

## Wildlife and Countryside Link response to the consultation on the simplification of guidance in England

### 1. Introduction

- 1.1. Wildlife and Countryside Link (Link) brings together 40 voluntary organisations concerned with the conservation and protection of wildlife, countryside and the marine environment. Our members practise and advocate environmentally sensitive land management, and encourage respect for and enjoyment of natural landscapes and features, the historic and marine environment and biodiversity. Taken together our members have the support of over eight million people in the UK and manage over 750,000 hectares of land.<sup>1</sup>
- 1.2. This submission is supported by the following eight organisations:
  - Bat Conservation Trust
  - Buglife – The Invertebrate Conservation Trust
  - Butterfly Conservation
  - Royal Society for the Protection of Birds
  - The Mammal Society
  - Whale and Dolphin Conservation
  - The Wildlife Trusts
  - Wildfowl and Wetlands Trust
  - WWF-UK
- 1.3. Link welcomes the report of the review of the implementation of the Habitats and Wild Birds Directives, which re-stated the Government's commitment to proper implementation of the Directives, and concluded that they do not act as a brake on economic development.<sup>2</sup> The Directives have provided valuable protection for Europe's rarest and most threatened habitats and species for over 30 years, and their effective implementation will be vital to meeting our national, European and international biodiversity commitments. Link actively engaged in the review of the Directives, and many of our members are closely involved in the initiatives that have proceeded from it.
- 1.4. Link is concerned that the public consultation for the stocktake of existing guidance and the core guidance only ran for 8 weeks (from 11<sup>th</sup> December to 5<sup>th</sup> February), including the Christmas and New Year period. We recognise that some of the core guidance had been subject to pre-consultation, however, there is still a significant amount of new material and such a short consultation period will impair the ability of individuals and environmental groups to respond effectively to the consultation. It also fails to respect the principles of the Compact<sup>3</sup> between government and the voluntary and community sector (which remains in place alongside the new Cabinet Office Consultation

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<sup>1</sup> Wildlife and Countryside Link is a registered charity (No. 1107460) and a company limited by guarantee in England and Wales (No.3889519)

<sup>2</sup> Defra (2012) *Report of the Habitats and Wild Birds Implementation Review*, <http://www.defra.gov.uk/publications/files/pb13724-habitats-review-report.pdf>

<sup>3</sup> "Where it is appropriate, and enables meaningful engagement, conduct 12-week formal written consultations, with clear explanations and rationale for shorter time-frames or a more informal approach." The Compact (Cabinet Office 2010), para. 2.4

Principles) and the public participation pillar of the UNECE Aarhus Convention<sup>4</sup>, which requires reasonable timeframes for the public to engage<sup>5</sup>.

- 1.5. Link welcomes the stated aim of the stocktake and overarching guidance in paragraph 5. However, while it is stated that neither seek to change policy on the way the Directives are implemented – that is the effect they will have. The Directive simply provides the bare legislative framework – it is the development and application of guidance and case law (both of which occurs at the domestic and European level) that shapes the day-to-day manner in which the Directive is applied across the territory of the EU. If this guidance is published as is (and we were disappointed to note that the guidance on Article 6(4) changed little from the consultation draft to final version), it will depart significantly from EU guidance on the Directive (despite the assurance in paragraph 9 that it will “take account of” EU guidance). Link sees serious problems arising from such a divergence as developers seek to rely on one document, the SNCBs and NGOs seek to rely on another and the competent authorities try to navigate themselves through the conflicting views from either side. This will result in confusion, delay and potential legal challenges (with associated cost and delay as cases are referred to the Court of Justice of the European Union, CJEU) for interpretation. We are certain this is not what the guidance seeks to achieve and, accordingly, we urge the government to ensure that the UK guidance is fully in conformity with EU guidance on the Directive. This observation applies equally to paragraph 22 of the stocktake.
- 1.6. We recognise the benefits of simplification and rationalisation of existing guidance and the spreading of good practice (paragraph 5), however, at the moment the overarching guidance fails to signpost where such good practice exists – whether that is within the UK, other Member States or within the Community institutions. We assume signposts will be added at a later stage. Any issues or concerns about this inclusion of non-Governmental sources of guidance needs to be addressed and resolved in the spirit of transparency and collaborative working to ensure that whilst removing duplication and excessive amounts of guidance, that existing relevant, non-governmental guidance can at least be signposted.
- 1.7. Link is concerned to note that paragraph 8 raises the question as to whether current guidance encourages “excessive precaution”. Link’s response to the core guidance discusses the applicability of the precautionary principle in some detail<sup>6</sup>, however, we would reiterate that in the field of environmental protection, the precautionary principle has been raised to a constitutional principle by Article 191(2) of the Treaty on the functioning of the EU<sup>7</sup> (“TFEU”). In this field, the CJEU has emphasised the importance of the principle as a measure of the legality of Member State measures, in particular where EU legislation has expressly given effect to the principle. One of the leading decisions of the CJEU concerning Article 6 of the Habitats Directive is the *Waddenzee*

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<sup>4</sup> UNECE Convention on Access to Environmental Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters

<sup>5</sup> Aarhus Convention, Article 6(3)

<sup>6</sup> Wildlife and Countryside Link response to the consultation on Core Guidance for Developers, Regulators and Land/Marine Managers (2013), [www.wcl.org.uk/docs/Link\\_response\\_on\\_core\\_guidance](http://www.wcl.org.uk/docs/Link_response_on_core_guidance)

<sup>7</sup> Article 191(2) of the Treaty requires that EU environmental policy is based on the need for a “high level of protection” of the environment. It must be “based on the precautionary principle and on the principles that preventive action should be taken ...” to protect the environment. Although Article 191(2) probably does not have direct effect, it is a prescriptive provision of the TFEU and, as such, is one which binds all domestic courts.

case<sup>8</sup>, in which the CJEU held that the Habitats Directive “must be interpreted” in accordance with the precautionary principle in Article 191(2)<sup>9</sup>.

- 1.8. Moreover, there is no need to depart from this well-established principle of EU law. Link observes that Defra’s own review of the Directive found no evidence to support the view that the Habitats Directive - as currently interpreted in accordance with the precautionary principle - is operating as a brake on economic development<sup>10</sup>.
- 1.9. Link recognises the importance of the principles for the stocktake set out in paragraph 13, however, we believe that “accurate and consistent” also applies to the relationship between UK and EU guidance. We are also concerned to note the stocktake confirms that a large amount of existing Government / agency guidance is likely to be amended, condensed or withdrawn (paragraph 15). Some of this guidance (e.g. guidance published by the MMO on sequencing and IROPI<sup>11</sup>) is a more accurate reflection of EU guidance than the core guidance and it would be backwards step to lose it.
- 1.10. Similarly, there are certain key documents of high value (such as Natural England’s FAQs document) which, if lost, would adversely impact the effective delivery of Natural England’s message through its collaborative work with NGOs such as the Bat Conservation Trust (e.g. through the National Bat Helpline). Accordingly, we request reassurance as to the timescales over which these decisions would be made and the communications to delivery partners and stakeholders within this.
- 1.11. Link welcomes the recognition that implementing habitats legislation will continue to raise complex issues and that there will be a need for detailed technical guidance (e.g. on how to undertake assessments, or detailed legal and general guidance to support the interpretations in the overarching guidance) (paragraph 16). We look forward to commenting on such draft guidance in due course.

## 2. Consultation questions – stocktake of existing guidance

### 1. Do you agree with the principles for undertaking the stocktake?

- 2.1. Link recognises the potential benefits of collating, rationalising and simplifying existing guidance for the range of audiences for the Directive. We have concerns, however, that the process of simplification will result in important safeguards being removed and we believe this will undermine the implementation of the Directive. We raise a number of examples of this in relation to Figure 1 of the core guidance. In many cases, the “devil is in the detail” – and quite simply it is the detail stakeholders need to see.

### 2. Do you agree with the proposed new structure of the guidance?

<sup>8</sup> Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee, Nederlandse Vereniging tot Bescherming van Vogels v. Staatssecretaris van Landbouw, Natuurbeheer en Visserij* [2005] Env LR 14, (“Waddenzee”)

<sup>9</sup> *Ibid*, para 44: “in case of doubt as to the absence of significant effects ... an assessment must be carried out, [which] makes it possible to effectively ensure that plans or projects which adversely affect the integrity of the site concerned are not authorised, and thereby contributes to achieving ... the Habitats Directive ... main aim, namely, ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora”

<sup>10</sup> *Ibid*, n.2, paragraph 27

<sup>11</sup> Guidance on imperative reasons on overriding public interest under the Habitats Directive, Marine Management Organisation available at: <http://www.marinemanagement.org.uk/licensing/supporting/documents/iropi.pdf>

- 2.2. It is difficult to say with any confidence at this stage whether the proposed structure will ensure that the range of audiences seeking to rely on the Directive will be able to access the level of information relevant to them. It will be important to monitor usage of the guidance on the government website.

**3. Is the draft guidance clear? Are there aspects of the guidance which you feel could be clarified?**

- 2.3. Link foresees considerable confusion with regard to aspects of the core guidance that depart from the EU guidance (as detailed in our response to the core guidance). We urge the government to ensure compatibility with the EU guidance.

**4. Does the guidance cover everything it needs to cover?**

- 2.4. Please see comments above in relation to simplification.

**Wildlife and Countryside Link  
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