

Wildlife and Countryside Link submission to the Defra Review of the Implementation of the Habitats and Wild Birds Directives

Wildlife and Countryside Link (Link) brings together 37 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 690,000 hectares of land.¹

This submission is supported by the following 21 organisations:

- Amphibian and Reptile Conservation
- Badger Trust
- Bat Conservation Trust
- Butterfly Conservation
- Buglife – The Invertebrate Conservation Trust
- Friends of the Earth England
- The Grasslands Trust
- Hawk and Owl Trust
- Humane Society International
- The Mammal Society
- Marine Conservation Society
- Plantlife
- People's Trust for Endangered Species
- Pond Conservation
- Royal Society for the Protection of Birds
- Salmon & Trout Association
- Whale and Dolphin Conservation Society
- Wildfowl & Wetlands Trust
- The Wildlife Trusts
- Woodland Trust
- WWF-UK

1. Summary and recommendations

1.1 The Habitats and Wild Birds Directives (the Nature Directives²) have provided valuable protection for Europe's rarest and most threatened habitats and species for over 30 years. In doing so, they have played an important role in securing vital ecosystem services benefiting human well-being. This includes providing clean water, regulating climate through carbon storage, flood prevention and recreation.

1.2 Effective implementation of the Nature Directives will be required if we are to meet our national and international biodiversity commitments.

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

² EU Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora and EU Directive 2009/147/EC on the conservation of wild birds (codified version)

- 1.3 The Habitats Directive regime for the protection of Natura 2000 sites and European Protected Species (EPS) provides a practical framework for sustainable development. It applies a set of tests to all activities and developments to ensure that all those which do not adversely affect sites and species of European importance may continue, and that those which cannot be progressed without such effects are only permitted if and when strict tests are passed (to ensure that such damage is unavoidable, is warranted by the importance of the development or activity and can be compensated for). Too often presented as a barrier to socio-economic activity, the Directives instead provide a key test for sustainable development.
- 1.4 The transposition of the Birds and Habitat Directives, although incomplete, is very accurate, and we find no evidence of gold-plating.
- 1.5 In respect of both Natura 2000 sites and EPS, key flaws in implementation are associated with data and evidence gaps, lack of clarity or engagement in process, and lack of competence and/or capacity in relevant organisations.

Recommendations

- 1.6 To address the issues identified in our submission, and to improve implementation of the Nature Directives in England in ways that benefit both nature conservation and facilitate more streamlined development, we recommend that:
 - The Government recognises the importance of the Nature Directives in delivering healthy ecosystems and biodiversity, specifically the Government's commitments to the Convention on Biological Diversity (CBD) and the EU Biodiversity Strategy, and their commitments in the *The Natural Choice* and *Biodiversity2020*.
 - The Government acknowledges the valid role of the Habitats Directive regime for the protection of Natura 2000 sites and EPS as a key test for sustainable development. Following on from this, it should also acknowledge the regime's role in highlighting the very few cases where a poorly conceived proposal would result in damage on a scale which cannot be justified by the proposal's public interest benefits.
 - The Government should take this opportunity to restate its commitment to the conservation of sites and species of European importance, to promote the value of these natural assets (both intrinsic and economic), to promote best practice solutions in the handling of development which may impact upon these and other biodiversity assets, and to increase pressure upon those developers and competent authorities which fail to embrace best practice approaches.
 - The Government focuses on win:win solutions which will deliver substantial improvements in the implementation of the Habitats Regulations in respect of both development and nature conservation:
 - As important as the handling of the Habitats Regulations process itself is the stage in the development process at which environmental considerations in general, and the Habitats Regulations in particular, are considered. If, as is the case for technical and economic factors, environmental considerations were considered from the outset many impacts (and the associated need for information and assessment etc.) could be at best avoided and at worst substantially reduced.
 - Data and evidence deficiencies present a barrier to both effective conservation and effective regulation: gaps should be prioritised and addressed (including the securing of effective and accessible post-construction monitoring data to facilitate a move from

a precautionary to a more evidence-based approach to impact and assessment and decision making)

- The failure by the UK to define favourable conservation status for habitats or species (both at national and appropriate local/site scales), and an associated lack of clarity regarding the conservation objectives/status against which impacts are to be considered, is a related and significant issue which locks decision-makers into a precautionary approach to decision-making. This should be addressed as a matter of urgency, in order to facilitate evolution towards a more evidence-based approach to decision-making in respect of both EPS and Natura 2000 sites.
- Clear and authoritative guidance is essential, and is desired by developers, statutory bodies and NGOs alike. Relevant guidance should be streamlined, improved and updated, and key gaps in current guidance should be addressed.
- There are many examples of innovation and best practice, a number of which involve adoption of a strategic approach to planning and to avoidance, mitigation and (where appropriate) compensation of impacts. These should be promoted and their lessons should be applied across the board.
- Capacity to engage with Habitats Regulations process amongst developers, competent authorities and Natural England (as well as other stakeholders) in terms of resources and relevant legal and ecological expertise is key to the effective application of the Habitats Regulations to development, and thus to achieving the best possible outcomes for both nature conservation and sustainable development. Resources are required to secure this, and standards and knowledge need to be raised, reviewed and enforced within the private sector, local authorities and in Natural England.

1.7 In respect of Natura 2000 sites, a major single cause of uncertainty and risk for developers and investors is a lack of clarity about the location and sensitivities of sites. Significant steps towards delivery of a coherent network of sites (in particular in the marine environment) are therefore required as a matter of urgency.

1.8 In respect of EPS there is a risk of a mismatch between the requirements for planning consent and those for gaining a licence. We would therefore recommend that the process for dealing with EPS licensing in the context of planning permission should be reviewed. We also recommend that EPS enforcement and sentencing be reviewed.

2. Introduction

2.1 Link welcomes the opportunity to submit evidence to this review. We also welcome the support that the Secretary of State gave to achieving the aims and maintaining the integrity of these Directives at the launch of the review.

2.2 The Nature Directives have provided valuable protection for Europe's rarest and most threatened habitats and species for over 20 years.^{3 4} In doing so, they have played an important role in securing vital ecosystem services benefiting human well-being. This includes providing clean water, regulating climate through carbon storage, flood prevention and recreation.

2.3 It is clear from *The Economics of Ecosystems and Biodiversity*⁵ and the UK National Ecosystem Assessment⁶ that the natural environment is providing us with a vital range of services that

³ Donald P et al (2007), International conservation policy delivers for birds in Europe. *Science*, 317:810-813 and Dodd, A (2008) EU Nature Directives: rights, responsibilities and results. *Environmental Law and Management*, 20:242-243.

⁴ Maclean, N. (ed.) 2010. *Silent Summer. The State of Wildlife in Britain and Ireland*. Cambridge University Press.

⁵ UN, 2010, *The Economics of Ecosystems and Biodiversity*: <http://www.teebweb.org/>

⁶ UNEP-WCMC, 2011, *UK National Ecosystem Assessment*: <http://uknea.unep-wcmc.org/Home/tabid/38/Default.aspx>

underpin our economy and our well-being. In many cases these benefits are undervalued, but in spite of this a recent assessment of the benefits of Sites of Special Scientific Interest (SSSIs) (which underpin all terrestrial Natura 2000 sites in England) demonstrated that: targeted action and investment in bringing these sites back into good condition delivers a wide range of benefits which are highly valued by the public; every £1 spent on maintaining SSSIs delivers benefits to society worth over £8, and; that the higher levels of protection from development and land use change afforded to Natura 2000 sites in particular enhances the conservation benefits and ecosystem services that these sites deliver.⁷

- 2.4 In addition, we have a clear responsibility to conserve threatened species and habitats. A European survey of attitudes to biodiversity⁸ showed that 90% of UK respondents agreed that halting biodiversity loss is a moral obligation, and in the latest EU barometer survey 73% of UK respondents agreed that protection of the environment can boost economic growth.⁹
- 2.5 Effective implementation of the Nature Directives will be required if we are to meet our international biodiversity commitments. The implementation of the Directives is an explicit goal of the European Biodiversity Strategy¹⁰, and the Directives will also play a key role in delivering against Aichi targets 11 and 12 that were agreed as part of the CBD Strategic Plan at Nagoya in 2010. For example, the Global Strategy for Plant Conservation was endorsed by the UK Government as part of this Plan; the Important Plant Areas (IPAs) programme sits at the heart of the GSPC and in England 56 IPAs are protected under the Habitats Regulations as part of the Nature 2000 Network.
- 2.6 The Nature Directives will also play a pivotal role in helping to deliver outcomes 1, 2 and 3 of the *Biodiversity 2020*,¹¹ not least because of the significant overlap between EPS and Natura 2000 habitats and species with the priority species and habitats in England. However, despite the valuable role that the Nature Directives have played in protecting biodiversity, particularly the importance of the Natura 2000 network in conserving some of our most important sites, nature is still in trouble. In England, the latest assessment in 2008 showed that 18 out of 42 priority habitats and 120 out of 390 priority species were in decline.¹² When the UK last reported on its implementation of the Habitats Directive in 2007 it found that of species listed under the Directive only 26% were in favourable conservation status, and 18% were improving; in relation to habitats, a mere 5% were in favourable condition, although 48% were considered to be improving.¹³ We need a step change if we are to meet our 2020 mission to halt overall biodiversity loss.
- 2.7 In seeking improvements to the implementation of the Nature Directives we believe that Defra should be looking to secure positive management of important sites, species and habitats. This will reflect the commitment in *The Natural Choice* to pass on to future generations a natural environment that is in a better state than the one we inherited.

⁷ Defra Benefits of Sites of Special Scientific Interest Report, 2011.

<http://randd.defra.gov.uk/Default.aspx?Menu=Menu&Module=More&Location=None&ProjectID=17005&FromSearch=Y&Publisher=1&SearchText=0768&SortString=ProjectCode&SortOrder=Asc&Paging=10#Description>

⁸ Attitudes of Europeans towards the issue of Biodiversity, European Commission December 2007

http://ec.europa.eu/environment/archives/barometer/pdf/flash_eurobarometer_2007_biodiversity_report.pdf

⁹ Attitudes of European Citizens towards the Environment, European Commission July 2011.

[http://ec.europa.eu/environment/pubs/pdf/eurobarometer/factsheets/EB752%20FS%20ENV%20UK%20\(EN\).pdf](http://ec.europa.eu/environment/pubs/pdf/eurobarometer/factsheets/EB752%20FS%20ENV%20UK%20(EN).pdf)

¹⁰ <http://ec.europa.eu/environment/nature/biodiversity/comm2006/2020.htm>

¹¹ *Biodiversity2020: A strategy for England's wildlife and ecosystem services*

¹² HMSO (June 2011), *The Natural Choice: securing the value of nature*

¹³ JNCC (2007), *Second report by the United Kingdom under Article 17, Conservation Status of Species and Habitats listed on the Annexes of the Habitats Directive – Summary of UK Results*

2.8 This review of the implementation of the Nature Directives is being carried out in advance of the Rio+20 United Nations conference on Sustainable Development. We urge Defra to ensure that all three pillars of sustainable development – economic, social and environmental – are properly addressed. A key test of this review is therefore whether it successfully identifies improvements in implementation that actually help to deliver favourable conservation status for species and habitats, as well as improvements the process for developers.

3. Setting the context

3.1 The Chancellor's Autumn Statement and the Defra review appear to be founded on an assumption that the implementation of the Nature Directives in the UK goes beyond our minimum legal obligations, and that the resulting 'gold-plating' may present an unnecessary burden on businesses. However, neither term (burden or unnecessary) is defined, nor is the link to business costs substantiated; the Chancellor's claim that EU rules on habitats impose 'ridiculous' costs on business contradicts an independent analysis of the economic impacts of EU legislation in the UK.¹⁴

3.2 In the context of the ongoing declines in many habitats and species, the imperative of halting and reversing declines (as enshrined in UK Government policy, national and international targets) and the value of biodiversity and wider ecosystem services, the need for protection is clear. The Nature Directives grew out of a recognition that past attempts by national Governments to halt the loss of the most important and vulnerable habitats and species were failing. There was therefore a need to effectively protect what little of the best was left, as well as to ensure a level playing field across Europe, so that one Member State could not gain advantage over another at the expense of species and habitats. There is clear evidence of the efficacy of the Nature Directives in contributing to effective conservation of threatened habitats and species, and as such their full and effective implementation is widely acknowledged as a cornerstone of, and prerequisite for, effective biodiversity policy and delivery. We would therefore argue that the role of the Nature Directives in conserving habitats and species is entirely necessary.

3.3 The Nature Directives provide a practical framework for sustainable development. They apply a set of tests to all activities and developments to ensure that all those which do not adversely affect sites and species of European importance may continue, and that those which cannot be progressed without such effects are only permitted if and when strict tests are passed (to ensure that such damage is unavoidable, is warranted by the importance of the development or activity, and can be compensated for). Too often presented as a barrier to socio-economic activity, the Directives instead provide a key test for sustainable development.

3.4 It is important that the scale of the impact of the Directives on development (and other activities) not be exaggerated. When compared to all other European Member States, the UK has designated the smallest percentage of its national area as Natura 2000 sites (just 7.2%).¹⁵ Natural England figures would suggest that of the 26,500 land use consultations received by them each year, less than 0.5% result in an objection by Natural England under the Habitats Regulations. Therefore, the area subject to designation is small, the proportion of total land use applications affected is very small and the proportion where significant effects and/ or compensation is required is even smaller.

¹⁴ Davidson Review on implementation of EU legislation (2006). Commissioned by Department for Business, Innovation and Skills. <http://www.bis.gov.uk/files/file44583.pdf>

¹⁵ European Commission 'Natura 2000 snapshot, January 2011
<http://ec.europa.eu/environment/nature/natura2000/barometer/docs/n2000.pdf>

3.5 Furthermore, in the small number of cases where significant issues are reported to arise, there is a need to differentiate between a) those cases where application of the Habitats Regulations is complex and may be problematic, b) those cases where application of the Habitats Regulations is not in fact the major cause of costs or delays, and c) those cases proposals where the Habitats Regulations play an important role in identifying poorly conceived developments which will have adverse impacts which cannot be justified in the context of public interest objectives.

4. Transposition of the Birds and Habitats Directives in the UK

4.1 The Nature Directives have been transposed into English law through a number of legal instruments over the past 33 years.¹⁶ Effective implementation depends first and foremost on clear and robust transposition designed to deliver the purposes of the Nature Directives. Such transposition helps create certainty and confidence in all users. In this regard, the UK Government has been only partially successful and has frequently had to respond to criticisms of its transposition through piecemeal amendments, often rushed through without the benefit of appropriate levels of public consultation, and thus requiring further amendments.

4.2 This need for ad hoc amendment has itself been a cause of ongoing uncertainty for all those who interact with the legislation as it has resulted in irregular “moving of goalposts”, perhaps most significantly in respect of EPS, where the law has been subject to frequent amendments in recent years.

4.3 The most significant recent changes resulted from the European Court of Justice (ECJ) judgment in *Case C-6/04 Commission vs United Kingdom* (October 2005):

- Application of the entirety of the Nature Directives requirements to the offshore marine environment from 2007¹⁷;
- Application of articles 6(3) and 6(4) to land-use plan systems;
- Significant amendments to the EPS regime which took several attempts to finally resolve through amending regulations.

4.4 As a result, transposition in respect of the protection of Natura 2000 sites and EPS now follows or draws heavily on the wording of the Nature Directives, and we would argue therefore that there is no evidence of gold-plating in the transposition of these provisions. The submission by WWF will address this issue in some detail, and in respect EPS this conclusion is supported by a legal opinion commissioned by the RSPB in support of the Link response to the Defra review (see Appendix A).

4.5 Indeed, it can be argued that far from gold-plating, the opposite is true. Considerable reliance for “transposition” continues to be placed by the Government on policy guidance rather than appropriate, explicit and proportionate transposition; this leaves the Government unnecessarily vulnerable to infraction, e.g. the protection of potential SPAs and protection of areas identified as compensatory measures under Article 6(4) of the Habitats Directive. It is questionable whether relying on policy is an effective form of transposition in light of ECJ Case C-98/03 (*Commission v Germany*) which requires implementing measures to be clear and precise, and in the context of the current emphasis on reducing guidance begs a question as to the position if such guidance is revoked. Furthermore, clear gaps in transposition of the Natura 2000 sites,

¹⁶ In particular: Wildlife and Countryside Act 1981 (as amended), Conservation of Species and Habitats Regulations 2010 (as amended), Offshore (Marine Conservation) Regulations 2007 (as amended), Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001 (as amended)

¹⁷ While this principle was already established in 1999 in relation to the Habitats Directive in England and Wales in the Greenpeace 'offshore' case (*R v Secretary of State for Trade & Industry & Ors, ex parte Greenpeace Ltd*), Case C-6/04 confirmed the position with regard to the territory of the EU”;

EPS and wider requirements of the Nature Directives remain which result in the Government being unable to realise the potential of the Nature Directives to support its objectives in respect of the natural environment, in particular restoring biodiversity and putting in place a robust framework for the delivery of landscape scale conservation¹⁸:

- Failure to transpose the habitat conservation (management, restoration and creation) measures set out in the Nature Directives to put in place an integrated framework to secure the recovery and maintenance of the UK's wildlife to favourable status. In particular:
 1. Article 3 of the Birds Directive (habitat conservation measures);
 2. With the exception of the classification of SPAs, Article 4 of the Birds Directive in respect of special conservation measures *per se* as part of an integrated package and the second sentence of Article 4(4) in respect of the protection of Annex I and migratory species outside SPAs; and
 3. Article 10 of the Habitats Directive.
- Failure to transpose in the terrestrial and inshore environment the requirements of Article 6(2) of the Habitats Directive to take appropriate steps to avoid deterioration and disturbance of habitats and species of Community interest in SPAs and SACs; and
- Failure to set clear conservation objectives for the favourable conservation status of species and habitats protected by the Nature Directives, including translating these to protected area level.

4.6 In relation to cetaceans, the Whale and Dolphin Conservation Society have commissioned a legal review of the efficacy of provisions for the protection of cetaceans, including those under the Habitats Regulations. This is due for imminent publication, and concludes that whilst the legislation covering the protection of cetaceans and their habitats in the UK has changed considerably in recent years, it does not provide a comprehensive and ecologically sound structure to ensure the long term favourable conservation status of our whales, dolphins and porpoises (see Appendix B).

4.7 We consider that Defra's review should provide an opportunity to address gaps in transposition of the Nature Directives to consolidate and provide clarity, and to ensure that the Nature Directives' objectives can be met.

5. Data and Evidence

5.1 There are fundamental barriers to both effective conservation and the evidence-based assessment of potential impacts upon those associated with development. These arise from limited understanding of the distributions, populations/extent, function/dynamics/behaviour, conservation status and sensitivities of habitats and species, and lack of clarity on the conservation objectives or outcomes required to maintain or achieve favourable conservation status.¹⁹ This is an issue both on land and at sea, although the limits on understanding in respect of both habitats and species are an order of magnitude greater in the marine environment.

5.2 The failure by the UK to define 'favourable conservation' status for both habitats and species, both at national and appropriate local/site scales, and an associated lack of clarity regarding the

¹⁸ See Dodd *et al* (in press) Protected Areas and Wildlife in Changing Landscapes: The Law and Policy Context for NGO Responses to Climate Change in the UK. *Journal of International Wildlife Law and Policy*.

¹⁹ The term 'favourable conservation status' is not used in the Birds Directive, but the EC has equated this Habitats Directive term to the requirements of Article 2 of the Birds Directive which requires Member States to take the requisite measures "...to maintain the population of the species referred to in Article 1 at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level."

conservation objectives/status against which impacts are to be considered, is a related and significant issue.

Sites

- 5.3 An understanding of where Natura 2000 sites are located is fundamental to their effective and streamlined protection. On land, the network of SPAs and SACs is substantially complete, although site designation for a number of bird species is incomplete and the results of the Government approved 2001 SPA review remain largely unimplemented. At sea there are substantial gaps in the network of SACs (for example the European Commission has made clear that additional sites are required for a number of species including harbour porpoise, bottle-nose dolphin and harbour seal), and, 31 years after the deadline for implementation of the Birds Directive in the UK, the SPA network at sea remains substantially incomplete. There are just two marine SPAs in England, which both lie in inshore waters and between them protect just two species in the non-breeding season. Maintenance extensions to breeding colonies, although agreed by Government since 2008, have yet to be classified in England (although these have been classified in Scotland). And, in common with the rest of the UK, there are no SPAs to protect the feeding areas of any of UKs internationally important breeding seabirds.
- 5.4 This means that at sea, strategic development areas (e.g. the zones for offshore wind development and oil and gas licensing rounds), are allocated in the absence of adequate information, in particular about mobile species. This means that developers head out to sea blind. They then invest in surveys which often result in the identification of aggregations of these species, the importance of which it may be hard to determine given the lack of contextual information about their distributions and densities in the wider marine environment. In some cases, the aggregations found in this way are of such significance that they require designation, as was the case for the London Array windfarm development (which is presented as a case study in the RSPB's submission). This situation poses an unacceptable risk to marine habitats and species and to expedient assessment of marine development proposals. It also represents a failure to meet Government aspirations and responsibilities on both nature conservation and sustainable development.
- 5.5 In order to start to address this issue NGOs have long called for a Government-led, national integrated marine survey programme to harness the efforts of Government, developers and others to identify and address the gaps in our knowledge. Costs of surveys at sea are significant, but much could be achieved in terms of economies of scale through better coordination and redistribution of existing effort and investment, and improved access to the data that already exists. Furthermore, the reduced uncertainty and investor risk associated with the clarity that designation of a coherent Natura 2000 network at sea would provide could also deliver significant benefits for Government and industry.
- 5.6 In the meantime, sensitivity mapping to aid the strategic siting of development has been shown to be a useful tool on land, and could be utilised at sea (albeit that their reliability will be affected by the same lack of data).
- 5.7 Once sites have been identified and designated, there must be clarity regarding the site-specific conservation objectives for the features for which the site is protected. Such objectives are a fundamental prerequisite for the application of the Habitats Regulations tests to any development proposals which may affect them. Yet even on land, where data is often available to inform such objectives, they are too often entirely generic in nature, often failing even to clarify whether the feature is in favourable condition and is to be maintained, or in unfavourable condition and therefore in need of restoration.

- 5.8 The importance of data and clarity of objectives in evidence-based assessment and decision-making at every stage of the tests that are applied by the Habitats Regulations to development proposals which have the potential to impact upon Natura 2000 sites and features cannot be overstated – from assessment of ‘likely significant effect’ to assessment of a case for ‘imperative reasons of overriding public interest’ (IROPI).
- 5.9 Where data is unavailable and objectives are unclear, the precautionary approach (which applies to the implementation of European Directives) is the logical and rational response to uncertainty. However, in many cases its continued use is indicative of a failure to address that uncertainty over time. For example, the failure by competent authorities to require adequate post-construction monitoring of impacts, and the efficacy of mitigation and/or access to the results of such monitoring, means that actual (as opposed to theoretical) impacts remain unquantified over time and that decisions remain locked in a precautionary system; again an issue which is especially acute in the marine environment. The precautionary approach will always have a role to play where uncertainties persist, but in many cases appropriate use of conditions on consents for development should be able to secure relevant, compatible and comparable data on impacts which can be used to move from a precautionary to a more evidence-based approach to decision-making.
- 5.10 For example, the monitoring packages associated with the creation of compensatory intertidal habitats in England, designed and applied with the input of both Natural England and NGO stakeholders, have substantially improved our understanding of managed realignment.²⁰ This has facilitated improved site design and management and has reduced the risks to both the features affected by port development and flood defence works, and to the developers and agencies delivering the schemes.

Species

- 5.11 All EPS are protected for good reasons; some are rare and restricted, while for others England has an internationally important proportion of the European population. All EPS are potentially vulnerable to development and land use change.
- 5.12 The failure to assess and to define favourable conservation status at national level, or at the spatial levels appropriate for different species, lies at the heart of the current approach to their protection: without a handle on what favourable conservation status looks like, and therefore what is required to achieve it, a precautionary approach must be adopted based on a goal of no net loss (as it is not known what scale of loss might prove significant). Therefore, steps to assess and define favourable conservation status at the national and other appropriate spatial scales for EPS is a prerequisite for the effective conservation of these species, and for the development of a more streamlined and less precautionary approach to development impacts.
- 5.13 Data and knowledge of populations and ranges of some terrestrial EPS is improving, (e.g. our knowledge the bat populations and ranges of some bat species has improved due to volunteer efforts in the last decade), but there are still significant gaps and some species, e.g. great crested newts and Bechstein’s bats, where knowledge on populations and trends is incomplete. Furthermore, in most cases knowledge of meta populations is inadequate to fully understand the impact of developments on conservation status. Steps to better define favourable conservation status should therefore be balanced with the need for robust data and spatial systems (e.g. sensitivity mapping) to back up the assessment process, and an understanding of the limitations of the available data.

²⁰ Such packages have been developed by a number of port developers and the Environment Agency.

- 5.14 Definitions of favourable conservation status are also going to be needed to inform and to guide progress towards *Biodiversity2020* outcomes.²¹
- 5.15 Monitoring and surveillance of national populations of EPS and the quality of the supporting habitats needs to be improved if attainment of favourable conservation status is to be adequately assessed.
- 5.16 The effectiveness and impact of EPS interventions is often unknown and needs to be backed up by research and monitoring. For example, there is currently no evidence to show what happens to bat roosts that are excluded from houses.²² Similarly, the efficacy of EPS mitigation measures required by Natural England is uncertain, and it is therefore essential that post-construction monitoring and reporting standards be improved to feed into development of good practice for future mitigation

6. Process

- 6.1 In the application of the Habitats Regulations to development, there must be a clear and transparent process that is understood by all parties. This is of course linked not only to the process itself, but also to the standards of evidence available to support decision-making and the competence of developers and their consultants, Natural England, competent authorities and other stakeholders. The Habitats Regulations are helpful in this regard, setting out a clear step-wise process for the assessment of development proposals in relation to potential impacts on both Natura 2000 sites and on EPS.
- 6.2 The role of authoritative guidance is vital in bringing clarity and consistency to the assessment process, and calls for improved guidance from both industry and the nature conservation sector. The impact of the cancellation of a very substantial amount of planning guidance through planning reforms and the forthcoming National Planning Policy Framework is therefore of significant concern. The previous body of RPGs, PPGs, PPSs and Circulars evolved over several decades, in response to the desire to make the planning process as clear, robust, certain and transparent as possible. The importance of up to date and unambiguous guidance is recognised by many stakeholders, including the Local Government Association, and has been reinforced by the ECJ and domestic courts.²³ The decision to strip away the vast majority of this guidance will undermine the decision-making process and cause confusion, delay and – contrary to the Government’s intentions – more cautious decision-making as decision-making authorities default to refusal. This, in itself, is likely to prompt lengthy and expensive appeals and legal challenges. We urge Defra to confirm that decision-makers should follow the body of EU guidance on the Habitats Directive and ensure that appropriate domestic guidance relating to the marine and terrestrial environments is (re)-instated as soon as possible.
- 6.3 As important as the handling of the Habitats Regulations process itself is the stage in the development process at which environmental considerations in general – and the Habitats Regulations in particular – are considered. Too often this is not considered until development proposals are already finalised, including siting, design, timing and methods of construction etc. If, as is the case for technical and economic factors, environmental considerations were

²¹ *Biodiversity2020* Outcome 3 states that ‘By 2020, we will see an overall improvement in the status of our wildlife and will have prevented further human-induced extinctions of known threatened species’

²² This gap in knowledge has been recognised and research has recently been commissioned for one bat species.

²³ See *Morgue* (referring to the value of EU Guidance on the Habitats Directive, *R (on the Application of Bown) v Secretary of State for Transport* (referring to the need to update PPG 9 (Nature Conservation)) and *R (on the application of Simon Woolley) v Cheshire East Borough Council & Millennium Estates Ltd* (referring to the value of ODPM Circular 06/06)

considered from the outset, many impacts (and the associated need for information and assessment etc.) could be at best avoided and at worst substantially reduced. The ease with which this can be done is linked to the availability of data and/or sensitivity mapping etc. to guide early consideration of environmental impacts and the availability of relevant Natural England, consultancy and other expertise to front-load the process in this way.

Sites

- 6.4 Avoidance is always the best form of mitigation and strategic planning is therefore the best way to avoid or reduce the potential effects of development on Natura 2000 sites. Strategic planning can also allow for the effective mitigation and compensation of impacts where required and appropriate. For example, on the Humber Estuary the Flood Risk Management Strategy identifies both flood defence requirements for the estuary and its hinterland, and associated compensation sites for delivery over the next 50 years. This facilitated Treasury funding and a streamlined consenting process for the individual projects encompassed within the plan (see Humber case study in Appendix D). However, the failure to adequately assess the potential impacts of multiple onshore windfarm applications around the estuary during development of the Regional Spatial Strategy for Yorkshire and the Humber, and therefore to take a strategic approach to their deployment, has resulted in multiple applications having overlapping and cumulative effects on multiple Natura 2000 sites. This in turn has resulted in substantial survey requirements and associated delays in consenting processes (the importance of strategic planning in this context will be examined further in the submission by WWF).
- 6.5 Our experience of working with the Habitats Regulations process has demonstrated that in the majority of cases there is an evolution of approach over time, as industries and the associated decision-making authorities develop their understanding of the process. This is perhaps best demonstrated in the ports sector. Ports are unusual for the proportion of developments that require assessment under the Habitats Regulations, as a result of the location of ports facilities on major estuaries that are amongst the most important wildlife sites in Europe. In this industry evolution to a mature approach to the Regulations has seen a number of major developments with substantial impacts progressed without undue delays or conflict (the RSPB submission will examine the evolution of approach in this sector in more detail). Once seen as the strongest opposition to the Nature Directives, most of the industry now works closely with Natural England and with the NGOs and is widely promoted as an exemplar of how major industry and nature conservation can survive and thrive in close proximity. As in any sector, though, the extent to which individual operators have evolved in their approach does vary (see the Humber case study at Appendix D for a range of port development examples).
- 6.6 In some circumstances, assessment of impacts under the Habitats Regulations is particularly complex. For example, where there are a significant number of small proposals, each will, on its own, have a limited effect, but when combined they can have adverse effects on the integrity of a Natura 2000 site. A range of such circumstances have driven innovative approaches, such as that developed in the Thames Basin Heaths (see Appendix D), where a framework was developed to enable development to proceed in a way that would not have been possible without a strategic approach. There are a range of initiatives which are attempting to adapt this best practice approach to other environments (see for example the South Humber Strategic Mitigation Strategy in the Humber case study at Appendix D).

Species

- 6.7 Some development activity may give rise to activities which could trigger EPS offences; to proceed with such activities would risk criminal liability. Since there are no longer any legal defences in the Conservation Regulations 2010 which a developer could rely upon (these were

removed in 2007 as a result of the Court of Justice's ruling in *Commission vs UK C-06/04*) the only option for the developer to proceed lawfully is to obtain an EPS license from Natural England.

- 6.8 Where an EPS license is required for development purposes the applicant must usually base the licence application on the statutory purpose at Regulation 53(2)(e) "preserving public health or public safety or other imperative reasons of overriding public interest including those of a social or economic nature and beneficial consequences for the environment."
- 6.9 To grant an EPS licence, Natural England has to be satisfied first that the statutory purpose relied upon by the applicant has been met. Then Natural England also has to consider the two further tests under Regulation 53(9): that there is no satisfactory alternative; and that the action will not be detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range.
- 6.10 The outcome of implementation of the Habitats Regulations for EPS should be the maintenance of, or restoration to, favourable conservation status. The detailed process necessary to achieve this may vary between different species depending on the size of their population, distribution and ecological requirements. Guidance will need to be specific to different species and advice will need to be tailored to specific circumstances.
- 6.11 Clear domestic guidance on the EPS offences under the Regulations is essential to inform successful implementation of the EPS protection regime, but there is currently no up-to-date guidance on the key criminal offences under the Regulations. For example, the only guidance on EPS and disturbance dates from 2007²⁴ (i.e. prior to the significant 2009 amendments to the Regulations), there is no guidance on damage and destruction, and JNCC guidance on protection of marine EPS consulted on in 2008 has yet to be published (this issue is addressed in further detail in the legal advice to the RSPB at Appendix A).²⁵
- 6.12 Many developers complain about the EPS licence application process (e.g. the delays, the lack of availability or willingness of Natural England staff to provide advice, the "further information requests" made by Natural England in circumstances where relatively small problems have arisen and clarity could have been obtained from the licence applicant by phone). However, Natural England is working within the constraints that its budget and expertise allows and to the extent that these complaints are valid, they could be satisfactorily addressed with additional funds, skills development and retention. This issue is therefore not one of law or interpretation, but rather to do with capacity and resources.
- 6.13 That said it can be argued that the process for dealing with EPS licensing in the context of planning permission should be reviewed. There is a need for full planning permission before a licence is granted, and there can be a mismatch between the needs of EPS in the planning consent and that needed for gaining a licence. There should be a consistent approach, as the conditions required for EPS licensing should be required by planners if (a) planning is delivering Sustainable development and (b) if the decisions made by planning authorities can give due consideration of the 'three tests' needed to comply with the Habitats Regulations.
- 6.14 There are some examples of good practice in this regard. Some authorities (e.g. Denbighshire County Council with Countryside Council for Wales) have developed proformas that ensure that their planning decisions are consistent with their duties under the Regulations (something that is far from universal). In Dorset, a protocol was adopted that enabled the County Council to

²⁴ Disturbance and protected species: Understanding and applying the law in England and Wales. A view from Natural England and the Countryside Council for Wales http://www.naturalengland.org.uk/Images/esisqd_tcm6-3774.pdf

²⁵ See <http://jncc.defra.gov.uk/page-4226>

review applications providing pre-application advice and a framework to ensure greater alignment with the planning and licensing system (further details of this example will be provided in the Bat Conservation Trust (BCT) submission). The success of this approach is reliant on the presence of in-house ecological expertise to review applications and ensure the appropriate level of information is supplied. It provides a safeguard to ensure that applicants are being provided with a good standard of advice from the professional consultants they employ.

- 6.15 However, such approaches do not preclude a different interpretation subsequently being given by the licensing authority – thus bringing uncertainty as to whether a licence will be issued – or sometimes creating a different requirement for ‘licensing’ than has been ‘conditioned’ by the planning permission. However, without the input of ecological expertise ahead of granting planning permission, there is a risk of planning authorities failing to fully address their functions in assessing compatibility of planning permission with the needs of the Habitats Regulations. This presents a risk that planning decisions could be unnecessarily quashed if local authority decisions are not compliant with Article 16 of the Habitats Directive.
- 6.16 We suggest that consideration should be given to agreeing the licensing method statement as part of the planning permission and not as a subsequent exercise. This would require earlier and more consistent agreement of ecological issues and clarity of expected outcomes. It would give more certainty to developers and consultants. However, this is reliant on the simultaneous strengthening and improvement of professional standards across the board.
- 6.17 We are aware of concerns about the complexity of the EPS licence form – and specifically the level of attention to detail and the overly prescriptive nature of the requirements in implementation/ method statements. There is an over-reliance on guidelines to prescribe activity and insufficient focus on agreeing necessary outcomes. A ‘conservation status plan’ developed, e.g. by predictive mapping, and the better use of data/ expert opinion discussed with statutory agencies would allow a better direction for conservation work and a better basis for agreeing necessary measures (e.g. survey) earlier, and with more focus on the conservation outcome than ‘tick box’ compliance.
- 6.18 There does appear to be a "disconnect" between the manner in which Natural England licences homeowners to exclude bats from their homes on "public health and safety" grounds (this being a scheme operated together with bat workers and the BCT) and the manner in which Natural England treats bat exclusion for development purposes. There is generally no requirement for the provision of compensatory habitat when bats are excluded from homes for this reason and yet the "maintenance of favourable conservation status test" applies equally. There is also concern that at the level of scrutiny applied to the public health ground or the alternatives tests in these situations. This could be argued two ways: that Natural England is being too relaxed with homeowners (albeit for understandable reasons as Natural England would rather work with homeowners to encourage cooperation over bats); or that Natural England is being too strict with developers where this way of working (perhaps for low level impacts) could potentially be adopted. The introduction of a class licensing system, further research into the impact of exclusions, and provision of training to extend the volunteer advice system remit to include low level impact developments could all help to redress this balance whilst maintaining safeguard against inappropriate application (see BCT response).
- 6.19 It is important that Natural England applies the ‘no satisfactory alternative’ test consistently and rigorously in relation to EPS license applications.
- 6.20 Natural England is developing its thinking over the idea of issuing class licences (i.e. a type of general licence) for low level impact activities which require a licence, instead of requiring individual licence applications in every case. Consideration could be given to the limited use of

'class licences' subject to careful requirements on registration, reporting and operator experience/competence.

- 6.21 Any significant changes to the implementation of EPS licensing should be accompanied by the development of statutory conservation action plans aimed at achieving favourable conservation status as a response to the obligation to 'take requisite measures to establish a system of strict protection' for EPS.
- 6.22 There are significant concerns regarding the efficacy of mitigation and compensation required by Natural England for EPS, the lack of effective monitoring of these measures, and associated feedback loops to ensure that the results of monitoring are used to validate or improve the efficacy of such measures.
- 6.23 Consideration should be given to the development of strategic approaches to the provision of mitigation and compensation at ecologically appropriate spatial scales, which (compared to the current piecemeal and development-specific approach) could better provide for the maintenance or restoration of populations to favourable conservation status and also provide a more cost-effective solution for developers.
- 6.24 The National Trust has commissioned a review of the success or otherwise of mitigation when EPS licences are issued to do with bats and buildings works to be completed in late spring 2012, and the results made available on the BCT's website.
- 6.25 The RSPB has also undertaken a rapid review of its experience of the EPS licensing regime in its capacity as a developer and land manager, the results of which are presented at Appendix C. In the majority of cases the RSPB's experience has been good, but other key findings reflect and add to the points raised above:
- The need for suitable guidance;
 - The lack of determination of favourable conservation status, which means that activities with negligible population effects are still liable to prosecution;
 - The lack of long-term view, which can hamper the long-term conservation gain for the species concerned.
- 6.26 There are serious concerns regarding adequate enforcement in relation to EPS. Planning conditions often 'lack teeth', and there is a need for better recording and monitoring of wildlife crime to produce meaningful information on the extent of infringements. Police resources to deal with wildlife crime are constrained, wildlife crime often proceeds without prosecution, and those who inform Natural England or the police of wildlife crime often see no action. These are of course problems of training, resources and implementation, rather than of law. Furthermore, many species offences go unreported – which is why the RSPB and the BCT have investigations units.
- 6.27 Where offences are committed, sentencing should be based on the context and reparation sought in creative ways that are both dissuasive and proportionate, and we recommend the need to review sentencing to achieve this.

7. Capacity Building

- 7.1 Capacity to engage with Habitats Regulations process amongst developers, competent authorities and Natural England (as well as other stakeholders) in terms of both resources and relevant legal and ecological expertise is key to effective application of the Habitats Regulations to development, to achieve the best possible outcomes for both nature conservation and

sustainable development. When considering examples of innovation and best practice, proactive and genuine engagement and relevant experience and expertise are recurring themes. Equally, when considering those cases where serious conflicts do arise, a lack of genuine engagement and/or expertise, along with data and evidence issues, often lie at the heart of the problems identified. Key issues here are resources, skills, training and attitudes.

- 7.2 Significant concerns around capacity building include the absence of ecologists in many local authorities, the variable standards of ecological consultants and the lack of accreditation. In addition, the ability of Natural England to act as an independent scientific advisor, with sufficient expertise and resource to service proactive and front-loaded engagement in development proposals and license applications, is critical to the effective, consistent and streamlined implementation of the Habitats Regulations.
- 7.3 There have been significant reductions in the quality and consistency of Natural England's advice associated with reductions in its confidence, budget and the numbers, experience and technical expertise of front-line staff dealing with Natura 2000 and EPS issues. Experience suggests that the provision of advice by Natural England at the local level has diminished, and the level of dialogue and expertise required to resolve issues when they arise is no longer embedded in the process. The most recent restructure of the organisation may provide an opportunity to repair some of the damage done in this regard over recent years, and the planned introduction of charging for non-statutory (e.g. pre-application) advice could drive improved engagement and consistency, although this benefit will only be realised if there is a substantial increase in the numbers, experience and expertise of staff on the front line.
- 7.4 There is a clear need to improve the quality and consistency of advice and implementation across the relevant sectors, a point which came across loud and clear at the 18 January 2012 Defra Review Stakeholders workshop. Consistent and informed advice is needed by developers and applicants from all those involved in the implementation of the Habitats Regulations. This means standards and knowledge need to be raised, reviewed and enforced within the private sector and local authorities, as well as in Natural England:
- Training and professional standards should be introduced and more rigorous assessments applied, including to individuals seeking to obtain personal EPS licences. To this end we support Natural England's development of 'earned recognition' and 'class licences', which should improve standards and implementation
 - Decision making bodies charged with the review and assessment of planning applications should have direct access to expertise in ecology and the environment. Local planning authorities must have access to expert ecologists to help them make informed decisions, either in-house or via service level agreements with neighbouring authorities. In addition to facilitating the effective and timely application of the Habitats Regulations to proposals, this will also provide a safeguard to ensure that applicants are being provided with a good standard of advice from the professional consultants they employ, as in some instances bad professional advice will lead to delays or even judicial review.
 - Linked to this is the need for greater clarity of roles and for better integration between statutory bodies, competent authorities and the police.
- 7.5 In addition, better use should be made of existing support structures such as volunteer schemes and advice systems that exist to improve the evidence base, compliance and good practice, including better training and investment in the volunteer support networks that currently alleviate burdens on the developer, licence applicants and statutory bodies.

8. Communications and Awareness

- 8.1 In addition to the availability of clear guidance and high quality ecological advice and expertise, experience shows that when responsible developers and competent authorities understand and value the importance of the sites and species protected, and are familiar with the legal process designed to protect them, early engagement with Natural England and NGOs and an understanding of likely impacts results in reduced conflict and more rapid resolution of any issues.
- 8.2 We therefore recommend that the Government takes this opportunity to restate its commitment to the conservation of sites and species of European importance, to promote the value of these natural assets (both intrinsic and economic), to promote best practice solutions in the handling of development which may impact upon these and other biodiversity assets, and to increase pressure upon those developers and competent authorities which fail to embrace best practice approaches.
- 8.3 In order to develop innovative and best practice solutions to some of the challenges posed by the need for sustainable development and for effective conservation action (including application of the Habitats Regulations), it is essential that the exchange of information and experience, both within and across the UK countries and between Member States is supported. Networks such as the Econat2000 network, which brings together experienced practitioners in the field of development affecting Natura 2000 sites and EPS from across north western Europe have real value in this respect.²⁶

9. EU and devolved implementation

- 9.1 EU and devolved implementation issues will primarily be addressed through the individual submissions of Link members to the review. For example, the RSPB and WWF will submit evidence in relation to EU implementation, and the Whale and Dolphin Conservation Society response includes a case study examining shortcomings in application of the law in Wales in relation to scallop-dredging.
- 9.2 Anecdotal evidence would suggest that the application of the EPS regulations may be stricter in Scotland and Wales than it is in England.
- 9.3 In 2009, the RSPB commissioned and published a review of positive planning for onshore wind to review different approaches to expanding onshore wind energy capacity whilst conserving nature.²⁷ Whilst not looking only at habitat and species of European importance its key findings reflect many of the issues raised in this response (the importance of early engagement, of appropriate institutional resourcing and knowledge, of taking a strategic and spatially explicit approach and of high-quality impact assessment). It also includes a comparison of planning approaches in the UK and in Spain, Germany and Denmark. Its findings would seem pertinent to the current review.

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²⁶ The Econat2000 network was established by 4 members organisations from both the nature conservation and economic development sectors in 4 European Member States and held a series of topic-specific workshops and seminars between 2007 and 2010, bringing together experts from across a number of Member States to compare approaches, identify shared problems and highlight best practice in application of the Birds and Habitats Directives. See: <http://seminar.econat.n2000.fr/>

²⁷ http://www.rspb.org.uk/Images/Positive%20Planning%20for%20Onshore%20Wind_tcm9-213280.pdf

Appendices

A. Legal advice to the RSPB on EPS regulation

DLA Piper UK LLP is an international law firm providing legal services to a wide range of public and private sector clients. Within the UK, DLA's Safety Health and Environment (SHE) Group, headed by Teresa Hitchcock, provides both environmental and health and safety legal services to its clients in sectors as diverse as manufacturing, energy, developer, consultancies and public authorities. One of the SHE Group's particular specialisms is in relation to natural environment law. Penny Simpson of DLA Piper's SHE Group advises a range of developers, environmental consultancies, public authorities and non-governmental organisations on all aspects of this area of law and in particular on protected sites and protected species issues. She is the Chairperson of the Nature Conservation Working Group of the United Kingdom Environmental Law Association and is the provider of many legal training courses on these issues on behalf of the Institute of Ecology and Environmental Management.

DLA Piper UK LLP was requested by the RSPB to provide advice on (i) the adequacy of transposition in England (by the Conservation of Habitats and Species Regulations 2010 ("Conservation Regulations 2010")) of Articles 12, 13 and 16 of the Habitats Directive relating to European Protected Species ("EPS"); and (ii) comments on where changes could be made in implementation of the Conservation Regulations 2010 by the relevant authorities in relation to development.

LEGAL ADVICE

ON THE TRANSPOSITION AND IMPLEMENTATION OF ARTICLES 12, 13 AND 16 OF THE HABITATS DIRECTIVE REGARDING EUROPEAN PROTECTED SPECIES IN RELATION TO DEVELOPMENT ACTIVITIES

Introduction

1. The Government has announced that it is undertaking a review of the implementation of the EU Habitats and Wild Birds Directives in England. The purpose of the review is to focus on those obligations affecting the authorisation process for proposed development, with a view to reducing the burdens on businesses while maintaining the integrity of the purpose of the Habitats and Wild Birds Directives. The intention is for Defra to publish its recommendations with the Budget 2012.
2. RSPB has requested DLA Piper UK LLP to provide (i) legal advice on the adequacy of transposition in England (by the Conservation of Habitats and Species Regulations 2010 ("**Conservation Regulations 2010**")) of Articles 12, 13 and 16 of the Habitats Directive relating to European Protected Species ("**EPS**"); and (ii) comments on where changes could be made in implementation of the Conservation Regulations 2010 by the relevant authorities in relation to development.

Adequacy of transposition in England of the development-related provisions of Articles 12, 13 and 16 of the Habitats Directive

3. The key provisions in the Habitats Directive relating to EPS are found in Articles 12 (EPS animals), 13 (EPS plants) and 16 (derogations in relation to EPS animals and plants).
4. The attached Table sets out the various provisions within Articles 12,13 and 16 which have the potential to relate to development activity in England (this being the focus of Defra's review) and comments on the adequacy of their transposition in England by the Conservation Regulations 2010. The Table is not a comprehensive list of all provisions of Articles 12, 13 and 16 of the Habitats Directive. The Table focuses only on provisions which have relevance to development activity.
5. It can be concluded from the Table that the relevant provisions of Articles 12,13 and 16 have in general been adequately transposed. This is perhaps unsurprising since, in general, the transposing legislation uses language taken directly from the Habitats Directive. In addition the original transposition of the Habitats Directive by the Conservation (Natural Habitats Etc) Regulations 1994 was scrutinised by the Court of Justice of the European Union (in case C-06/04 *Commission vs UK*) so that a number original inadequacies have already been rectified.
6. In relation to two points (which reflect the same issue for EPS animals and EPS plants) it can be argued that there has been under-transposition. See the Table for detail.
7. The Table refers to some offences in the Conservation Regulations 2010 which are not strictly contemplated by the Habitats Directive. However these simply aid the smooth running of the EPS protection regime and in many cases, for example in the case of the "body corporate" offence (Reg 124), are standard in UK legislation. They do not widen the protection afforded to EPS by the Habitats Directive.

Comments on possible changes to the implementation of the Conservation Regulations 2010 by the relevant authorities in relation to development

Guidance on the EPS offences under regulation 41 and 45 of the Conservation Regulations 2010

8. Clear domestic guidance on the EPS offences under regulation 41 and 45 of the Conservation Regulations 2010 is a crucial aspect to successful implementation of the EPS protection regime.
9. Both Natural England ("NE") and the police need to interpret the EPS offences in their roles: NE must also do so in relation to its EPS licensing function; and the police (with NE's assistance) must do so as enforcer of the EPS offences. In addition developers need to understand how the offences are to be interpreted in relation to specific species so that they and their advisers can make clear and robust decisions as regards when EPS licences are required.
10. There is however little or no up to date domestic guidance on the meaning of the key criminal offences in regulations 41 and 45 of the Conservation Regulations 2010; and specifically no guidance has as yet been provided as contemplated under Reg 41(9) of the Conservation Regulations 2010. Helpful guidance does exist from the European Commission (Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC, February 2007) ("**2007 Guidance**"). However despite the existence since 2007 of Reg 41(9) Conservation Regulations 2010 (and its predecessor regulation) (which empowers guidance to be published by NE / Defra on two of the key offences: damage and destruction of a breeding site or resting place (Reg 41(1)(d)); and deliberate disturbance (Reg 41(1)(b)) no such guidance has been released. This guidance is eagerly awaited by both developers and others, particularly since it will have to be taken into account by the courts in accordance with Reg 41(11) Conservation Regulations 2010.
11. In relation to the "strict liability" offence of (Reg 41(1)(d) (the offence of damaging or destroying a breeding site or resting place of an EPS animal) guidance is needed urgently on the following issues:
 - 11.1 The extent to which one may mitigate against this offence (so as to avoid the need for a EPS licence) in accordance with the concept of "continued ecological functionality" as set out in pages 47-48 of the 2007 Guidance. This section of the 2007 Guidance suggests that there is a degree of flexibility in the interpretation of this offence. It is important to clarify this at a domestic level as this offence causes the most difficulty to developers due to its "strict" nature.
 - 11.2 The specific meaning of "breeding site" or "resting place" for each EPS. As confirmed by the 2007 Guidance, the offence of Reg 41(1)(d) does not protect "habitat" generally, rather specific parts of that habitat, and clarity is needed to discern for each EPS the extent of the protection afforded. The 2007 Guidance pg 44 (para 61) states "The prohibition of Article 12(1)(d) can consequently be seen as an aspect of habitat conservation, albeit covering only specific parts of the biological cycle. Other parts of the habitat, e.g. feeding areas, are not covered unless they coincide with breeding sites or resting places." The meaning of "breeding site" and "resting place" are, for some species, difficult to elucidate. Dormice are an example. The dormouse conservation handbook (2006 English Nature, page 45) states "Exactly what constitutes a breeding site or resting place for a dormouse has not been defined in case-law, but a narrow interpretation might include nests (summer or winter) currently in

use or, perhaps, built or used during the current season. Because the dormouse is so embedded in its habitat and nests are difficult to find a pragmatic approach is to treat any dormouse habitat as though it is protected and develop mitigation based on this assumption." Great crested newts are another example - whilst their breeding ponds are their "breeding sites", it is unclear which discrete areas of their terrestrial habitat are to be regarded as their resting places.

12. In relation to the deliberate disturbance offence (Reg 41(1)(b)), guidance is needed on the scope of this offence. The Supreme Court decision of *Morge vs Hampshire County Council* (January 2011) [2011] UKSC 1 relating to the impacts of a new bus route on foraging bats considered the meaning of Art 12(1)(b). Guidance should now be issued by Defra / NE under Reg 41(9) Conservation Regulations 2010 to set out its interpretation of that judgment and in relation to specific species. It would be helpful if the guidance could also include comment on the Wildlife and Countryside Act 1981 intentional / reckless disturbance offence (s9(4)(b)) which applies to EPS, whilst recognising that guidance on this offence is not strictly within the scope of Reg 41(9) and so would not benefit from Reg 41(11).
13. Further guidance would also be welcomed on the requirement of Reg 53(9)(b) "that the actions authorized will not be detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range". This is discussed further below.

Absence of an EPS licence appeal process

14. Very unusually for an environmental permitting regime, there is no appeal process in existence to allow applicants for EPS licences to appeal NE EPS licensing decisions. NE's practice is not to "refuse" licences, but instead to send to the applicant a "request for further information" letter to which a response must be provided within 6 months in order to keep the application "live". An applicant may provide a response but receive a further "requests for further information" and this may continue over a number of months. Where the developer is not in agreement with NE, the only recourse available to him is to the court by way of judicial review. This route is extremely expensive and time consuming and in many cases is likely to lead to costs on both sides which are entirely disproportionate to the issues at stake. An appeal route would allow a cheaper and quicker way of dealing with disagreement and would be entirely consistent with most other statutory licensing regimes in the environmental field. Appeal could be by way of written representations to minimize the administrative burden.

Present interpretation of the Reg 53(9) favourable conservation status test in relation to EPS license applications

15. As noted above, Reg 53(9)(b) provides that any EPS derogation to be licenced by NE must not be "detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range".
16. Note that this is the EPS licensing requirement with the biggest cost impact on the developer. It is this requirement which drives the developer to deliver compensatory land for the EPS animals or plants affected by the development.
17. NE's EPS Guidance: "How to get a licence" states: "*In order to obtain a licence to allow for the capture of EPS, damage or destruction of breeding sites, etc, in advance of any otherwise legitimate activity which may impact on the favourable conservation status of the EPS*

concerned, you and your consultant ecologist must demonstrate that the damage will be adequately compensated for to satisfy Regulation 53(9)(b)"....."Current Natural England advice is that there should be no net loss in the local population status of the species concerned, taking into account factors such as population size, viability and connectivity. Hence, when it is unavoidable that an activity will affect an EPS population, the mitigation should aim to maintain a population of equivalent status on or near the original site". This advice is also repeated in, for example, the great crested newt mitigation guidelines (page 12, 5th paragraph); and the bat mitigation guidelines (pg 11).

18. Taking great crested newts as an example, NE's advice (pg 35 of the great crested newt mitigation guidelines) is that one of the following three outcomes should be achieved from development activity, in decreasing order of preference (very similar advice for bats is provided on pg 38 of the bat mitigation guidelines):
 - 18.1 No negative impact on great crested newt populations;
 - 18.2 Where only a minor impact is predicted, compensation by small-scale relocation and exclusion of newts, combined with habitat creation, enhancement or restoration (all occurring on-site or in the immediate surrounding area, ie *in situ* mitigation); and
 - 18.3 Where a major impact is unavoidable, and it is not possible to compensate through on-site mitigation, translocation of newts away from the site, to an area that provides equivalent or better habitats. To achieve this, new habitats, including ponds, will invariably need to be created, enhanced or restored prior to translocation.
- 18.4 NE also comments that (pg 36 of the great crested newt mitigation guidelines) that there should be no net loss of sites and where significant impacts are predicted there will be an expectation that compensation will provide an enhanced habitat compared with that to be lost.
19. This approach may not be entirely consistent with two relevant guidance documents.
20. The first is the 2007 Guidance.
21. The 2007 Guidance was relied upon heavily by the judges of the Supreme Court in the *Morge vs Hampshire County Council* case (2011) (which focused on the meaning of deliberate disturbance in relation to bats). It is therefore to be regarded as persuasive.
22. The 2007 Guidance (pages 60-62) emphasizes two aspects to assessing impacts on favourable conservation status under Art 16: assessing status at the "natural range" level (at biogeographic level in each member state level); and at the "population" level (animals living in a geographic area and potentially interbreeding). It comments that a specific derogation will in most cases have to be assessed "at a lower level than the biogeographic region" in order to be meaningful and it suggests "a useful level" "could be" the "local population". Whilst noting that "assessments at *lower levels* [ie lower than biogeographic level] are normally essential", the 2007 Guidance does not specifically *require* assessment at local population level. It also gives an example of destruction of an amphibian breeding site and suggests that evaluation should be at site or at meta-population level (ie a group of spatially separated populations of the same species which interact at some level), whereas for a large carnivore it would need to be at a much a larger level.

23. The 2007 Guidance says (para 46) that "such an assessment at a lower level would then have to be seen in relation to the situation on a larger scale (eg biogeographic or national) for a complete picture of the situation".
24. The 2007 Guidance says (at para 51 on pg 62) that "it is generally true that no derogation can be granted if it has a detrimental effect on the conservation status or the attainment of favourable conservation status for a species at all levels. In other words if a derogation is likely to have a significantly negative effect on the population concerned (or the prospects of this population) or at biogeographical level within a Member State, the competent authority should not allow it. The net result of a derogation should be neutral or positive for a species".
25. The 2007 Guidance (pg 28) also comments (in the context of Art 12) that "measures taken by Member States should be appropriate with a view to attaining the objective of maintaining or restoring the conservation status of a species. This implies that the measures to be taken must be decided depending on the particular circumstances of each situation and taking into account the specificity of each species. For instance, the characteristics of a species, such as its conservation status, may justify more specific or intense protection measures". At page 62 (para 48) this idea is similarly applied to Art 16 "Again (as with protection measures), the conservation status of a species (at biogeographic and population level) is the core concept for a flexible and proportional approach to the use of derogations".
26. Four issues arise from this:
 - 26.1 NE's approach (above) does not appear to put the "local population status" assessment in the context of a larger / wider population assessment, as the 2007 Guidance advises. The wider (biogeographic) population assessment (para 22 above) does not appear to be taken into account.
 - 26.2 NE's approach (see para 17 above) appears to be general and apply across all EPS species, whereas the 2007 Guidance suggests (para 48) that there may need to be variation between species. In addition there may need to be variation within different populations of a specific species.
 - 26.3 NE's approach is to assess at a "local population status" basis so that "mitigation should aim to maintain a population of equivalent status on or near the original site", whereas the 2007 Guidance leaves open the precise level of "lower level" assessment eg site / meta - population / wider, depending on the species and specific situation. The "population level" assessment envisaged by the 2007 Guidance may therefore in some specific circumstances not require maintenance of a population of equivalent status *on or near the original site*. If for example the population were large in a specific area of the country then it might be possible to address maintenance of the population on a wider basis.
 - 26.4 NE's approach to secure "no detriment" is to ensure "no net loss" in local population status and also (in the context of great crested newts at least - we have not reviewed all the species guidance documents) "no net loss in sites". By contrast the 2007 Guidance (para 51) appears to equate detriment with "significant negative effect on the population", suggesting that de minimis effects may in certain circumstances be acceptable to meet the requirement that the net result of a derogation is "neutral or positive".
27. The second guidance document is Defra's guidance (November 2009) on the implementation in England of the Environmental Liability Directive ("**EDR Guidance**"). Even though the

focus of the Environmental Liability Directive and the Habitats Directive is different, both regimes offer protection to EPS and some of the language in the Environmental Liability Directive and the Habitats Directive is similar, so comparisons in implementation in certain respects can justifiably be made. Specifically, both Reg 53(9)(b) of the Conservation Regulations 2010 and the Environmental Damage (Prevention and Remediation) Regulations 2009 ("**EDR**") refer to an assessment of impact on favourable conservation status of species, even though the relevant *threshold of damage* is expressed differently under each regime:

- 27.1 EDR: The EDR regime is designed to protect biodiversity interests listed under the Birds and Habitats Directive from significant pollution / other harmful events. Under the EDR, the meaning of "environmental damage" includes damage to protected species (which includes EPS) and natural habitats, which is "any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species". The significance of such effects is to be assessed with reference to the baseline condition, taking account of the criteria set out in Annex I".
- 27.2 Conservation Regulations 2010: Under Reg 53(9)(b), the issue is whether there is "detriment" to the "maintenance of the population of the species concerned at a favourable conservation status in their natural range".
28. Despite these similarities, Defra's EDR Guidance adopts an entirely different approach to that of NE in relation to EPS. By contrast to NE's EPS "no net loss at local population level status" approach, Defra's EDR Guidance states (A1.30) that the relevant range for the purpose of *assessing conservation status* and impacts on conservation status for the purpose of the EDR is generally *member state level*. It justifies this (A1.30) by reference to (i) the reporting under Art 17 of the Habitats Directive which is at the level of EU member states; and (ii) other guidance under the Habitats Directive. It says that these sources indicate that range should generally be taken to be at the member state level. A1.32 states that "depending on the species or habitat, the relevant range may be the whole of the UK (eg great crested newts) or it may be only part of the UK (eg the stag beetle)" (note that the stag beetle is not an EPS). NE's recent guidance document on its new "civil sanction" powers confirms that the EDR are to be assessed by reference to the UK range (para 1, page 18 of NE's Compliance and Enforcement Position, 2011).
29. A1.34 to A1.45 of the EDR Guidance states that there are 4 parameters for assessing conservation status of species. These are as follows:
 - 29.1 range - a measure of a species' distribution throughout the UK or relevant area;
 - 29.2 population - the number and density of individuals present in the UK or relevant area;
 - 29.3 habitat for species - judgments should be based on the extent and severity of damage to habitat;
 - 29.4 future prospects - judgment of the effect on the conditions needed to reach or maintain favourable conservation status of species or habitats in the long term, taking into account current or foreseeable threats.
 - 29.5 A.135 states that under the EDR if the effect of the activity is judged significant in terms of any of the above parameters, the overall judgment should be that there is a significant conservation status effect.

30. The EDR Guidance above is very carefully expressed to be "for the purpose of the EDR". However, as noted above (para A1.30), its adopted approach is stated to be based on (i) the reporting under Art 17 of the Habitats Directive which is at the level of EU member states; and (ii) other guidance under the Habitats Directive. Both of these bases can be argued to apply equally to Article 12 of the Habitats Directive. Therefore a legitimate question arises: why is favourable conservation status treated differently in relation to the 2 regimes? It would no doubt be argued by some that the EDR regime focuses specifically on ascertaining "significant adverse impacts" and this therefore justifies an approach different to Article 12 Habitats Directive. However in response it can be said that whilst the *trigger threshold of impact* as between the two regimes is expressed differently (significant adverse impact vs. no detriment), this does not alter the fact that the *measure of that impact* is the same in each case ie the favourable conservation status of the population.
31. Defra's EDR Guidance demonstrates an approach to "favourable conservation status" entirely different to that adopted by NE in relation to EPS licensing. To adopt the Defra EDR approach in relation to EPS licensing would be inconsistent with the 2007 Guidance as the 2007 Guidance (as noted above) clearly encourages a dual level approach. However the EDR approach does emphasise the relevance of the "natural range" level of assessment as discussed in the 2007 Guidance and would also appear to demonstrate an ability of the Government to apply the concept of favourable conservation status with a degree of flexibility.
32. On the basis of the 2007 Guidance and the EDR Guidance it may be possible to argue for a wider view of the "lower level" population by which to assess impacts on EPS under Reg 53(9)(b). This might, in relation to certain of the more "common" EPS, or in relation to certain larger populations of certain species, allow greater flexibility for developers to coordinate at appropriate spatial scales compensation strategies. It may also be acceptable to allow activities with "de minimis" impacts to proceed without provision of compensatory measures in certain limited circumstances (on the basis that the 2007 Guidance (para 51) equates detriment with "significant negative effect on the population"). Such an approach would obviously have to be carefully controlled but it is nevertheless an issue which ought to be considered.
33. Clearly key to this debate is the absence of a clear understanding as to the meaning of favourable conservation status and how it should be defined for specific EPS. If Defra could promote and facilitate clearer guidance on this concept for the EPS species, it would then be easier to draw conclusions as to the impacts of a particular project on the relevant population and as to the extent of compensation needed to "maintain the favourable conservation status" of that population.
34. Once further point is the manner in which NE deals with applications for licences to exclude bats from homes on public health and safety grounds. We understand that it is currently presumed by NE that the excluded colony of bats will find a suitable alternative roost by themselves if the work is done in the autumn after the maternity season. Licences issued on this basis do not therefore require provision of specific compensation measures under Reg 53(9)(b). This represents an approach which might be said to be inconsistent with NE's present general approach to developers as noted above.

The "breach of licence condition" offence under Reg 58 Conservation Regulations 2010

35. Regulation 58 Conservation Regulations 2010 makes it an offence for the "licence holder" to contravene or fail to comply with any condition attached to the EPS licence. This wording

differs from the original wording of this offence adopted in 2007 in the earlier Conservation (Natural Habitats Etc) Regulations 1994: there it was an offence for "any person authorised by the licence" to breach a licence condition.

36. It is unclear why this change was made to the offence when the Conservation Regulations 2010 were drawn up. The offence is now more restrictive, as compared with the 2007 position. This may be an issue for consideration under The Law Commission's 11th Programme of Law Reform.
37. The restrictive nature of Reg 58 is possibly exacerbated by NE's practice of issuing EPS licences to individuals rather than to corporate entities where the works are being undertaken by companies. It follows from Reg 58 that in this scenario only the individual licence holder may be prosecuted. If licences were issued to corporate entities, as is the case for most other environmental permits, the scope for enforcement under Reg 58 would be greater. Corporate entities would be likely also to prefer such a system as there are real sensitivities over putting individual employees at legal risk under Reg 58 as the licence holder.
38. Furthermore, although NE's new civil sanction powers do not as yet apply to the Conservation Regulations 2010, it is the intention that this will ultimately be the case. Further careful thought will have to be given to this issue at the point of adoption of civil sanctions in respect of the Conservation Regulations 2010, as imposing civil sanctions on individual EPS licence holders in relation to a company project may not be regarded as appropriate.
39. NE's present policy to address this issue (ie to impose a condition on the EPS licence reading "all persons authorised to act under the licence are by virtue of that grant of authority the holder of the licence for the purposes of the offence in regulation 58(1) of the 2010 Regulations") is unlikely to be lawful. The power to impose conditions on licences is limited to the purpose in Reg 53(8) (ie conditions "subject to which the action authorized by the licence may be taken...") which does not extend to a condition such as this.

Sanctions for EPS offences

40. The sentencing available for EPS offences (as with other protected species offences) is out of kilter with other environmental offences (the EPS offences are dealt with in the Magistrates' Court and the penalties are to up to 6 months' prison and / or a £5,000 maximum fine).
41. By way of comparison, the Environmental Permitting (England and Wales) Regulations 2010 contains penalties as follows:

For operating a facility without an environmental permit
For causing or knowingly permitting a water discharge activity (eg pollution of waters) without an environmental permit
For failure to comply with an environmental permit condition
For failure to comply with various statutory notices

in the Magistrates' Court: up to £50,000 fine and / or up to 12 months' prison
in the Crown Court: unlimited fines and / or up to 5 years' prison.

42. This means that the law may often fail to have the requisite deterrent effect.



Natural England's use of class licences

43. NE has been developing its thinking over the use of EPS class licences (ie a type of general licence) for low level impact activities (instead of requiring individual licence applications in every case). Development of this policy should be encouraged.

Adherence by public bodies (eg Local Planning Authorities) to their EPS duties

44. The *Morge vs Hampshire County Council* Supreme Court judgment has highlighted the need for public bodies to comply with Reg 9(5) Conservation Regulations 2010. Reg 9(5) requires "a competent authority, in exercising any of their functions, to have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions". The *Morge* case was a judicial review of a planning decision potentially impacting on bats. It has clarified the duty of Local Planning Authorities ("LPA") as regards EPS when making planning determinations. The case, however, has implications for all public bodies. In discharging their functions (eg LPAs in granting planning permissions, or the EA granting environmental permits) the public body should (i) consider whether the Art 12(1) prohibitions will be triggered by the proposed activity; and (ii) if so, then consider whether the activity is likely to be licensed by NE pursuant to the three derogation tests; and (iii) not refuse the consent on EPS grounds unless there is reason to believe NE will not grant a licence.
45. This obligation is not understood well within local government and this is not aided by the redundancies of many local government ecologists. It is even less well understood by other public bodies, such as the Environment Agency, statutory undertakers etc. Lack of understanding can manifest itself in two ways both of which create difficulty for the development process: an over cautious approach of the public authority; or a failure of the public authority to take the matter in to account at all. Either way challenges by third parties can be made.

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**ANALYSIS OF THE TRANSPOSITION IN ENGLAND OF ARTICLE 12/13 AND 16 HABITATS DIRECTIVE
IN SO FAR AS THOSE ARTICLES RELATE TO DEVELOPMENT**

ARTICLE 12/16 HABITATS DIRECTIVE		CONSERVATION REGULATIONS 2010 ¹	COMMENTS
Article 12			
12(1)	Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) in their natural range, prohibiting:	No specific transposition of the general obligation to "take requisite measures to establish a system of strict protection".	<p>Potentially inadequate transposition.</p> <p>Subject to Reg 9(5) (see further below), the Conservation Regulations 2010 limit implementation of Art 12(1) to a series of criminal offences only. Caselaw from the Court of Justice of the European Union suggests that implementation of Art 12(1) merely by way of domestic criminal offences may not be adequate.</p> <p>CJEU Case c-183/05 <i>Commission vs Ireland</i> (2005) held that: it should be recalled that Article 12(1) of Directive 92/43 requires the Member States to take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) to that directive in their natural range (28); As noted by the Advocate General in point 24 of his Opinion, the transposition of Article 12(1) of the Directive requires the Member States not only to adopt a comprehensive legislative framework but also to implement concrete and specific protection measures (see, to that effect, Case C-103/00 <i>Commission v Greece</i> [2002] ECR I-1147, paragraphs 34 to 39) (29); Similarly, the system of strict protection presupposes the adoption of coherent and coordinated measures of a preventive nature (Case C-518/04 <i>Commission v Greece</i>, not published in the ECR, paragraph</p>

¹ The Conservation of Habitats and Species Regulations 2010

ARTICLE 12/16 HABITATS DIRECTIVE	CONSERVATION REGULATIONS 2010 ¹	COMMENTS
		<p>16) (30).</p> <p>CJEU Case 383/09 <i>Commission vs France</i> (2011) held (in relation to Art 12(1)(d)) that France had failed to secure adequate preventative regulation of agricultural practices. These practices involved replacement of forage crops (such as alfalfa) with more profitable crops such as maize which impacted negatively on the European hamster population (an EPS). The Court said that "<i>the transposition of that provision [Art 12(1)(d)] requires the Member States not only to adopt a comprehensive legislative framework but also to implement concrete and specific protection measures (19). The system of strict protection presupposes the adoption of coherent and coordinated measures of a preventative nature (20). Such a system of strict protection must therefore enable the effective avoidance of deterioration or destruction of breeding sites or resting places [of EPS] (21).</i>"</p> <p>It is doubtful whether enactment of criminal offences to reflect Art 12(1)(a)-(d) can be said, alone, to amount to "<i>the adoption of coherent and coordinated measures of a preventative nature</i>". Criminal offences are after all inherently retrospective in their application.</p> <p>The general obligation of public bodies to have regard to the Habitats Directive in the exercise of their functions (Reg 9(5)) could be said to go some way towards "coherent and coordinated measures of a preventative nature". But it is not a complete answer. For example EPS impacted by development arising from permitted development ("PD") rights would not be subject to any protection by virtue of Reg 9(5). This is because Reg 9(5) comes into play where a public body such as a LPA exercises its functions. When development occurs as a result of PD rights there is no exercise of any LPA function.</p> <p>To rectify this, it may be that there should be in domestic legislation a</p>

ARTICLE 12/16 HABITATS DIRECTIVE		CONSERVATION REGULATIONS 2010 ¹	COMMENTS
			disapplication of PD rights where EPS are likely to be affected (note there are provisions in regs 73-75 Conservation Regulations 2010 which serve effectively to disapply PD rights in relation to development which is likely to have a significant effect on European site; but there is no equivalent in relation to EPS).
12(1)(a)	all forms of deliberate capture or killing of specimens of these species in the wild;	Reg 41(1)(a): a person who deliberately captures, injures or kills any wild animal of a European protected species, is guilty of an offence.	Adequate transposition.
12(1)(b)	deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;	<p>Reg 41(1)(b): a person who deliberately disturbs wild animals of any species is guilty of an offence.</p> <p>Reg 41(2): for the purposes of Reg 41(1)(b), disturbance of animals includes in particular any disturbance which is likely (a) to impair their ability (i) to survive, to breed or reproduce, or to rear or nurture their young, or (ii) in the case of animals of a hibernating or migratory species, to hibernate or migrate; or (b) to affect significantly the local distribution or abundance of the species to which they</p>	<p>Adequate transposition.</p> <p>Although the domestic law does not track the exact wording of Art 12(1)(b), the wording of Regs 41(1)(b) and Reg 41(2) is consistent with the Supreme Court's interpretation of the Art 12(1)(b) prohibition in its judgment in <i>Morge vs Hampshire County Council</i> (January 2011) [2011] UKSC 1. Therefore as a matter of English law Regs 41(1)(b) and 41(2) are acceptable. The Supreme Court in <i>Morge</i> refused to refer the issue to the Court of Justice of the European Union and ruled that:</p> <ul style="list-style-type: none"> ▪ The focus of Art 12(1) is on the conservation of the species as a whole, not individuals ▪ Notwithstanding the focus of Art 12(1) on species rather than individuals, the Court of Appeal had not been correct to rule that "disturbance" was only triggered where there is a detrimental effect on the conservation status of the species at population level and biogeographic level. To set the threshold for disturbance at such a (high) level was too conservative and a more precautionary approach was appropriate.

ARTICLE 12/16 HABITATS DIRECTIVE		CONSERVATION REGULATIONS 2010 ¹	COMMENTS
		belong.	<ul style="list-style-type: none"> ▪ The Court gave strong support for the EU Commission 2007 Guidance² ▪ In assessing whether there is Art 12(1)(b) disturbance, one should consider: <ul style="list-style-type: none"> ▪ sensitive times: breeding, rearing, hibernation, migration times, but disturbance is still possible outside these periods ▪ season / period in life cycle ▪ rarity of species (species in decline are likely to be more sensitive so that effects on smaller numbers might trigger the disturbance threshold) ▪ disturbance could be triggered if there is major intrusion of habitat ▪ There must be a judgment as to whether the impact of the activity is "sufficient" to amount be "harmful" to the species
12(1)(c)	deliberate destruction or taking of eggs from the wild;	Reg 41(1)(c): a person who deliberately takes or destroys the eggs of such an animal is guilty of an offence.	Adequate transposition.
12(1)(d)	deterioration or destruction of breeding sites or resting places.	<p>Reg 41(1)(d): a person who damages or destroys a breeding site or resting place of such an animal is guilty of an offence.</p> <p>Reg 41(11) in deciding upon the sentence for a person convicted of an offence under</p>	<p>Adequate transposition. The word "damage" is used instead of "deterioration". The European Commission's 2007 Guidance states (pages 39 and 40) that Art 12(1)(d) does not mean that proactive habitat management measures are required and also confirms that natural deterioration is not within the scope of Article 12(1)(d). "Damage" would therefore appear to be consistent with the European Commission's interpretation.</p> <p>Note that Reg 41(11) requires that "in deciding upon the sentence for a person convicted of an offence under paragraph Reg 41(1)(d), the court must in particular</p>

² Guidance document on the strict protection of animal species of community interest under the Habitats Directive (February 2007).

ARTICLE 12/16 HABITATS DIRECTIVE		CONSERVATION REGULATIONS 2010 ¹	COMMENTS
		paragraph 41(1)(d) the court must in particular have regard to whether that person could reasonably have avoided the damage to or destruction of the breeding site or resting place concerned.	have regard to whether that person could reasonably have avoided the damage or destruction of the breeding site or resting place concerned". This is helpful to developers. It was introduced, when the Conservation Regulations 1994 were amended in 2007, so as to provide comfort to developers whose position was worsened by the 2007 deletion of the commercially useful legal defences originally included in the Conservation Regulations 1994. The deletion of the defences came about because of the European Court decision in case C-6/04 <i>Commission vs UK</i> .
12(2)	For these species, Member States shall prohibit the keeping, transport and sale or exchange, and offering for sale or exchange, of specimens taken from the wild, except for those taken legally before this Directive is implemented.	Reg 41(3) (3): it is an offence for any person (a) to be in possession of, or to control, (b) to transport, (c) to sell or exchange, or (d) to offer for sale or exchange, anything to which this paragraph applies.	Adequate transposition.
12(3)	The prohibition referred to in paragraph 1(a) and (b) and paragraph 2 shall apply to all stages of life of the animals to which this Article applies.	Reg 41(5): Reg 41(1) and (3) apply regardless of the stage of the life of the animal in question.	Adequate transposition.

ARTICLE 12/16 HABITATS DIRECTIVE		CONSERVATION REGULATIONS 2010 ¹	COMMENTS
NA	NA	<p>Reg 116(1): The offence of attempting to commit an EPS offence in Reg 4.</p> <p>Reg 116(2): The offence of being in possession of anything capable of being used for committing such an offence</p> <p>Reg 58(1): The offence for the holder of a licence to contravene or to fail to comply with any condition attached to a EPS licence</p> <p>Reg 57(1): offence of making a false statement for the purpose of obtaining an EPS licence</p>	These offences are not strictly required by the Habitats Directive but they serve to allow the regime to be enforced more effectively and in some cases are standard in UK legislation.
Article 13			
13(1)	Member States shall take the requisite measures to establish a system of strict protection for the plant species listed in Annex	<p>No specific implementation of the general obligation to "take requisite measures".</p> <p>See Article 12(1) above</p>	Potentially inadequate transposition. See Article 12(1) above

ARTICLE 12/16 HABITATS DIRECTIVE		CONSERVATION REGULATIONS 2010 ¹	COMMENTS
	IV(b), prohibiting:		
13(1)(a)	the deliberate picking, collecting, cutting, uprooting or destruction of such plants in their natural range in the wild	Reg 45(1): it is an offence deliberately to pick, collect, cut, uproot or destroy a wild plant of a European protected species.	Adequate transposition.
13(1)(b)	the keeping, transport and sale or exchange and offering for sale or exchange of specimens of such species taken in the wild, except for those taken legally before this Directive is implemented	Reg 45(2): it is an offence for any person to be in possession of, or to control, to transport, to sell or exchange, or to offer for sale or exchange, anything to which this paragraph applies.	Adequate transposition.

ARTICLE 12/16 HABITATS DIRECTIVE		CONSERVATION REGULATIONS 2010 ¹	COMMENTS
13(2)	The prohibitions referred to in paragraph 1(a) and (b) shall apply to all stages of the biological cycle of the plants to which this Article applies.	Reg 45(3): Reg 45(2) applies to (a) any live or dead plant or part of a plant (i) which has been taken in the wild, and (ii) which is of a species or subspecies listed in Annex II(b) (other than any bryophyte) or Annex IV(b) to the Habitats Directive; and (b) anything derived from such a plant or any part of such a plant.	Adequate transposition.
Article 16			
16(1)	Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate from the provisions of Articles 12,13, 14 and 15 (a)	Reg 53(1): subject to the provisions of this regulation, the relevant licensing body may grant a licence for the purposes specified in Reg 53(2). Reg 53(9): the relevant licensing body must not grant a licence under this regulation unless they are satisfied (a) that there is no satisfactory alternative; and (b) that the action authorised will not be detrimental to the	Adequate transposition.

ARTICLE 12/16 HABITATS DIRECTIVE	CONSERVATION REGULATIONS 2010 ¹	COMMENTS	
	and (b);	maintenance of the population of the species concerned at a favourable conservation status in their natural range.	
1691(a)	in the interests of protecting wild fauna and flora and conserving natural habitats;	<p>The purposes for which a relevant licensing body may grant a licence under Reg 53(1) include:</p> <p>Reg 53(2)(b) ringing or marking, or examining any ring or mark on wild animals.</p> <p>Reg 53(2)(c) conserving wild animals or wild plants or introducing them to particular areas.</p>	Adequate transposition.
16(1)(b)	to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;	<p>The purposes for which a relevant licensing body may grant a licence under Reg 53(1) include:</p> <p>Reg 53(2)(g) preventing serious damage to livestock, foodstuffs for livestock, crops, vegetables, fruit, growing timber or any other form of property or to fisheries.</p>	Adequate transposition.

ARTICLE 12/16 HABITATS DIRECTIVE		CONSERVATION REGULATIONS 2010 ¹	COMMENTS
16(1)(c)	in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;	<p>The purposes for which a relevant licensing body may grant a licence under Reg 53(1) include:</p> <p>Reg 53(2)(e) preserving public health or public safety or other imperative reasons of overriding public interest including those of a social or economic nature and beneficial consequences of primary importance for the environment.</p> <p>Reg 53(2)(f) preventing the spread of disease.</p>	Adequate transposition.
16(1)(d)	for the purpose of research and education, of repopulating and reintroducing these species for the breeding operations necessary for these purposes, including the artificial propagation of plants;	<p>The purposes for which a relevant licensing body may grant a licence under Reg 53(1) include:</p> <p>Reg 53(2)(a) scientific or educational purposes.</p> <p>Reg 53(2)(c) conserving wild animals or wild plants or introducing them to particular areas.</p>	Adequate transposition.

ARTICLE 12/16 HABITATS DIRECTIVE		CONSERVATION REGULATIONS 2010 ¹	COMMENTS
16(1)(e)	to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.	Reg 53(7): the relevant licensing body may grant a licence under Reg 53(4) only if they are satisfied that the grant of the licence would be consistent with the restrictions in Article 16(1)(e) of the Habitats Directive (namely “under strictly supervised conditions, on a selective basis and to a limited extent” and “in limited numbers”).	Adequate transposition.

B. Whale and Dolphin Conservation Society's legal review of the efficacy of provisions for the protection of cetaceans: summary of findings

Whale and Dolphin Conservation Society (WDCS) have commissioned a legal review of the efficacy of provisions for the protection of cetaceans, including those under the Habitats Regulations. This is due for imminent publication, and will be provided to Defra once available.

It concludes that whilst the legislation covering the protection of cetaceans and their habitats in the UK has changed considerably in recent years, mainly driven by EU legislation, it still does not provide a comprehensive and ecologically sound structure to ensure the long term favourable conservation status of our whales, dolphins and porpoises.

Overall, there is a lack of coordination across different sectors, with markedly different approaches from the different licensing and regulatory bodies. This not only leads to confusion for other users of the marine environment, but also means there is no comprehensive package of protection for cetaceans.

The statutory nature conservation agencies currently largely rely on marine users approaching them in order to provide advice on legislative responsibilities. An example of this includes the Ministry of Defence, which only began formally communicating with JNCC in 2010 and had previously, we believe, been making decisions about legislative responsibilities solely within its own departments. Other sectors, such as ports and harbours, are subject to a complexity of legislation, which could impact on nature conservation issues.

Historically, the UK has applied a very site-based approach to UK conservation. However, meaningful boundaries at sea are difficult to define, and, in any case, mobile species, including cetaceans, are not simply confined to such geographic boundaries, although as noted earlier, particular areas may be important to them.

For the two cetacean species currently listed in the Habitats Directive Annex II as requiring the designation of SACs, harbour porpoise and bottlenose dolphin, there is still no 'coherent network' of protected sites proposed. There are none currently proposed in the UK for the former and only three established for the latter with no new proposals. In addition, although there is likely to be more scrutiny of a proposal for an activity within a protected area, there is growing concern about the extent of effective 'protection' afforded to these sites.

Despite the requirement under Article 12 of the Habitats Directive, to establish a *system of strict protection*, there are few obvious robust and enforced mechanisms that would put a stop to *all forms of deliberate capture or killing (e.g. bycatch); deliberate disturbance, particularly during the period of breeding, rearing, hibernation and migration (e.g. licensing, mitigating and limiting noisy activities such as seismic survey work within areas known to be important to cetaceans)*, nor measures to stop *deterioration and destruction of breeding sites or resting places* outwith SACs.

C. RSPB review of EPS experience on reserves

1. Introduction

The RSPB manages 104 reserves in England, 66 of which support European Protected Species (EPS). In recent years, c75% of the RSPB's land acquisition has been for the purposes of habitat restoration, meaning that the RSPB has become increasingly involved in large-scale habitat change. The RSPB therefore has experience of the EPS licensing regime in its capacity as a developer and land manager.

As a contribution to the Link response to the Defra Review of Birds and Habitats Directive implementation in England, the RSPB has undertaken a rapid review of its experiences of the EPS licensing system, and the key messages that arise from this experience.²⁸

In section 2 below, key messages are illustrated using relevant examples from case studies which are described in more detail in Section 3.

2. Key messages arising from the RSPB's experience of EPS in its capacity as a developer and land manager

i) In the majority of cases RSPB's experience is good

Examples:

- Shorne Marshes: scrub clearance and large population of great crested newts: early survey work, consultation with NE and adaptation of work programme to minimise disturbance. No licence required.
- Minsmere: changes to building and bat roost: survey, assessment of design, methods and timing of operations in relation to potential disturbance. Written advice from consultant.
- Middleton Lakes: vegetation clearance to create new paths near where great crested newt recorded: NE's advice sought and timing of work adjusted to avoid disturbance.

ii) There is a need for suitable guidance

Examples:

- Little Whirlpool Ramshorn snail, *Anisus vorticulus*: Requirement for an agreed management protocol for the maintenance of ditches and other water-bodies (protocol still in draft).
- Dormouse and tree clearance for heathland regeneration at Broadwater Warren: guidance on tree clearance relates to forestry operations and is inappropriate for habitat creation schemes. The statutory agency guidance for felling in woodlands with dormice is to 'avoid felling more than a third of the area of habitat in the woodland, less for small woods, and retain remaining areas of habitat for at least 5 years'. The five year gap between felling blocks of woodland may be applicable to clear-fell forestry operations but is less relevant to heathland creation schemes where the general approach is to fell relatively small areas of conifer (much less than a third) annually so as to gradually increase the area of regenerating heathland. Rather than applying this guidance rigidly, a degree of pragmatism would allow wider conservation gains for heathland-dependent species and still enable dormouse conservation as it could be argued that the gradual clearing of an area of conifers, especially starting from the centre and moving outwards, is more likely to sustain

²⁸ It has not been possible to undertake a comprehensive assessment across all our reserves, but the rapid review is considered broadly representative.

a population of dormice than the clearing of a large block of trees followed by 5 years of no clearance.

iii) Lack of determination of Favourable Condition Status, with the result that carrying out activities with negligible population effects are still liable to prosecution

Examples:

- Little Whirlpool Ramshorn snail, *Anisus vorticulus* and routine ditch management. To maintain suitable habitat for the snail, ditch management is required to prevent them becoming completely vegetated and drying up. During this management, disturbance and potential destruction of individual snails is unavoidable and therefore needs licensing, yet is unlikely to have population effects.
- Dormouse and tree clearance for heathland regeneration at Broadwater Warren. Given the amount of suitable habitat in the surrounding area (including broadleaved woodland being actively coppiced by Sussex Wildlife Trust) there is likely to be a large local population of dormice so the effect on the overall population of removing c40ha of conifers is likely to be very small. In addition it is likely that dormice would rapidly recolonise the area from the neighbouring areas once suitable habitat has developed.

iv) Lack of long-term view can hamper the long-term conservation gain

Example:

- Dormouse and tree clearance for heathland regeneration at Broadwater Warren. In the long-term the habitat produced through the heathland recreation scheme is likely to be better for dormice than the existing conifer plantation which is generally considered sub-optimal.

3. Illustrative case studies

Great crested newts and habitat management at Shorne Marshes, Kent

Great crested newts occupy large numbers of ephemeral 'explosion crater' ponds surrounded by scrub. RSPB wanted to manage the scrub to provide aestivating sites (damp places to lie dormant during hot weather) for the newts and to prevent over-shading of the ponds. A survey in 2006 estimated a population of over 1000 adults. NE's advice was sought and a system of rotational scrub management was initiated with 10-15% of the scrub coppiced each winter. No licence was required.

Great crested newts and creation of new paths at Middleton Lakes, Staffordshire

This is a gravel pit restoration site. RSPB wanted to clear vegetation to create new paths 100m from where great crested newts had been recorded. NE's advice was that no licence was required provided the work was carried out over winter prior to March.

Bats and the Discover Nature Project at Minsmere, Suffolk

As part of the Discover Nature Project three buildings were being replaced or improved and a bat survey was commissioned to assess the buildings. They included the work-centre where a summer bat roost was found in the loft. It was established that the roost was not being used over-winter so the working methods and timing of operations were adjusted to ensure the work was completed before March/April to minimise the chance of disturbance. Because of potential concern that access could be affected by the new build being added to the work centre, new access points were installed prior to any work commencing. Access to the roof-space was maintained throughout.

Little Whirlpool Ramshorn snail, *Anisus vorticulus*, and routine ditch maintenance at Pulborough Brooks and Amberley Wildbrooks, West Sussex

This small snail (4-7mm) has a restricted distribution but where present it can occur in large numbers. Ditch management involves removal of silt and vegetation, therefore the disturbance or potential destruction of individual snails is unavoidable and a licence is required. At present there is no published best practice guidance for mitigation. RSPB carries out ditch management on rotation and only clears small sections where the snail is known to be present. Repeat surveys suggest the population is being maintained and expanding.

Dormouse and tree clearance for heathland regeneration at Broadwater Warren, Kent

RSPB planned to remove conifers from a Plantation on Ancient Woodland Site (PAWS) but dormice were found to be using the young conifer plantation. Contractors were employed to survey the whole site and NE and FC consulted. A mitigation licence was required involving substantial changes to the planned schedule of work, increasing the time taken to restore the heathland. In the long-term the habitat produced is likely to be better for dormice than the existing conifer plantation which is generally considered sub-optimal. Good dormouse habitat should develop from 5 years after the felling of conifers with the creation of glades with bramble and the restoration of coppice. In the meantime, a dormouse population is being maintained through the use of nest-boxes.



Staggered ditch clearance for *Anisus vorticulus* at RSPB's Pulborough Brooks reserve

D. Natura 2000 case studies

Case Study: Thames Basin Heaths SPA & Dorset Heathlands SPA

Overview – context and key issues

1. The Thames Basin Heaths Special Protection Area supports important populations of three bird species – Dartford warbler, woodlark and nightjar – requiring ‘special protection measures’²⁹ and the complex site³⁰ (ca 35 km from the City of London) is a focus for new housing and other development activity. Tensions and challenges arise from the risks to the heathland habitat and the vulnerable breeding bird populations it supports posed by residential housing development. Not least of the problems is the difficulty of the ‘in-combination’ assessment required under the Habitats Regulations when considering large numbers of small scale developments which together generate a potential adverse effect. The context is not unique to the Thames Basin Heaths. The consequence is that local planning authorities, as the competent decision-making authority, are faced with the difficult task of judging likely effects and developers in turn are required to provide evidence through appropriate assessments to demonstrate that their activity will have no likely significant effect on the European site either alone or in-combination. The burden on both developers and planning authorities required a strategic approach to which all relevant competent authorities are in accord. The Thames Basin Heaths SPA has been at the vanguard of developing a model solution, paralleled in the Dorset Heathlands SPA and in the process of being applied to or proposed for other Natura 2000 sites requiring similar strategic planning solutions, to avoid pressures from urban growth damaging wildlife assets of European importance.
2. English Nature (now Natural England), with the support of the Wildlife Trusts and the RSPB and various local planning authorities, were at the forefront of bringing forward innovative strategic planning solutions designed to conserve the European sites and to enable development to proceed in areas of considerable development pressure. These solutions proved challenging to the housing sector and initially met with considerable resistance. Following significant collaboration between all parties, it has taken several years for the solutions to bed down and begin to take full effect. The strategic approach adopted has provided best practice for other areas facing similar challenges.

Background

3. Heathlands in close proximity to urban areas in England have long been recognised as vulnerable to a range of pressures. Land use change, including conversion to arable agriculture and plantation forestry and urbanisation has resulted in the most obvious impact of direct land take and fragmentation of the formerly extensive blocks of open heathland habitat, most commonly used for stock grazing, into smaller patches of often isolated habitat. The quantified dramatic loss of heathlands around Poole in Dorset from ca 40,000 ha in the mid-18th century to 10,000 ha in 1962 and under 6,000 ha in 1978³¹ is a pattern repeated elsewhere in lowland England. Further studies of the Dorset heaths over the last 15 years have shown that the remaining heaths, many of which are adjacent to housing developments and roads, are

²⁹ These are included in Annex I of the Birds Directive, Article 4 of which requires that such species “... shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution.”

³⁰ An aggregation of 13 individual but fragmented SSSIs within 11 local planning authority areas centred on the intersection of Hampshire, Surrey and Berkshire.

³¹ N. Webb (2005) Overview of the Dorset Heaths. In: *Combating urban pressures on European heathlands in Dorset*. Proceedings of the final project seminar, pp 3-7. University of Bournemouth.

http://ec.europa.eu/environment/life/project/Projects/files/file/Outcomes_Seminar_June2005.pdf

frequently subject to damage and disturbance by a range of urbanisation effects: arson, off-road motorcycle scrambling, dumping of garden and other waste, eutrophication, and informal recreational use, in particular dog-walking and increased predation by cats.

4. Robust scientific research and related studies of the effects of disturbance from informal recreational use of heaths in Dorset and the Thames Basin area have demonstrated that breeding performance of ground and near-ground nesting birds can and have been detrimentally affected. Such impacts are considered to be an adverse effect on the integrity of these European sites.

Strategic planning to accommodate new housing development in the Thames Basin Heaths area

5. During the process to establish a regional spatial strategy for the South East, local authorities covering the Thames Basin Heaths SPA were allocated varying levels of housing growth (amounting to around 40,000 houses overall). Since an increase in population would potentially generate additional recreational and other 'urbanisation' pressures on the SPA, as listed above, and the site was acknowledged to be already detrimentally affected by such pressures, the Habitats Regulations require likely impacts of any new development both alone and in combination with other developments potentially affecting the site to be assessed. The challenge facing local planning authorities, developers, English Nature and NGOs was that the recent scientific studies demonstrated the ongoing and cumulative adverse effects of residential development on the SPA, therefore the addition of any new housing without mitigation would exacerbate the existing problem. If a conclusion of no adverse effect on the SPA's integrity could not be reached, then the local planning authorities would have to refuse consent because there would always be less damaging alternative solutions available in terms of housing supply e.g. locating housing further than 5km away from the SPA. This process puts a substantial burden of proof on the developer who has to undertake Habitats Regulations Assessment (appropriate assessment) of the proposal and on the local planning authority to assess and make a determination based on the information provided.
6. To overcome the problems, English Nature devised a strategic and innovative approach to enable any planning application for housing development which met defined mitigation standards to proceed without the need to undertake appropriate assessment i.e. to be able to conclude there would be no likely significant effect. They comprised measures to divert recreational pressures from the SPA through the creation of new open space and to manage recreational use of the open access Heathlands.³² The Thames Basin Heaths 'Delivery Plan' approach was endorsed by the Secretary of State in every case which went to appeal and was thoroughly tested through a series of technical sessions as part of the Examination in Public (EiP) of the South East Plan. Local authority planners, Natural England, voluntary bodies (including the Wildlife Trusts and the RSPB) and house builders all participated in these debates.
7. Following the EiP into the South East Plan, a Joint Strategic Partnership Board comprising the affected local authorities, advised by key interested parties including Natural England, land owners, developers and environmental NGOs was established to develop the Plan. The Partnership Board produced and adopted a finalised Delivery Framework³³ and a legal agreement between the LPAs which now form the basis for enabling development whilst avoiding impacts on the SPA.

³² These included wardening of TBH and signage on existing entrances to the heathland site to inform users about the impacts of recreational activities, particularly during the breeding season.

³³ Joint Strategic Partnership Board (2009) *Thames Basin Heaths Special Protection Area Delivery Framework*. Guildford.

8. The TBH Delivery Framework ‘standards’ comprise the following key provisions:³⁴
- avoiding housing development within 400 metres of the SPA to avoid urban effects that cannot be mitigated e.g. dumping of garden waste, cat predation;
 - allowing the LPA to approve, without recourse to an Appropriate Assessment, housing development between 400m and 5km of the SPA (an evidence-based ‘zone of influence’) on condition that:
 1. sufficient ‘Suitable Alternative Natural Greenspace’ (SANG) of appropriate quality and in an appropriate location is available to divert recreational pressure from the SPA; and
 2. Strategic access management measures and monitoring provision across the areas of the SPA open to public access has been supported by an appropriate developer contribution.
9. These measures result in consistency across all local authorities and reasonable certainty that housing development individually and in-combination will not have a likely significant effect on the Thames Basin Heaths SPA. Any development proposals that do not meet the Delivery Framework standards will, of course, be subject to Appropriate Assessment to determine their likely impacts on the SPA.

Joint Dorset Heathlands Interim Planning Framework

10. Almost in parallel with decisions in the Thames Basin Heaths SPA to establish a strategic planning solution, English Nature commenced work with the local planning authorities in South-East Dorset, around the Dorset Heaths SPA and SAC (as well as other European Sites and the Ramsar site) to develop a similar scheme. This became known as the ‘Joint Dorset Heathlands Interim Planning Framework’.
11. Under the Framework, developers adding residential units between 400m³⁵ and 5km from European Sites were required to contribute to a fund to support activities to mitigate the impact of recreational pressures arising from additional development on the heathlands. As with TBH the activities included wardening and signage on existing heathland sites to inform heathland users about the impact of recreational activity on the heathlands; the management of non-heathland greenspaces as SANGs within South East Dorset, to encourage recreational users to shift away from the SPA heathlands; and the creation of new SANGs.
12. This approach has provided clarity for developers who would otherwise have been required to undertake appropriate assessments on each development – this would have been especially challenging for developers of sites which involved a small number of units. Considering all the impacts of additional residential development together also enabled an assessment of the cumulative effects of the developments, something which would have been challenging but required under Habitats Regulations process. In this way an apportionment of developer contribution towards the costs of mitigation could be made on a per-unit basis, providing an equitable solution.
13. As with TBH, the mitigation has proceeded on an experimental basis. Consultants funded from the ‘Mitigation Fund’ have been monitoring the effect of the Interim Planning Framework and its associated mitigation activities, to determine whether the reduction in additional recreational pressures from the new residential units has resulted in ‘no adverse effect on integrity’ as

³⁴ This is a very brief outline of the Delivery Framework standards. Full details are set out in the Framework, available at <http://www.bracknell-forest.gov.uk/thames-basin-heaths-spa-delivery-framework.pdf>

³⁵ As with Thames Basin Heaths, there was consensus that it was not possible to conclude ‘no adverse effect on the integrity’ of the European Site interest features (ground-nesting birds such as nightjars) from additional residential development within 400m of the boundary of the European site.

intended. Monitoring measures include car park counts, automated visitor counters, visitor questionnaires, as well as monitoring populations of the three affected Annex 1 bird species³⁶. Populations of Annex 1 birds are increasing nationally, and Dorset holds significant populations of several of these species.³⁷ At present it is still too early to tell whether populations are responding positively to the IPF regime.

14. The IPF was intended to become a Development Plan Document under the previous planning system. It is now planned that it will become a Supplementary Planning Document for each Local Planning Authority in South-East Dorset. In this way the requirements of the Habitat Regulations will be incorporated into each Local Plan, creating transparency and equity for developers across the sub-region.

Extending the lessons and measures from Thames Basin Heaths and Dorset Heathlands to other Natura 2000 sites

15. The Thames Basin Heaths and Dorset Heathlands cases have supported substantial research and development to provide model strategic planning solutions that should enable development to be accommodated alongside safeguarding the integrity of the features for which a European site is designated, as long as defined standards are adhered to.
16. These are innovative solutions, and require monitoring data to be collected and closely scrutinised to confirm that the intended outcomes of avoiding and managing recreational impacts in order to avert damaging impacts on a Natura 2000 site are being achieved.
17. In the meantime, a strategic approach to Habitats Regulations Assessment is being applied or considered for a range of other Natura 2000 sites in England including:
 - Breckland SPA
 - Burnham Beeches SAC
 - Cannock Chase SAC
 - The Sandlings SPA
 - The Solent SPA

³⁶ Fearnley, H & Liley, D (2010). *Analysis and presentation of IPF monitoring and projects to inform the Heathland DPD*. Footprint Ecology, Wareham, Dorset.

³⁷ Although it is important to note that the national population of Dartford warblers is likely to have been seriously affected by recent cold winters.

Case study: Humber Estuary SPA, SAC and Ramsar site

Whole Estuary cases studies

1. Humber Flood Risk Management Strategy ☺	
Data & Evidence	<ul style="list-style-type: none"> • Developed using best available data ☺ • Monitoring leading to refinement ☺ • Evidence-based decision-making ☺ • Pragmatic response to data uncertainties (e.g. habitat balance sheet) ☺ • Improvements to condition of Natura 2000 site not recognised as boundary not yet amended to encompass compensatory realignment sites in line with Government policy ☹
Process	<ul style="list-style-type: none"> • Process relatively smooth. Defra has approved strategy enabling sensible forward planning and budgeting ☺ • Challenges by some local communities ☹
Legislative interpretation	<ul style="list-style-type: none"> • Local concerns including initial refusal of planning consent for Donna Nook managed realignment ☹
Communications & awareness	<ul style="list-style-type: none"> • Lack of understanding and awareness in local communities and some local authorities ☹ • EA communication process improving ☺
Capacity building	<ul style="list-style-type: none"> • -
Lessons from other countries	<ul style="list-style-type: none"> • -
Additional benefits/ disbenefits	<ul style="list-style-type: none"> • Managed realignment sites at Alkborough & Paull Holme Strays delivering ecosystem services in addition to flood risk management and habitat compensation. Ref - <i>The National Ecosystem Assessment Technical Report (2011)</i> ☺

2. Humber Management Scheme and Humber INCA ☺	
Data & Evidence	<ul style="list-style-type: none"> • Roles in strategic data collection & data sharing ☺
Process	<ul style="list-style-type: none"> • Practical implementation ☺
Legislative interpretation	<ul style="list-style-type: none"> • Clear interpretation ☺
Communications & awareness	<ul style="list-style-type: none"> • Strong roles ☺
Capacity building	<ul style="list-style-type: none"> • Roles in developing understanding ☺
Lessons from other countries	<ul style="list-style-type: none"> • Liaison ☺
Additional benefits/ disbenefits	<ul style="list-style-type: none"> • Strong partnership working ☺

3. Onshore windfarms ☹	
Data & Evidence	<ul style="list-style-type: none"> • Sensitivity mapping tools available ☺ • Gaps in understanding ☹
Process	<ul style="list-style-type: none"> • Failure to adequately assess potential impacts of multiple onshore windfarm applications around the estuary resulting in multiple applications with overlapping and cumulative effects on multiple Natura 2000 sites. Result -

	substantial survey requirements & associated delays in consenting processes ☹️
Legislative interpretation	<ul style="list-style-type: none"> Failure to apply robust and meaningful assessment at strategic level ☹️
Communications & awareness	<ul style="list-style-type: none"> Poor understanding of issues amongst developers and competent authorities ☹️
Capacity building	<ul style="list-style-type: none"> -
Lessons from other countries	<ul style="list-style-type: none"> See: http://www.rspb.org.uk/Images/Positive%20Planning%20of%20Onshore%20Wind_tcm9-213280.pdf 😊
Additional benefits/ disbenefits	<ul style="list-style-type: none">

North Bank case studies

4. ABP Quay 2005 container port, Hull (incl. compensation) 😊	
Data & Evidence	<ul style="list-style-type: none"> Sound data & monitoring programme (pre- and post-construction) 😊 Improvements to condition of Natura 2000 site not recognised as boundary not yet amended to encompass compensatory realignment sites in line with Government policy ☹️
Process	<ul style="list-style-type: none"> Early engagement and positive working with statutory bodies & NGOs resulted in agreement which avoided need for public inquiry 😊
Legislative interpretation	<ul style="list-style-type: none"> Not controversial 😊
Communications & awareness	<ul style="list-style-type: none"> Good 😊
Capacity building	<ul style="list-style-type: none"> High level of engagement and understanding of legislation and process by the developer. Solutions aided by involvement of experienced specialists from within ports, agency and NGO sectors 😊
Lessons from other countries	<ul style="list-style-type: none"> ABP aware that some other countries interpret more strictly 😊
Additional benefits/ disbenefits	<ul style="list-style-type: none"> Compensatory managed realignment sites exceeding targets and delivering multiple ecosystem services. 😊

5. ABP Green Port, Hull (incl. compensation) 😊	
Data & Evidence	<ul style="list-style-type: none"> Comprehensive data available on development and potential compensation sites from volunteer-based survey and previous development-related survey 😊
Process	<ul style="list-style-type: none"> Rapid agreement re nature and scale of effects, and potential compensation 😊
Legislative interpretation	<ul style="list-style-type: none"> Not contentious 😊
Communications & awareness	<ul style="list-style-type: none"> Very good – experienced developer with good working relationships with NE, NGOs and other stakeholders 😊
Capacity building	<ul style="list-style-type: none"> Issues with NE resourcing to meet developer requirements ☹️
Lessons from other countries	<ul style="list-style-type: none"> ABP aware that some other countries interpret more

	strictly 😊
Additional benefits/ disbenefits	<ul style="list-style-type: none"> Application submitted but not yet determined. Approach adopted should ensure delays are avoided 😊

South Bank case studies

6. South Humber Gateway Mitigation Strategy 😊😞	
Data & Evidence	<ul style="list-style-type: none"> Strategic approach to data collation driven by developing mitigation strategy. Will also provide an evidence base for individual developers & and reduce their requirement for further survey 😊 To date, lack of data has been a major barrier to delivering both effective conservation and streamlined consenting 😞
Process	<ul style="list-style-type: none"> An innovative solution in preparation that should allow development in this area to proceed on a much more streamlined basis whilst ensuring the integrity of the Humber Estuary SPA bird populations through provision of strategic mitigation areas 😊
Legislative interpretation	<ul style="list-style-type: none"> Designed to address complexity of cumulative and in-combination impact assessments in area of high development pressure 😊
Communications & awareness	<ul style="list-style-type: none"> Work towards a strategic mitigation solution has improved understanding and awareness of legislative process and requirements, and recognition of the value of the estuary's natural (as well as commercial) assets 😊
Capacity building	<ul style="list-style-type: none"> Need for greater relevant legal understanding and ecological expertise amongst planners 😞
Lessons from other countries	<ul style="list-style-type: none"> -
Additional benefits/ disbenefits	<ul style="list-style-type: none"> If delivered, the mitigation strategy should provide a more stable habitat resource for SPA birds, more certainty for business and streamline the consenting of development 😊 Lack of strategy to date has resulted in sub-optimal, piecemeal mitigation 😞

7. ABP Immingham Outer Harbour (incl. compensation) 😊	
Data & Evidence	<ul style="list-style-type: none"> Sound data + monitoring programme (pre and post construction) 😊 Improvements to condition of Natura 2000 site not recognised as boundary not yet amended to encompass compensatory realignment sites in line with Government policy 😞
Process	<ul style="list-style-type: none"> Early engagement and positive working with statutory bodies & NGOs resulted in agreement which avoided need for public inquiry 😊
Legislative interpretation	<ul style="list-style-type: none"> Not controversial 😊
Communications & awareness	<ul style="list-style-type: none"> Good 😊

Capacity building	<ul style="list-style-type: none"> • High level of engagement and understanding of legislation and process by the developer. Solutions aided by involvement of experienced specialists from within ports, agency and NGO sectors ☺
Lessons from other countries	<ul style="list-style-type: none"> • ABP aware that some other countries interpret more strictly ☺
Additional benefits/disbenefits	<ul style="list-style-type: none"> • Compensatory managed realignment sites exceeding targets and delivering multiple ecosystem services.☺

8. Able Logistics Park ☺	
Data & Evidence	<ul style="list-style-type: none"> • Surveys undertaken to fill evidence gaps ☺
Process	<ul style="list-style-type: none"> • Protracted due to failure to agree impacts and mitigation requirements ☹
Legislative interpretation	<ul style="list-style-type: none"> • Not straight forward – but not without precedent ☺
Communications & awareness	<ul style="list-style-type: none"> • Much engagement but insufficient effective dialogue and low level of awareness of legal requirements ☹
Capacity building	<ul style="list-style-type: none"> • -
Lessons from other countries	<ul style="list-style-type: none"> • -
Additional benefits/disbenefits	<ul style="list-style-type: none"> • Significant delays largely attributed to the Habitats Regulations process, but more than a year after those were resolved, and more than six months since conditional planning permission was granted, developer has yet to finalise arrangements so that work can commence ☹

9. Able Marine Energy Park ☺	
Data & Evidence	<ul style="list-style-type: none"> • Surveys undertaken to fill evidence gaps ☺
Process	<ul style="list-style-type: none"> • Protracted due to failure to agree impacts and agree mitigation requirements ☹
Legislative interpretation	<ul style="list-style-type: none"> • Non-contentious ☺
Communications & awareness	<ul style="list-style-type: none"> • Much engagement but insufficient effective dialogue and low level of awareness of legal requirements ☹
Capacity building	<ul style="list-style-type: none"> • -
Lessons from other countries	<ul style="list-style-type: none"> • -
Additional benefits/disbenefits	<ul style="list-style-type: none"> • Application submitted to and accepted by the IPC – significant opportunity to review the efficacy or otherwise of the IPC in handling a case with major impacts on a Natura 2000 site ☺

