Wildlife and Countryside Link response to the consultation on Core Guidance for Developers, Regulators & Land/Marine Managers

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.[1]

1.2. This submission is supported by the following ten organisations:

- Bat Conservation Trust
- Buglife – The Invertebrate Conservation Trust
- Butterfly Conservation
- The Mammal Society
- Marine Conservation Society
- Royal Society for the Protection of Birds
- The Wildlife Trusts
- Whale and Dolphin Conservation
- 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.[2] 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. For example, in October 2012 Link responded to the consultation on draft guidance on the application of Article 6(4) of the Habitats Directive. We are, however, disappointed to note that of the eighteen substantive recommendations Link proposed, only four were reflected in the final document (and a further four partially reflected). We find this troubling as many of these recommendations were based upon the requirements of EU guidance on the Directive. As a result, sections of the UK guidance now depart quite significantly (and we would argue inappropriately) from the EU guidance despite assurance in para 9 of the Simplification Consultation document that this new guidance will take account of the EU guidance. This will undermine the consistent application of the Directive across the territory of the EU and lead to considerable uncertainty on the part of developers, statutory undertakers and competent authorities.

[1] Wildlife and Countryside Link is a registered charity (No. 1107460) and a company limited by guarantee in England and Wales (No.3889519).

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

1.5. The corollary of the above is unsound decision-making and a potential recourse to litigation (with consequent delays particularly if domestic cases are referred to the Court of Justice of the European Union (CJEU) for an interpretative ruling). We are certain this is not what the guidance seeks to achieve – and would, thus, urge the government to recognise the importance of maintaining compatibility with EU guidance.

2. Core guidance for developers, regulators & land/marine managers

Introduction

2.1 The first sentence of the introduction states that "*The EU Birds and Habitats Directives aim to protect and improve Europe's most important habitats and species*". First, it should be noted that the Directives aim to maintain and **restore** Europe's most important habitats and species. Second, Link is concerned that beyond this brief statement the importance of the Directives for nature conservation is lacking. Link would like to see emphasis of the conservation importance of Directives strengthened throughout the document, so that developers and members of the public appreciate the significance of the legislation in conservation terms. At present it is presented as a problem to overcome rather than legislation which should be embraced and is there for good reason.

2.2 As such, Link is disappointed to see habitats legislation being referred to as a "*block on development*" in paragraph 5. Such terminology discourages developers from adopting a constructive approach to EU or UK habitats legislation. We request this reference (and any other such inflections) be removed from the core guidance before publication.

2.3 Link welcomes the recognition in Paragraph 6 that habitats legislation can give rise to complex considerations and that the core guidance will be supported by more detailed guidance where appropriate. We look forward to commenting on such guidance in due course.

2.4 Paragraph 7 recognises the core guidance cannot cover every situation and recommends that it should be read in conjunction with the relevant legislation. Link believes this is an appropriate place to signpost the target audience (business and developers) to EU guidance, which should be read alongside the core guidance. We would also suggest that readers be directed to the specific relevant legislative provisions throughout the document (e.g. the Conservation of Habitats and Species Regulations 2010 (as amended) (the Habitats Regulations) Regulations 61 and 62 in respect of the HRA requirements).

3. Decision making under habitats legislation

3.1 Link welcomes paragraph 11, which reinforces the need to adopt the precautionary approach required by the Habitats Directive and that the absence of information is not a basis to assume no negative effect.

3.2 However, we are concerned that the contents of paragraph 12 seriously undermine the effective application of the precautionary principle as embodied in the Habitats Directive and advocated in paragraph 11. In our view, it is impossible for pragmatic and precautionary approaches to apply simultaneously - and any attempts to do so will lead to considerable confusion, delay and potential legal challenges as developers and regulators grapple with conflicting principles.

3.3 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[3] ("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* case[4], in which the CJEU held that the Habitats Directive "*must be interpreted*" in accordance with the precautionary principle in Article 191(2)[5]. And most recently, in the case of *Sweetman*[6], Advocate General Sharpston argues that the precautionary principle applies where there is uncertainty as to the existence or extent of risks.

3.4 Moreover, we see 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[7].

3.5 Link therefore requests the removal of any text conflicting with the application of the precautionary principle in this context. This includes the need to: "*take a pragmatic approach and seek to enable development and other relevant activities to proceed*", to "*apply a risk based approach to implementation with an aim to minimise regulatory burdens*" and to "*only seek information that is necessary to seek a view on compliance with the legislation*".

3.6 In relation to the latter, we would point out that at an early stage of the project it is not always possible to discern whether information is relevant or not. However, the application of the precautionary principle may require competent authorities or the Statutory Nature Conservation Bodies (SNCBs) to request information in order to refine its decision. This information may be deemed to be unnecessary at a later stage, but they should not be discouraged from requesting such information in the first instance. Consequential amendments in this regard will also need to be made to paragraphs 43, 68, 71 and 72 of the core guidance.

4. Section 1: Habitats Regulation Assessment (HRA) requirements
Stage 1: Screening for likely significant effects
The relationship between significant effects and site conservation objectives

4.1 Paragraph 15 states: "*The HRA requirements protect these European sites by requiring that any plan or project which may have a "likely significant effect" on a site (either individually or in combination with other plans or projects) must be made subject to an*

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3 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.

4 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")*

5 *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"

6 Case C-258/11, *Sweetman v An Bord Pleanala*

7 *Ibid*, n.2, paragraph 27

"appropriate assessment" of its implications for the site ***in view of the site's conservation objectives***" (own emphasis added).

4.2 Given the explicit requirement to consider the potential impact of the plan or project on a site's conservation objectives, it is an essential prerequisite that all Natura 2000 sites have such objectives in place. Member States are, in any event, required to establish such measures under Article 6(1) of the Directive[8].

4.3 EU Guidance also refers to the need for Member States to adopt conservation measures[9] and further duties are imposed by Article 6(2) of the Directive, which requires Member States to take appropriate steps to avoid the deterioration of natural habitats and the habitats of species as well as disturbance of the species within SACs and SPAs, in so far as such disturbance could be significant in relation to the objectives of this Directive. The obligation is wide in scope and not limited to plans or projects.

4.4 The general protection obligation established by Article 6(2) of the Directive helps to reinforce the duty imposed upon Member States to take positive action as required by Article 6(1). Article 6(2) imposes a high threshold of protection in line with the overall objectives of the Directives. This is an important factor for competent authorities to take into account when determining "significant effects" under Article 6(3) of plans and projects not directly connected to the management of the site (see below).

The threshold for triggering an Appropriate Assessment (AA)

4.5 Paragraph 21 of the core guidance states: "*For the vast majority of plans or projects undertaken in England it will be immediately clear that there is no likelihood of a significant effect*". We submit that such a general statement over-simplifies the situation. While it is clear that the vast majority of planning proposals in England will not have a significant effect on a Natura 2000 site (we note, for example, that of the 26,500 land use consultations received by Natural England annually, less than 0.5% are objected to on Habitats Regulations grounds[10]), it is likely that most medium-large plans or projects which may impact on Natura 2000 sites will require an Appropriate Assessment.

4.6 The question of whether or not the plan or project is "likely to have a significant effect" is clearly intended to screen out those projects that are benign or *de minimus* in their negative impacts upon the protected site. The obligations set out under Article 6 of the Directive require the competent authority to consider whether there is likely to be: (a) any deterioration to the conservation status of the site; and/or (b) any significant effects upon the contribution of the site to the overall objectives of the Directive? (namely its contribution to the Natura 2000 network).

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8 Article 6 requires: "*For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites*". See also the eighth recital to the Directive: "*Whereas it is appropriate, in each area designated, to implement the necessary measures having regard to the conservation objectives pursued*" and the reference in Article 1(a) to "*a series of measures required to maintain or restore the natural habitats and the populations of species of wild fauna and flora at a favourable status as defined in (e) and (i*)"

9 "*Member States have to adopt the conservation measures necessary to achieve the general aim of the directive as set out in its Article 2(1): 'The aim of this directive shall be to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies'*".

10 Report of the Habitats and Wild Birds Directives Implementation Review (March 2012) available at http://www.defra.gov.uk/publications/files/pb13724-habitats-review-report.pdf

4.7 The second limb of Article 6(3) requires assessment to be made of the adverse effects upon the "integrity" of the site. EU Guidance states that "integrity" requires the consideration of effects over the short, medium and long term and involves looking at the site's "ecological functions in the light of **its conservation objectives**[11]" (own emphasis added).

4.8 What is clear is that the term must be given meaning and significance by the competent authority so that they can determine whether development consent would lead to negative effects.

4.9 The trigger for the carrying out of an AA is a determination by the competent authority that a plan or project is "likely to" have a significant effect on the conservation objectives of the site. As stated above, the conservation framework established by the Directive establishes that these objectives should be viewed in the light of the conservation measures already put in place under Article 6(1). Where there are none, we would suggest it is necessary for inquiry to be made of the *in situ* conservation status of the site, including any positive measures necessary to ensure restoration of a favourable conservation status. In this way, scientific meaning can be brought to bear on the term "integrity" so that adverse effects can be measured against a set of indicators or conservation standard for the site. This information is necessary as a minimum even at the screening stage.

4.10 This is because it is at the screening stage that the competent authority must consider the range of effects that could pose a threat to the future protection of the site and must have sufficient information to understand their impacts both upon the site's conservation objectives and the measures in place for the day to day maintenance of the site. Where negative effects are removed by way of simple modifications to the plan or project at the design stage an AA should not be necessary under Article 6(3). However, for many plans and projects there will be a range of effects which cannot easily be determined and mitigated for at the screening stage. For instance, the impacts from a residential development may need to be considered both in terms of increased recreational users as well as effects from future drainage/water use and potential flooding events over the longer term. In these cases it is clear that the Directive intends an AA to be provided as it will only be in exceptional circumstances that full details of any likely significant effects and potential mitigation measures can be fully quantified and guaranteed to be an integral part of the proposal.

4.11 Also, as underlined by the Advocate General in *Sweetman* the term "likely to" should be understood as meaning no more than that there is a possibility of there being a significant effect[12]. The Advocate General considered that there is no need to establish the existence of such an effect. As highlighted above, although the vast majority of planning proposals in England will not have a significant effect on a Natura 2000 site, it is likely that most medium-large plans or projects which may impact on Natura 2000 sites will require an Appropriate Assessment.

4.12 In light of these factors, we submit that the Advocate General in *Sweetman* is correct to hold that the threshold for requiring an AA under Article 6(3) is intended to be a "very low one"[13].

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11 European Commission, Managing Natura 2000 sites: The provisions of Article 6 of the Habitats Directive 92/43/EEC

12 *Ibid*, n.8, paragraph 47

13 *Ibid*, n.8, paragraph 48

4.13 It therefore follows that: (i) the assessment of significant effects under Article 6(3) of the Habitats Directive requires the consideration of the conservation measures put in place under Article 6(1) of the Directive; and (ii) there may be few cases where a competent authority has sufficient information to be certain that there is unlikely to be a negative effect on the site's ecological functions, We therefore urge Defra to consider refining the wording of the first bullet point in paragraph 21 to reflect the distinction highlighted in paragraphs 4.5 and 4.11 above, namely that it is likely that most medium-large plans or projects which may impact on Natura 2000 sites will require an Appropriate Assessment.

Figure 1: Habitats Regulations Assessment (HRA) requirements

4.14 Link is concerned that in an attempt to simplify the approach to a Habitats Regulations Assessment (HRA) Figure 1 has omitted key considerations from its scope. Figure 1 is reproduced in Annex I of this response. The approach advocated in EU guidance[14] is reproduced in Annexes II and III. Stage 2 of Figure 1 omits the following safeguards enshrined in EU guidance: (i) explicit reference to the application of the precautionary principle; (ii) a clear procedural step from mitigation measures to the AA report; and (iii) explicit reference to the requirement to consult relevant bodies in order to reach an objective conclusion as to adverse impacts on the integrity of the site.

Is the development or activity a "plan or project"

4.15 Link welcomes the recognition in paragraphs 23-26 that while the Habitats Directive does not define a plan or project, it should be taken to have broad meaning to cover a wide range of activities. This approach correctly reflects the established case-law of the domestic and European Courts[15].

4.16 Paragraph 27 advocates no formal need for consideration under the HRA requirements until just before early stage plans or projects are formally adopted or enacted. We recognise the need for flexibility in this respect, however, Link believes that an AA should be considered as soon as there is a reasonable prospect of a plan or project proceeding – not just prior to the moment of adoption. We therefore recommend omitting the word "just" from the second sentence of paragraph 27.

The likely significant effects decision

4.17 Link welcomes the recognition in paragraph 29 that the likely significant effects decision must be applied on a precautionary basis, and a plan or project must be assumed to have a likely significant effect unless such effects can be ruled out (as discussed in paragraphs 3.1-3.5 above).

4.18 Link recommends the reference to the potential benefits of involving the relevant SNCB(s) in assessing significant effects in paragraph 31 of the core guidance be strengthened as follows: "*However, it is encouraged to do so in order to improve the robustness of its decision … later stages of consideration*".

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14 European Commission (2001) Assessment of plans and projects significantly affecting Natura 2000 sites: Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC

15 See, for example, Case C-127/02 (*Waddenzee*), *Ibid*, n.4, Case C-50/09 *Commission v Ireland*, Case C-256/98 *Commission v France*, Case C-6/04 *Commission v UK* and *R (on the application of Akester and another (on behalf of the Lymington River Association)) v Department for the Environment, Food and Rural Affairs and another* [2010] EWHC 232 (Admin)

Assessing effects

4.19 Link is concerned that the use of the phrases "simple assessment" and "brief consultation" undermine the importance of a robust screening process (paragraph 34). We would recommend alternative wording that reflects the need to make a suitably informed and scientifically rigorous decision.

4.20 Link does not support the assertion in paragraph 34 that: "*As far as possible, the competent authority should seek to rely on existing information and expert opinion at the screening stage, rather than require detailed new evidence to be gathered …".* As discussed in paragraph 3.6 (above), it is not always possible to discern whether information is relevant or not at an early stage of a project. However, the application of the precautionary principle may require competent authorities or the SNCBs to request information in order to refine its decision. This information may be deemed to be unnecessary at a later stage, but they should not be discouraged from requesting such information in the first instance. We also note this concern in relation to paragraph 45 of the core guidance.

4.21 Paragraphs 34 and 35 refer to the consideration of conservation objectives in the assessment process. We refer to comments in paragraphs 4.1-4.15 of this response.

Deciding whether effects are "significant"

4.22 Paragraph 36 provides some examples of site impacts that may not be considered "significant". Link would advocate caution in this respect. Once again, it may be an appropriate place to signpost EU guidance which goes into more detail on this aspect[16] or to encourage competent authorities to consult the SNCB(s) (and other bodies as appropriate) in order to assess whether impacts are significant or not (as is the case in paragraph 38 of the core guidance).

4.23 Link welcomes the clarification of "in-combination" effects and a description of the process should a number of applications come in at roughly the same time. However, to discount plans or projects for which no formal application has been submitted contradicts earlier statements in paragraph 27 regarding early dialogue and screening. We believe the same approach should be adopted when assessing in-combination effects, i.e. that all plans or projects that have been applied for, or progressed to a reasonable degree of certainty, should be considered together. In particular, Table 3 limits the scope of consideration for in-combination effects to 'proposals where…consent has been applied for or granted', and states that 'it is not necessary to take account of plan and projects for which there have been no applications under an approvals process'. This text diverges significantly from the EU guidance (footnote 13), which states that, when identifying all projects / plans that might act in combination it is necessary to consider "any other effects likely to arise from other proposed projects or plans". The guidance requires consideration of the likelihood of a project coming forward, rather than limiting consideration to projects close to adoption or already adopted. Adopting the text in Table 3 (1st and 2nd bullets) could lead to the exclusion of major projects, to which the government is committed, from being considered in an 'in-combination' assessment - despite being almost certain of being adopted - including, for example, projects: (i) in a command paper; (ii) in a National Policy Statement (e.g. the nuclear NPS which lists 8 sites as potentially suitable sites); (iii) in national, regional or local plans which have not, as yet, been submitted to a consenting authority; and/or (iv)

[16] European Commission (2001) Assessment of plans and projects significantly affecting Natura 2000 sites: Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC, pages 20-24.

which are going through pre-application consultation as required for all major or large scale infrastructure projects (i.e. all National infrastructure Directorate projects). This is clearly contrary to the intention of the Directive, and EU guidance.

Stage 2: Appropriate assessment
General approach to assessment

4.24 Link recommends the reference to the appropriateness of consulting third parties with relevant expertise in agreeing what information needs to be gathered in paragraph 44 of the core guidance be strengthened as follows: "*… the situation changes. It would also be helpful to consider at this stage whether there are any other third parties, including environmental and other civil society groups, which may have relevant expertise in agreeing what information needs to be gathered, e.g. to inform the process and potentially reduce the risk of delay later in the process*."

Mitigation

4.26 Paragraphs 52-59 of the core guidance concern mitigation. We are concerned that, as currently drafted, the guidance fails to provide clarity on the stage at which mitigation should be considered in the assessment process, how that assessment process is to be done and how mitigation needs to be considered within it. We set out our reasoning below.

4.27 In a series of cases in England and Wales, the Courts have ruled on mitigation at the screening stage of assessment. The most pertinent cases are those of *Hart*[17] and *Hargreaves*[18]. However, it should be noted from the outset that these are exceptional cases which turned on particular circumstances and that, in our view, the judgments (both at first instance) should not be taken to apply to development proposals in general.

4.28 In the case of *Hart*, [the then] Justice Sullivan recognised strict conditions for the consideration of mitigation at the screening stage, namely that full information had been provided by the developer on not only the details of the proposal but also all the possible effects that may occur as a result ("*…fully recognised, assessed and reported the effects, and have incorporated appropriate mitigation measures into the project…*[19]"). In effect, it could be reasoned that because the application was accompanied by full information on the mitigation measures being proposed (including how those measures would be carried out, legally secured and with robust evidence as to their efficacy) the requirements for an AA were satisfied in any event.

4.29 The judgment goes on to state that "…*If the competent authority does not agree with the proponent's view as to the likely efficacy of the proposed mitigation measures, or is left in some doubt as to their efficacy, then it will require an appropriate assessment because it will not have been able to exclude the risk of a significant effect on the basis of objective information*." (paragraph 76). Justice Sullivan no doubt took his reasoning for such an approach from the judgment of the CJEU in *Waddenzee*, in which it was held that: *"...the first sentence of Article 6(3) of the Habitats Directive must be interpreted as meaning that any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded,* ***on the basis of objective information****, that it will have a significant effect on*

17 *Hart District Council* [2008] EWHC 1204
18 *Hargreaves* – CO/692/2011, paragraph 151
19 *Ibid*, n.17, paragraph 61

that site, either individually or in combination with other plans or projects." (paragraph 45, own emphasis added). Link would argue that such doubt would exist if one of the SNCBs and/or other bodies with relevant expertise (i.e. not only the competent authority) maintained any objection as to the efficacy of the mitigation measures proposed.

4.29 In *Hargreaves*, it was held that: "*It is common ground that the reasoning that I have set out above in relation to the EIA Directive and the EIA Regulations concerning the meaning of "likely" and the approach to be taken in relation to mitigation is the same under both Directives and the applicable domestic Regulations*". Link notes that in *Hargreaves* the proposed mitigation measures had been dramatically improved after the first two attempts for permission had been refused and at the time of the appeal were agreed to by Natural England, the local planning authority and one of the main environmental objectors, the RSPB. All parties concluded that there would be no adverse effect on the integrity of the SPA as a result of the improved mitigation measures. The judge placed a large amount of emphasis on this point when deciding that it was appropriate for no AA to be carried out.

4.30 As a general point, Link has concerns about the approach of the Courts in these cases. We set out our rationale below. First, EU Guidance[20] notes a clear separation between the procedures and assessments required by the EIA and Habitats Directives and we therefore question the validity of simply assuming that if it is appropriate to consider mitigation at the screening stage of EIA it will automatically be appropriate to do so at the screening stage of AA (we expand upon this later). This concern is reflected by the flow diagram in EU guidance relating to Stage two of the AA process[21], which clearly confirms that even if mitigation measures will cancel or minimise the adverse impacts, an AA must still be undertaken (see Annex III of this response).

4.31 Revised EU Guidance[22] also underlines the point that consideration of mitigation is more appropriate during the assessment stage of a plan or project. It states: "*The assessment provides for the incorporation of the most effective mitigation measures into the plan or project concerned, in order to avoid, reduce or even cancel the negative impacts on the site*". Thus, EU guidance confirms that mitigation has no place at the screening stage in Habitats Directive cases.

4.32 We also consider that it is more likely than not that there will be a possible adverse effect if mitigation is required and that in the absence of an assessment relying upon the "best scientific evidence" (as per *Waddenzee*), it is inherently uncertain whether a plan or project has identified the most effective mitigation for protecting the ecological integrity of the site.

4.33 Moreover, in the Levett report (commissioned by Defra for the purposes of formulating guidance), reference is made to guidance set by the Institute of Ecology and Environmental Management's (IEEM) for its members. The guidance explains how ecological impacts can be identified and evaluated, explaining the need to make reference to the magnitude, extent, duration, reversibility, timing and frequency of the expected impacts associated with the plan. According to IEEM "*this makes it possible to determine whether or not mitigation or the reversal of an adverse trend is likely to be*

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20 EU Assessment of Plans and Projects significantly affecting Natura 2000 sites: Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC, para 2.3

21 *Ibid*, page 26

22 Guidance document on Article 6(4) of the "Habitats Directive" 92/43/EEC: Clarification of the concepts of Alternative Solutions, Imperative Reasons of Overriding Public Interest, Compensatory Measures, Overall Coherence: Opinion of the Commission, 2007/2012

possible". The report also notes that it is rarely possible to fully assess in combination effects on a site without the degree of information referred to by the IEEM guidance. This degree of information, it argues, is important to understand how a plan might interact with other plans once implemented.

4.34 Finally, Link is also concerned that the taking into account of mitigation at the screening stage (i.e. pre-application) could lead to a situation in which developers seek to argue that there is no likely significant effect on site integrity (due to the mitigation measures being proposed) and that a decision as to authorisation can then be made – thus inappropriately avoiding the need to address the requirements of Article 6(4) of the Directive that would necessarily follow if it were not possible to ascertain there is no adverse effect on site integrity, including the need to consider alternative solutions, satisfy the IROPI "test" and address compensatory measures. We understand that it is becoming standard practice in the UK for developers to propose mitigation and Article 6(4) requirements up front at the screening stage. While we agree that developers should be applauded for providing information to inform discussions leading to an application being made, there is a clear sequencing procedure set out in EU guidance which reflects the requirements of the Directive and enables competent authorities to ensure that all of the Article 6(4) requirements have been properly met. Link therefore urges the government to ensure that the UK guidance reflects the sequencing advocated in the EU guidance.

4.35 Paragraph 52 of the core guidance states: "*The appropriate assessment should include consideration of the effects of any mitigation measures forming part of the plan or project. Mitigation is not specifically mentioned in habitats legislation but it should be considered* ***from the earliest stages of (and during) the assessment*** *to help avoid and reduce potential effects on European sites. As far as possible, applicants should incorporate mitigation into proposals before the application is made, as this can help speed-up the regulatory process*" (own emphasis).

4.36 We assume this wording was conceived with the current case law in mind (i.e. that "from the earliest stages" can be taken to mean that mitigation can be considered at the screening stage). However, the situation is then confused by Figure 1 of the core guidance (reproduced in Annex I), which shows mitigation at play in stage 2 of the AA process. It is therefore unclear whether the guidance is advocating: (i) that mitigation measures should be considered at stage one or stage 2 of the AA process (or indeed both); and (ii) that the consideration of mitigation at stage 2 can obviate the need for an AA. In order to remove any confusion and restore consistency with the EU position we recommend the core guidance is amended to reflect the EU guidance.

4.37 We recognise that the SNCBs may have a role in helping competent authorities to identify mitigation measures. This role must, however, be seen in light of the SNCB's primary function, which is to ensure that the natural environment is conserved, enhanced and managed[23].

Other comments
Environmental Impact Assessment and Appropriate Assessment

4.38 The core guidance makes reference to the EU Environmental Impact Assessment (EIA) Directive (e.g. paragraphs 17 and 25). Link believes that it would be helpful for the guidance to explain the key differences between these two distinct (but occasionally overlapping) EU instruments.

[23] The primary functions of the SNCBs are laid out in the Natural Environment and Rural Communities Act 2006.

4.39 The objectives of the Habitats and Species Directive are significantly different to those of the EIA Directive. Specifically, there is no need to consider conservation objectives when determining environmental impacts under the EIA regime. This may appear obvious but (as seen above) recent rulings of the Courts in England and Wales fail to give this fact sufficient weight - and instead approach both regimes in the same way when giving consideration to the need for further assessments at the screening stage.

4.40 We have noted above that consent for development likely to have an adverse effect on the integrity of a Natura 2000 site is prohibited, except in those instances where the Article 6(4) tests are passed. Further, the CJEU has ruled that adverse effects must be considered in the light of the overall ecological integrity of the site which must be determined with reference to the precautionary principle and the best scientific evidence available[24]. In addition, *Sweetman* demonstrates that the Directive establishes very clear conservation objectives and thresholds for the standard of protection to be achieved. This standard is a high one.

4.41 By contrast, the purpose of the EIA Directive is to avoid, reduce and mitigate against negative environmental impacts of certain projects. As others have acknowledged it is even possible, where it is assessed above the significance threshold, for an EIA project to be consented regardless of significant adverse effects. Such a result is never permissible however under the Habitats Directive in the light of the prohibition against adverse effects upon the integrity of the protected site[25]. This fact is often insufficiently appreciated.

4.42 The UK Courts tend to disregard the fact that the threshold for triggering an AA is a very low one. Instead, they have sought - by reliance on mitigation measures - to lower the threshold for triggering an AA in a way never intended by the Directive. This is incorrect in our view and we urge the government not to reflect such an approach in its core guidance – not least because it is highly probable that the correct approach will in due course be confirmed by the CJEU in the case of *Sweetman*.

5. Section 3: Protected species requirements
Deciding whether to apply for a licence

5.1 Link suggests that the first bullet point of paragraph 115 be reworded to say: “If there is a negligible or no chance of an offence being committed because protected species are not present, or the activity would cause them no harm, the activity can proceed without a licence.”

5.2 Link does not feel that it is appropriate for a person, who may not have sufficient ecological expertise, to (a) assess the likelihood of committing an offence (b) consider the need for mitigation measures and (c) decide whether to apply for an European Protected Species (EPS) Licence. There needs to be clear guidance on whether one has to apply for a license to carry out certain projects or not, it should not be up to the person who wants to carry out the plan or project to decide whether a licence is needed.

5.3 Test 3 of Figure 2 states that “The action authorised must not be detrimental to the maintenance of the species at favourable conservation status in its natural range”. Link suggests that this also be reflected in the second bullet point of paragraph 115, as a reminder that this is the necessary outcome.

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24 *Ibid*, n. 4
25 *Ibid*, n.4

Assessing the risk of offence

5.2 Link advocates caution with regard to the second bullet point under paragraph 177. The current wording suggests that it would normally only be possible to commit an offence if the protected species (or a habitat that it uses, such as a resting place or breeding area) is present near the activity being undertaken. However, we would point out that noise can carry a very long way under water. Link therefore suggests a qualification is added with respect to the marine environment.

Offences

5.3 Link welcomes paragraph 122 of the core guidance, which confirms that "deliberate" extends beyond mere intention and includes subjective recklessness. This reflects the established case-law of the CJEU, which has given "deliberate" a very broad construction - to the effect that it is not a defence that the disturbance of a species was the unintended result of the pursuit of other purposes see (see *Commission v Ireland*[26] and *Commission v Spain*[27]).

Imperative reasons of overriding public interest (EPS only)

5.7 The core guidance sets out the meaning of "IROPI"; this should be amended, in accordance with the 2007/2012 guidance and for maximum clarity, as follows:

"Imperative" should be defined as where a plan or project is "indispensable" rather than "necessary". This would then follow the EU guidance, which sets a higher threshold through its use of "indispensable".

The guidance fails to recognise, and give sufficient emphasis to, the fact that it is the "public interest" associated with a plan or project that must be both "imperative and 'overriding". Disconnecting "public interest" from "imperative" and "overriding" runs the risk that a plan or project could meet the IROPI test if there is simply a public interest element. This would clearly be a lower threshold than the Directives set. The 4th recital to the Habitats Directive confirms this point in referring to the "community's natural heritage", which it is necessary to conserve at a "community level". Local and often regional public interest will therefore not be sufficient to meet the IROPI test.

5.8 Link also has concerns that the interpretation in paragraph 33 suggests that anything with a social or economic gain, however marginal or localised, such as maintenance, is seen as having a strong case in demonstrating IROPI. Whilst consideration for social and economic aspects are acknowledged as a required part of the process, this interpretation appears to change the emphasis to one of a presumption in favour of activities being licensable and would run the risk of being open to challenge in the interpretation of the Habitat Directive, particularly in light of the in-combination (and cumulative) impacts and its effect on favourable conservation status.

Activities for socio-economic purposes (wild birds only)

5.9 Link is concerned to note the contents of paragraph 135 of the core guidance, which states: "*For example, the offences relating to disturbing certain birds or harming nests only apply during the nesting / breeding season and (provided the activity does not kill or injure a bird) it will often be possible to undertake activities at another time of year*". This

[26] Case C-183/05 Opinion of Advocate General Léger at paragraphs 60 to 61 and judgment of the Court at paragraph 36

[27] Case C-221/04, paragraphs 70 to 74

text requires clarification in order to comply with the judgment of the CJEU in *Commission v France*[28], which held that the prohibitions set out in Articles 5(b) and (c) of the Wild Birds Directive apply without any limitation in time with respect to migratory species. In this case, the Court held that an uninterrupted protection of the birds' habitat is necessary since many migratory species re-use each year nests built in earlier years. To suspend that protection throughout any particular period of the year cannot be considered to be compatible with the abovementioned prohibition. We therefore request this text be revised.

Test 2: Alternatives

5.10 Link is concerned at the lack of definition or clarity around the term 'prohibitively expensive' as used in paragraph 139. Without guidance this could be interpreted as any increase in cost in excess of the original planned work prior to EPS being taken into consideration.

Test 3: Favourable conservation status (EPS only)

5.11 Link is concerned about the statement in paragraph 143 that a licence would be easier to justify for species populations that are healthy and unlikely to suffer detrimental effect. Whilst initially appearing to reflect common sense, this needs a definition of 'healthy' for clarity. This would need to take into consideration species which are currently increasing but may still be a long way from recovering from highly significant declines. The cumulative effect of multiple assumptions of unlikely to suffer detrimental effect should also be considered.

5.12 Paragraph 143 states that an assumed relative ease of justifying a licence through the favourable conservation status test would also apply if the population was '*healthy locally but less so at the national or regional level'.* In addition to the concerns outlined in the point above, this is to ignore the landscape scale use and seasonal and life cycle movements of some EPS across what would be deemed at least a regional scale and that to such species these descriptive scales of geographical coverage are an artificial anthropogenic division of what is a functioning whole.

5.13 Link has serious concerns about the statement within paragraph 143 with regard to it being possible '*to grant licences for activities affecting species in an unfavourable conservation status, provided it does not undermine the overall objective of reaching favourable conservation status in the species' natural range'.*

This clearly has potentially serious implications for the Government's commitment to halting and reversing the decline of our most vulnerable and threatened species. Certainly a definition of the interpretation of the 'species natural range' would need to be provided. As would the process by which the wide range of licensed projects that alone might not undermine the overall objective of reaching favourable conservation status but in combination would be highly likely to would be taken into consideration before individual decisions were taken.

Post-licence monitoring and action obligations

5.14 When describing monitoring obligations in paragraph 144 the example given relates to "*the effects of a plan or project to check whether the assumptions on which the licence*

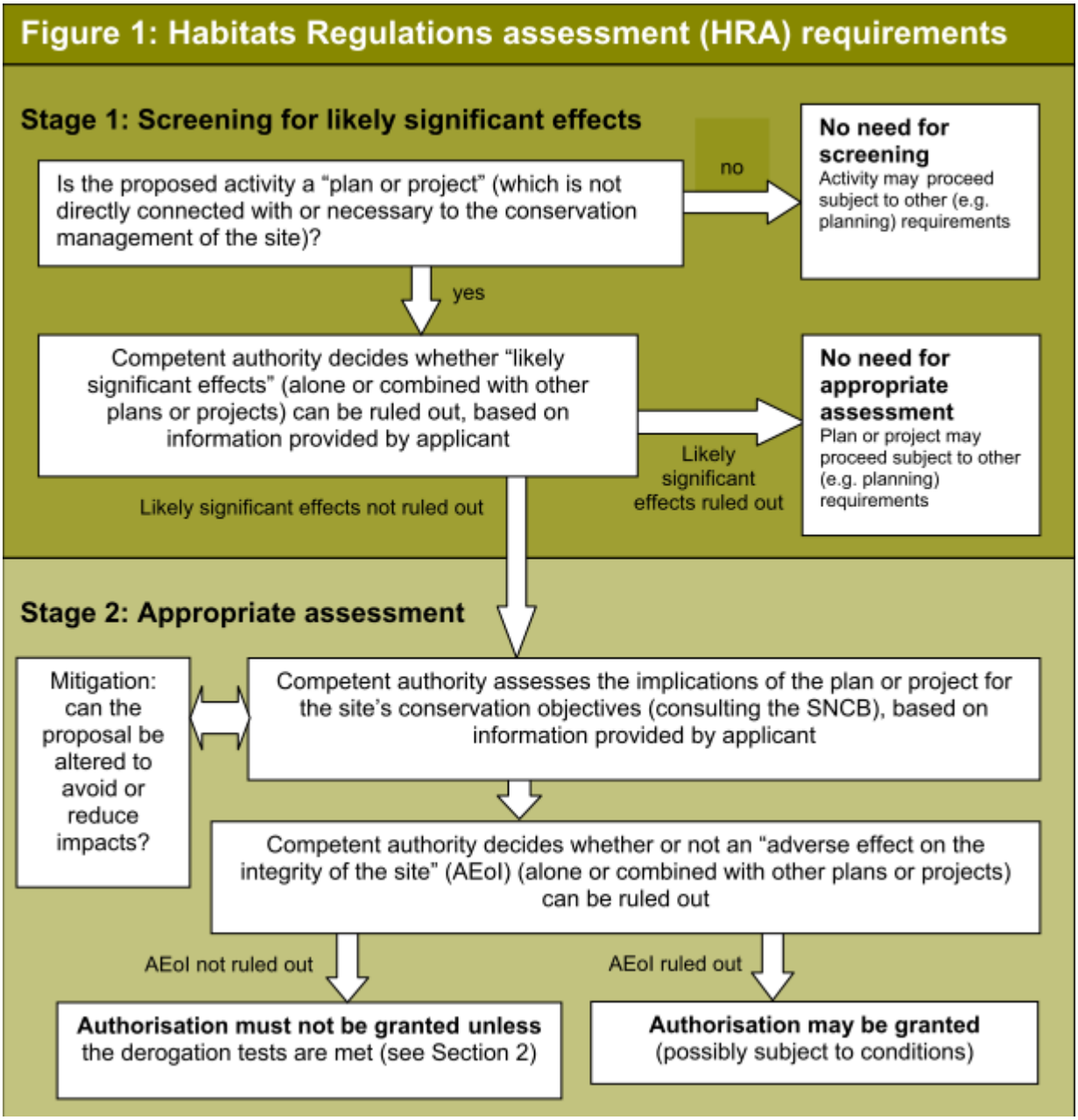
[28] Case C-252/85

was based hold true in practice, and that if not, the situation is recognised and brought to the attention of the licensing body if necessary". Link wishes to emphasise the importance of all monitoring being reported. This is to enable the combined impact of licenses to be assessed and to address another important recommendation from the Habitat's Directive, with regard reviewing the effectiveness of mitigation.

Wildlife and Countryside Link
February 2013

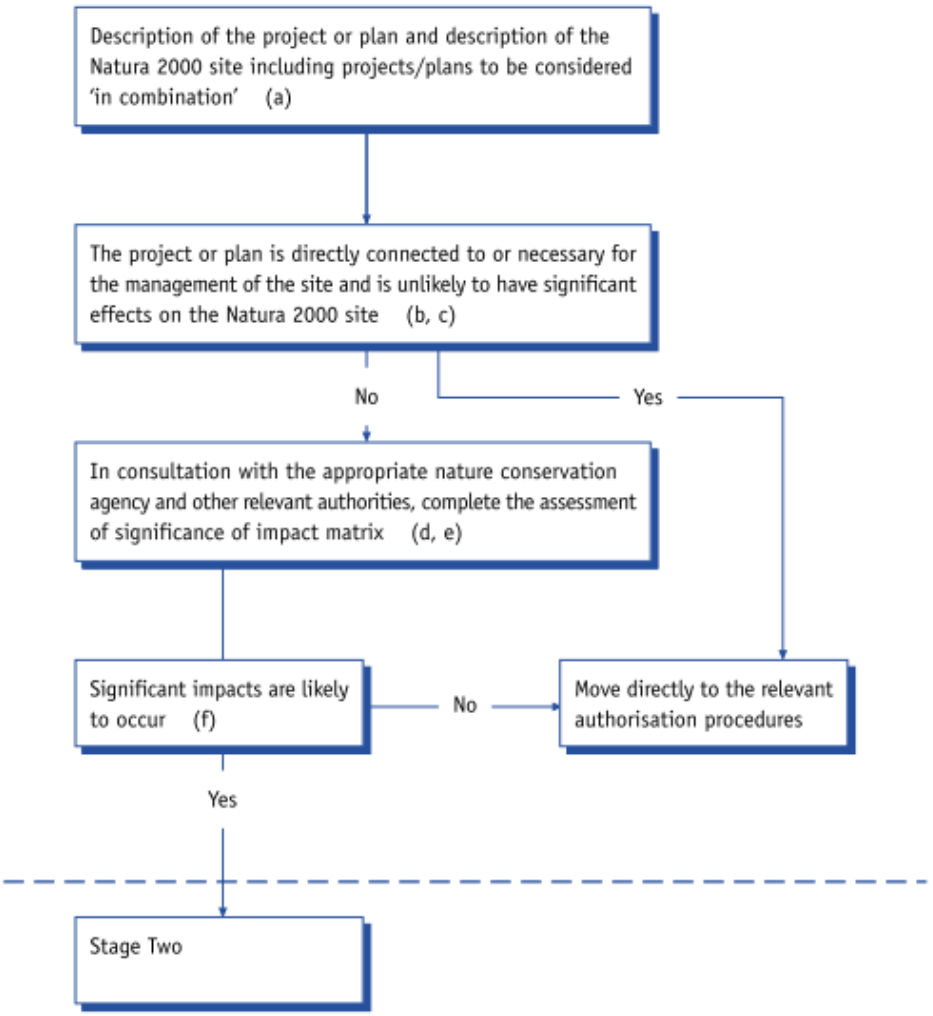
Wildlife and Countryside Link
89 Albert Embankment, London, SE1 7TP
W: www.wcl.org.uk

Annex I – Core guidance Figure 1: Habitats Regulations assessment (HRA) requirements



Annex II – Stage One: Screening

Stage One: Screening



Notes

(a) In order to carry out an assessment of the project or plan, it is first necessary fully to characterise the project or plan and the receiving environment (see Section 3.1.4 below).

(b) The assessment must address effects from other plans/projects (existing or planned) which may act in combination with the plan/project currently under consideration and generate cumulative effects (see Section 2.5 above).

(c) Where a plan or project is directly connected to or necessary for the management of the site, and is unlikely to have significant effects on the Natura 2000 site, appropriate assessment is not required (see MN2000, paragraph 4.3.3).

(d) Institutions vary from Member State to Member State. The institution to be consulted may be the one responsible for the implementation of the habitats directive.

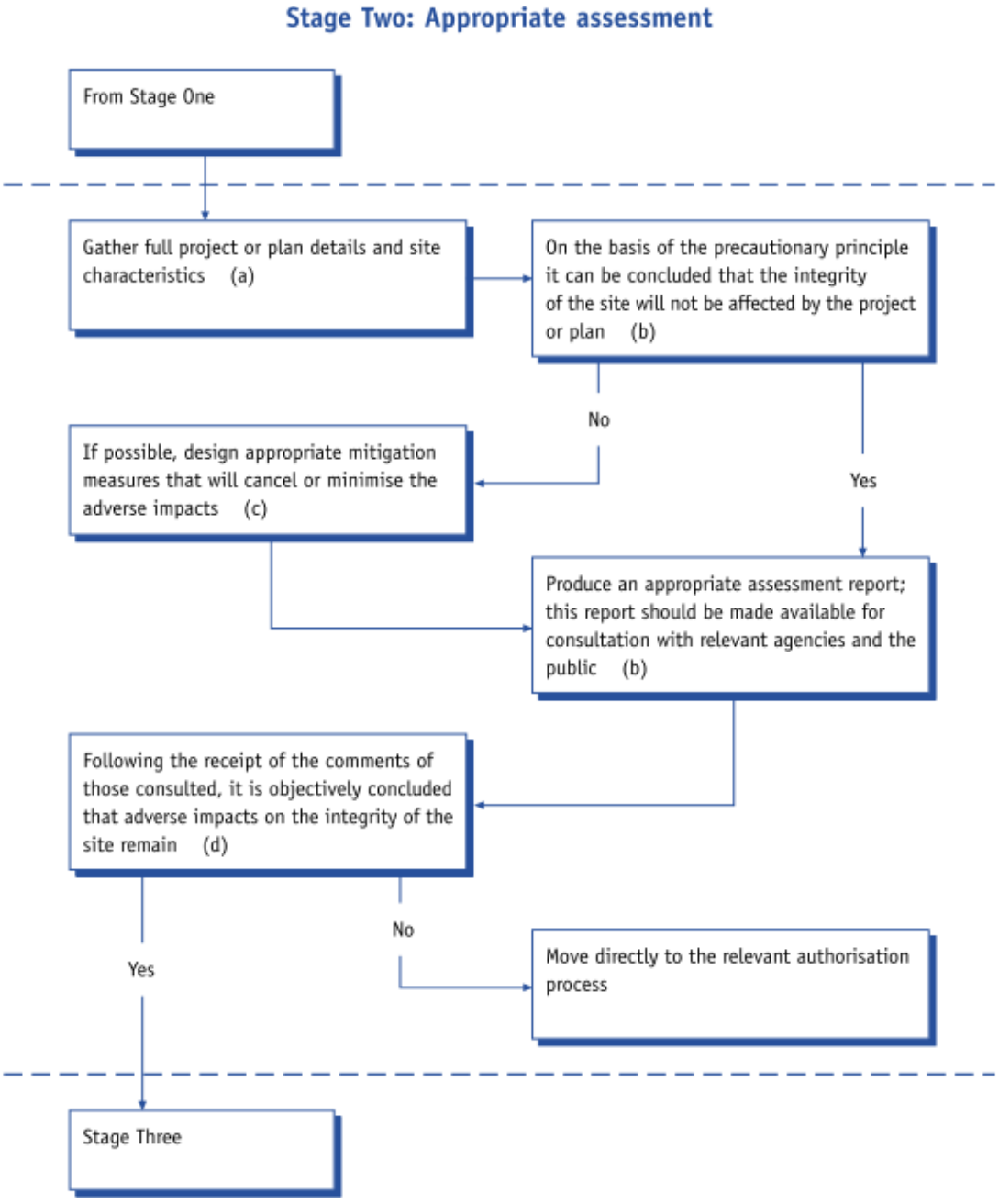
(e) Assessment of significance (see Section 3.1.5 below).

(f) This evaluation is made using the precautionary principle.

Stage One outputs: Screening matrix (Figure 1)

Finding of no significant effects report (Figure 2)

Annex III – Stage Two: Appropriate Assessment



Notes

(a) This may make use of information gathered in Stage One, although it will also require more detailed information (see Sections 3.2.2 and 3.2.3 below).

(b) This assessment must be made on the basis of the precautionary principle (see Section 3.2.4 below).

(c) It is for the competent authority to determine what mitigation measures will be required (see Section 3.2.5 below).

(d) Make use of the checklist in Box 10 below.

Stage Two outputs: Appropriate assessment: Mitigation measures (Figure 3)
Appropriate assessment report (Figure 4)