a description of a likely significant adverse effect and any measures to avoid, reduce or remedy it, to a later stage would not be in accordance with the terms of Sched. 3, would conflict with the public's right to make an input into the environmental information and would, therefore, conflict with the underlying purpose of the directive.

This is, in effect, what happened in the present case. There may well be scope for argument in some cases, as to the extent to which details of mitigation measures may be left for subsequent approval. I do not suggest that an environmental statement must contain every detail, provided the mitigation measures are described. In the present case, because there is no description of the development proposed to be carried out, nor any description of its design, size or scale, it is not possible to describe the proposed mitigation measures. The conditions in the outline planning permission effectively require that descriptions shall be given in due course when the design, scale and size of the development to be constructed is known.

Condition 1.3 does not answer the problem. It ties the mitigation measures to the environmental statement (unless otherwise agreed), but those measures were a response to the environmental impacts of development in accordance with the illustrative masterplan. Recognising, as I do, the utility of the outline application procedure for projects such as this, I would not wish to rule out the adoption of a masterplan approach, providing the masterplan was tied, for *546 example by the imposition of condition to the description of the development permitted. If illustrative floor space or hectareage are given, it may be appropriate for an environmental assessment to assess the impact of a range of possible figures before describing the likely significant effects. Conditions may then be imposed to ensure that any permitted development keeps within those ranges."

76 These difficulties of tying the EIA process to long-term phased developments, particularly where as here the ecological effects of the development will alter over time so that those effects cannot be predicted with precision for later phases that will not be started for some years, have largely been removed by the 2008 amendment to the Regulations allowing for staged application of that process. This amendment was brought about as a direct result of the decision of the European Court of Justice in two cases heard together, [R. \(on the application of Barker\) v](#)

[Bromley LBC \[2006\] UKHL 52; \[2007\] Env. L.R. 20](#) and *Commission of the European Communities v UK*³¹ and the subsequent decision of the House of Lords in the [Barker](#) case.³²

77 In the course of his leading speech in the House of Lords, Lord Hope of Craighead said this:

“21. Mr Elvin QC for the Secretary of State accepted, in the light of the court's rulings, that he was not in a position to resist a declaration that the 1988 Regulations failed fully and properly to implement the Directive. Mr Straker QC adopted the same position on the council's behalf. In my opinion they were right to do so. It is clear that the effect of regulation 4(2) of the 1998 Regulations, read together with the definition of ‘Schedule 2 *application*’ in regulation 2(1), was that any consideration of the need for an EIA was precluded at the reserved matters stage. The Regulations overlooked the fact that the relevant development consent may, as the Court of Justice said in *Commission v United Kingdom*, para 102, be a multi-stage process. That situation is demonstrated by the terms in which outline planning permission was given in this case. In its notification of grant of outline planning permission the council stated that the grant was subject to conditions, which included the following:

‘01(i) Details relating to the siting, design, appearance, access, landscaping shall be submitted to and approved by the local planning authority before any development is commenced.’

The effect of that condition was that the consent which would have entitled L & R to proceed with the project was withheld until the details referred to were approved by the local planning authority. Any grant of planning permission which contains a condition in these terms must be regarded as a multi-stage development consent for the purposes of the Directive.

22. It does not follow however, where planning consent for a development takes this form, that consideration must be given to the need for an EIA at each stage in the multi-consent process. The first recital in the Directive indicates that the competent authority must take account of the effects on the *547 environment of the project in question at the earliest possible stage in all the technical planning and decision-making processes: see also *Wells*, para 51. In the case of a Schedule 2 development the competent authority must decide at the outset whether an EIA is needed because the development is likely to have significant effects on the environment. An application for outline planning permission should be accompanied by sufficient information to enable that question to be answered and an EIA, if needed, to be obtained and considered before outline planning permission is granted. The need for an EIA at the reserved matters stage will depend on the extent to which the environmental effects have been identified at the earlier stage.

23. If sufficient information is given at the outset it ought to be possible for the authority to determine whether the EIA which is obtained at that stage will take account of all the potential environmental effects that are likely to follow as consideration of the application proceeds through the multi-stage process. Conditions designed to ensure that the project remains strictly within the scope of that assessment will minimise the risk that those effects will not be identifiable until the stage when approval is sought for reserved matters. In cases of that kind it will normally be possible for the competent authority to treat the EIA at the outline stage as sufficient for the purposes of granting a multi-stage consent for the development: *R v Rochdale Metropolitan Borough Council, Ex p Milne* (2001) 81 P & CR 365, para 114, per Sullivan J.

24. As the European Court said in para 48 of its judgment, however, the competent authority may be obliged in some circumstances to carry out an EIA even after outline planning permission has been granted. This is because it is not possible to eliminate entirely the possibility that it will not become apparent until a later stage in the multi-stage consent process that the project is likely to have significant effects on the environment. In that event account will have to be taken of all the aspects of the project which have not yet been assessed or which have been identified for the first time as requiring an assessment. This may be because the need for an EIA was overlooked at the outline stage, or it may be because a detailed description of the proposal to the extent necessary to obtain approval of reserved matters has revealed that the development may have significant effects on the environment that were not anticipated earlier. In that event account will have to be taken of all the aspects of the project that are likely to have significant effects on the environment which have not yet been assessed or which have been identified for the first time as requiring an assessment. The flaw in the 1988 Regulations was that they did not provide for an EIA at the reserved matters stage in any circumstances.

25. In my opinion it is plain that the appellant is entitled to a declaration that by precluding any consideration for the need for an EIA at the stage when, following the grant of outline planning permission for the development, consideration is being given to an application for approval of reserved matters the 1988 Regulations failed fully and properly to implement the Directive.” *548

78 It is only necessary to add this quotation from the earlier decision of the European Court of Justice in [R. \(on the application of Wells\) v Secretary of State for Transport, Local Government and the Regions](#)³³ :

“51 According to the first recital in the preamble to the directive, the competent authority is to take account of the environmental effects of the project in question at the earliest possible stage in the decision-making process.

52 Accordingly, where national law provides that the consent procedure is to be carried out in several stages, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which the project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of that procedure.”

79 **Conditions.** Medway granted outline permission subject, in relation to the invertebrate and habitat features of the site, to a number of so-called Grampian-type conditions. These are negative conditions which prohibit the start of each phase of the development until specified steps associated with the development, in this case survey work and the revision of the masterplan, have been undertaken and approved by Medway. It is not permissible, however, for a local authority to leave for subsequent determination or working out pursuant to a negative condition any matter sufficiently significant that it might have a significant impact on the environment or on any mitigation measures. On the other hand, matters of detail and implementation which do not or are not likely to have such a significant effect may be left for subsequent determination in that way. In other words, nothing may be left for subsequent finalisation subject to a negative condition which falls within the ambit of matters that the directive intends to be the subject of public consultation in the EIA process.

G. Summary of Medway and NGPH’s EIA obligations

80 In the light of this detailed analysis of the factual background, it is now possible to summarise the relevant obligations of both Medway and NGPH to the EIA. The development is, quintessentially, a multi-phase development for which a staged EIA approach was intended. The development is for a business park that is to be constructed over 10 years in at least four distinct and discrete stages in accordance with a demand-led business plan and is located on a highly significant site from an environmental point of view. The outline application even provides for a development of “up to” a defined area, thereby allowing for a completed development of much less than that area. The invertebrate assemblage and mosaic habitat on and close to the site are both subject to continuous and rapid change and it is only possible to identify the effects of any particular stage of the development on both of these ecological features and the necessary mitigation measures that will be needed at the time that particular stage of the development is to commence. *549 In consequence, a two-phase approach to the undertaking of the EIA was devised from the outset.

81 Even if the EIA could have been undertaken in a way that would have enabled a single ES to be prepared and for the EIA to be completed when the outline application was submitted, that is not how the development project was planned. The survey work and the ecology masterplan development were to be undertaken in two phases with the second phase work linked to the individual development stages as they came forward. In consequence, the development that was submitted for outline permission was the barest of bare outline applications. There were no details of any of the buildings, no settled location, size or area of any of the stages and no finalised masterplan. Furthermore, due to the exigencies of the necessary CIF funding, there was no time to undertake the necessary surveys envisaged by the first phase of the EIA since this

had to be summarily truncated to fit in with the funding timetable.

82 Thus, what was needed, and what has been provided by the outline permission, is a staged EIA in which an interim or outline EIA is undertaken at the outline application stage and separate EIAs for each subsequent detailed reserved matters application. This approach has been supported by the Grampian-style conditions which prevent the start of any stage until an ES has been prepared and a consequent revision of the masterplan and the subsequent approval of the content of these documents as part of the decision-making process involved in that particular detailed application. In an extreme case, in the unlikely event of it turning out that the assemblage in general or the bee population in particular cannot be preserved by any workable ecology masterplan, Medway could refuse permission having taken the EI into consideration and the development would never take place.

83 The reason why Buglife has not accepted this approach is that, for reasons that have not been made clear, Medway and NGPH now contend that they have completed their EIA obligations with the EIA undertaken prior to the grant of outline permission and that the ES that was prepared in October 2010 was sufficient for the purposes of a single-stage EIA process. They both concede that a further EIA might be required by Medway but only if a detailed application is for a development which amounts to a change in the scheme of development that was granted outline permission. But, subject to that qualification, they contend that the necessary further surveys, mitigation details and siting and design work are all appropriately and lawfully subject to control through the Grampian-style conditions imposed with the outline permission without the requirement for additional EIAs. However, Medway supports its contention with a concession, which it contends is offered although it has no obligation to make it, that Buglife will be consulted about the further surveys and their contents and the proposed further ecology masterplans and masterplan revisions.

84 This approach, which is not spelt out in the ES or the EI or the Officers Report that went to committee prior to the outline decision being taken, is untenable. If the ES and EI prepared and submitted prior to the planning decision being taken are the only ES and EI that will be prepared, subject to the unlikely eventuality of a change in the development arising from future detailed reserved matters application, the EIA process did not conform to the requirements of the Regulations and Medway did not take into consideration before it took the crucial decision the details of the EI. This is because the Officers Report recommended, albeit in garbled terms, that the committee should not allow ecological considerations to hold up *550 the grant of outline permission since, if further surveys needed to complete the EI were carried out, the grant of outline permission would inevitably be delayed and the CIF grant would be lost.³⁴ The Report did, however, recommend that appropriate ecological safeguards were built into the proposed development since further survey work and ecological planning would be required and would be controlled by the Grampian-style conditions that were to be imposed.

85 The reasons why that this approach is untenable is that the EI, let alone the ES, did not provide sufficient details of the development, did not provide sufficient details of the invertebrate assemblage, provided no details of the bee population, provided only rudimentary details of the habitat (and only in the EI), provided only outline details of the proposed mitigation, provided no ecology masterplan and left the preparation of these details to be the subject of Grampian-type conditions even though they were all details which Buglife was entitled to be consulted about through the EIA process. Overall, the approach is untenable since it fails to take account of the way that the development has proceeded from its inception. The planning and preparations that have been undertaken from 2006 onwards have all inexorably been directed to a multi-stage EIA process, the development application for, and the grant of, outline planning permission provides for the continuation of that process and, given the change in the Regulations which took effect in 2008, the law now permits development substantially affecting the environment to proceed on that basis.

H. Approach of the Court when an EIA is challenged in Judicial Review proceedings

86 Buglife sought to raise as a discrete ground of challenge the question of the correct approach to be adopted by a court when addressing a challenge to the contents of an ES. Traditionally, a court applies Wednesbury tests to the decision of the planning authority that the ES contains sufficient details and that the planning decision sufficiently took the ES into consideration. Buglife

wished to argue that the test is now more rigorous and involves a court in itself considering whether the ES sufficiently complied with the regulations. However, this interesting submission does not arise as an issue in this case. If, as I have found, the ES was intended for use, and was used, purely for the purposes of obtaining outline permission as the first stage of a multi-stage EIA process which would yield a further four EIA processes, the ES and the EIA process that were being challenged clearly sufficiently complied with the Regulations without the need for detailed analysis and, conversely, if the EIA process being challenged was to be the only EIA for this development, the Regulations were clearly not complied with. This is so, even if the Wednesbury tests are as narrow as was submitted in argument.

87 I will merely observe that English law is in a rapid state of flux in relation to this issue. The Administrative Court is now obliged to determine, as part of the judicial review process, antecedent factual conditions precedent. These would, or certainly could, include such matters as whether the ES contained sufficient data to enable it to pass muster as a required ES notwithstanding current authority suggesting that that question is a matter of discretion to be decided exclusively by the planning authority. Moreover, the trend in the law of the European Union, and ***551** of English courts when considering decisions arising from directives and other directly enforceable features of Community law, is to require the English courts to apply objective standards of proportionality and legal certainty instead of the subjectively-based Wednesbury tests. The challenge that Buglife wished to mount in this judicial review is, therefore, now awaiting an appropriate case. It is not one however that arises in this case.

I. Buglife's grounds and NGPH and IP's defence grounds

88 Buglife contended that it should be permitted to seek to review the grant of outline planning permission on four separate grounds; that the ES was inadequate, that the planning permission wrongly allowed for deferral of essential environmental information until a later stage of the development, that Medway failed to provide it with the EI in conformity with the mandatory rules as to publicity; that the conditions were unlawful in that they removed from the EIA process the assessment of the mitigation measures required in the light of the substantial effects that the development would have on the environment and that there was a failure to consider alternative sites.

89 These grounds are all premised on the assumption that there are to be no more EIAs and that the full rigours of the EIA process would not be implemented again and that Medway would not be able to refuse permission for any detailed application even if appropriate mitigation is not possible. These grounds would all be tenable and arguable if those two premises were correct.

90 These grounds were, in reality, only put forward because Medway and NGPH contended, following Buglife's challenge, that the relevant EIA process was the only EIA process that would take place for this development and that the Grampian-style conditions could not be used so as to preclude the full development of the site, save if the development was amended, in which eventuality an EIA process could be required as a matter of Medway's discretion.

91 I refuse permission since these grounds do not arise in the light of my conclusion that the wording of the outline planning permission requires the development to be subject to a multi-stage EIA process. That process will incorporate at each detailed planning application stage a requirement that the interested party must submit to the defendant an ES containing details of all recently conducted environmental surveys, details of the currently proposed mitigation measures supported by an ecology masterplan and details of the particular phase of the development that the application relates to. Medway will need to take all those matters and the ES in which they are set out into consideration when approving both the matters required to be approved by the conditions in the outline permission and the detailed application itself.

92 It would, thus, be an academic and futile exercise to decide whether to quash the outline permission on the basis of it being a different kind of permission to that which was actually granted. However, in refusing permission, I am doing so on the express basis that each stage of the reserved matters approval process will be preceded by a fresh ES and that Medway may not approve any of the matters reserved for approval by the outline permission conditions nor the detailed application unless it has first taken all the EI arising from that application into consideration. ***552**

K. Conclusion

93 I refuse permission. Since Buglife has, essentially, succeeded in the judicial review process, I will consider any application for its costs when this judgment is handed down. *553

1. See para.11.338 of the EIA; paras 0.3 and 3.8 of the second (final) revision, dated February 17, 2010, of the report: "Assessment of the impact of the proposed Grain Business Park on the invertebrate and reptile fauna and flora of the Application Site and the proposed mitigation, compensation and enhancement" prepared by RPS, NGPH's Ecology Consultants and the "Background issues" section of the report dated February 17, 2011 "Proposed Grain Business Park Mitigation, compensation and enhancement proposals for invertebrates, Further considerations" prepared by Dr Peter Kirby, NGPH's Entomology Consultant. Both the reports formed part of the Environmental Information submitted in connection with NGPH's EIA.
2. The [Town and Country Planning \(Environmental Impact Assessment\)\(England and Wales\) Regulations 1999](#) (as amended) "The EIA Regulations".
3. Planning Policy Statement 9: Biodiversity and Geological Conservation issued by the Office of the Deputy Prime Minister, August 2005.
4. Page 3 of the letter (p.105 of the claimant's bundle).
5. Page 89 of the report (p.259, claimant's bundle). See [16] below for a discussion of the succeeding passage which appears to give reasons why Medway rejected that approach.
6. Page 83 of the report, (p.53 of the claimant's bundle).
7. Page 89 of the report, (p.259 of the claimant's bundle).
8. See Pt 3 of Annex One to Natural England's letter of objection to Medway dated February 3, 2010.
9. [Paragraph 2 of Pt II of Sch.4 to the EIA Regulations](#) .
10. Figure 11.6. Figure 11.5 provided an overview of approximate areas where plant species of conservation concern were located.
11. Paragraph 11.336 of the EIA.
12. W.S. Atkins: "A site investigation of the contamination of the Isle of Grain" produced for NGPH.
13. [Paragraph 3 of Pt I of Sch.4 to the EIA Regulations](#)
14. [Paragraph 4 of Pt 1 of Sch.4 to the EIA Regulations](#) .
15. [Paragraph 5 of Pt 1 of Sch.4 to the EIA Regulations](#) .
16. Figures 11.1 "Site layout and ownership boundaries".
17. When referring to these three bodies collectively, I will describe them as "consultees" although NE is a statutory consultee and both Buglife and Kent Wildlife Trust are objectors or interested parties.
18. Annex One listed the following protected species: Great crested newts, Water Voles, Badgers and Widespread Reptiles as well as Plant Assemblage. These are not relevant to the present challenge.
19. Sic. It is suggested that this passage has become garbled during the preparation of the report and that the passage was intended to read along these lines: "Medway Council is not prepared to lose the opportunity of achieving a 'once-in-a-lifetime' opportunity in order to obtain significant ecological value."

- [20.](#) Officers' Report, p.89 (p.259 of claimant's bundle).
- [21.](#) See [84] below.
- [22.](#) Conditions 3, 4 and 51–55 inclusive.
- [23.](#) Office of the Deputy Prime Minister, August 2009.
- [24.](#) Office of the Deputy Prime Minister, August 2009, paras 1 and 13.
- [25.](#) Although this statement is widely quoted as being one that was first made by Albert Einstein, there appears to be no record of when or where he wrote or stated it.
- [26.](#) [2010] EUECJ C-406/08, January 28, 2010.
- [27.](#) See [20] & [21] above.
- [28.](#) The [Town and Country Planning \(Environmental Impact Assessment \(Amendment\) \(England\) Regulations 2008](#)
- [29.](#) [Regulation 3\(2\)](#) .
- [30.](#) [\[2000\] Env. L.R. 1](#), QBD, Crown Office List at pages 19 – 20.
- [31.](#) [\[2006\] QB 764](#).
- [32.](#) [\[2007\] 1 AC 470](#).
- [33.](#) [R. \(on the application of Wells\) v Secretary of State for Transport, Local Government and the Regions \(C-201/02\) \[2004\] E.C.R. I-723; \[2004\] Env. L.R. 27](#) .
- [34.](#) See [40] & [41] above.