

Wildlife and Countryside Link response to the consultation on draft guidance on the application of Article 6(4) of the Habitats Directive

1. Introduction

1.1. Wildlife and Countryside Link (Link) brings together 39 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.

1.2. This submission is supported by the following 10 organisations:

- Amphibian and Reptile Conservation
- Bat Conservation Trust
- Buglife – The Invertebrate Conservation Trust
- Mammal Society
- Marine Conservation Society
- Royal Society for the Protection of Birds
- The Wildlife Trusts
- Whale and Dolphin Conservation
- Woodland Trust
- WWF-UK

1.3. Link welcomes the report of the review of the implementation of the Habitats and Wild Birds Directives, which re-stated the Government's commitment to proper implementation of the Directives, and concluded that they do not act as a brake on economic development.¹ The Directives have provided valuable protection for Europe's rarest and most threatened habitats and species for over 30 years, and their effective implementation will be vital to meeting our national, European and international biodiversity commitments. Link actively engaged in the review of the Directives, and many of our members are closely involved in the initiatives that have proceeded from it.

2. Question 1: The draft guidance sets out the circumstances in which Article 6(4) may apply. Do you agree with this overall approach?

2.1. We recognise the objective of this guidance on Article 6(4) ('the draft guidance'). We do, however, have a number of concerns regarding its alignment with existing EU case-law and guidance. We also believe that, in order to be most effective for all stakeholders and to ensure compliance with the Directives, the guidance needs to give more detail in key areas, as outlined below.

2.2. The introduction to the guidance must clearly state the following points:

- 2.2.1. The purpose of 'a coherent ecological network of protected sites' – i.e. Natura 2000 – is to maintain the species and habitats within the network at, or restored to, favourable conservation status, and the network is important *because* it makes a significant

¹ Defra (2012) *Report of the Habitats and Wild Birds Implementation Review*, <http://www.defra.gov.uk/publications/files/pb13724-habitats-review-report.pdf>.

contribution to that objective.² The importance of a site to the coherence of the network is a function of the conservation objectives of the site, the number and status of the habitats and species found within the site, as well as the role the site plays in ensuring an adequate geographical distribution in relation to the range of species and habitats of species concerned. This objective must therefore be borne in mind whenever considering possible derogations under Article 6(4).

2.2.2. Article 6(4) makes it clear that sites should only be damaged or destroyed ‘in exceptional circumstances’ or ‘as a last resort’ – as is stated in the existing 2007 guidance.³ This is because Article 6(4) is a derogation from Article 6(3), and it must therefore be interpreted in a restrictive way, so that its application is limited to circumstances where all conditions are satisfied.

2.2.3. We recognise that Statutory Nature Conservation Bodies (SNCBs) have a role in helping competent authorities to identify adequate compensatory measures. This role must, however, be seen in light of the SNCB’s primary function, which is to ensure that the natural environment is conserved, enhanced and managed.⁴ To achieve this, SNCBs must be allowed to maintain an independent and impartial view as to the potential adverse implications of, and alternative solutions to, a plan or project on a Natura 2000 site, and be able to object to such a proposal if they believe there has been inadequate assessment of impacts, there are less damaging alternatives or inadequate compensation has been proposed.

3. Question 2: Do you agree that the approach linking alternatives and IROPI as set out in the guidance is sensible?

3.1. We believe that the approach to alternative tests in the draft guidance is too narrow. As the EU guidance shows, alternative solutions should explore in a general sense the scope to deliver the objective of a plan or project in a less harmful way, including using other operational methods. The Court of Justice of the European Union (CJEU) has confirmed that Member States: (i) cannot exclude certain categories of project from assessment⁵; and that (ii) the implementation of a plan or project under Article 6(4) of the Habitats Directive is, *inter alia*, subject to the condition that the absence of alternative solutions be demonstrated.⁶

3.2. We also believe that the criteria for assessing alternative solutions should be clarified. The draft guidance is clear that ‘alternative solutions are limited to those which would deliver the same overall objective as the original proposal’ (paragraph 10). Paragraph 12 must therefore ensure that, in assessing alternative solutions, competent authorities are directed to assess the relative impact of solutions on the conservation of the site, and the maintenance of its integrity and ecological functions. As the EU Guidance states, ‘other assessment criteria, such as economic criteria, cannot be seen as overruling ecological criteria.’⁷

² See the definition of a ‘site of Community importance’, Art 1(k) in Directive 93/43/EEC; SACs are drawn from the list of SCIs.

³ Marine Management Organisation, *Guidance on imperative reasons on overriding public interest under the Habitats Directive*, <http://www.marinemanagement.org.uk/licensing/supporting/documents/iropi.pdf>

⁴ The primary functions of the SNCBs are laid out in the Natural Environment and Rural Communities Act 2006.

⁵ See Cases C-98/03, *Commission v Germany*, C-6/04, *Commission v United Kingdom*, C-241/08, *Commission v France* and C-538/09, *Commission v Belgium*

⁶ See Case C-239/04, *Commission v Portugal* – “Castro Verde”

⁷ European Commission (2000) *Managing Natura 2000 Sites – the Provisions of Article 6 of the ‘Habitats’ Directive 92/43/EEC*,

4. Question 3: Do you agree with the guidance on IROPI?

- 4.1. We do not agree with the guidance on the IROPI test as currently drafted.
- 4.2. The draft guidance clearly lays out the meaning of 'IROPI'; this should be amended, in accordance with the 2007 guidance and for maximum clarity, as follows:

'Imperative' should be defined as where a plan or project is 'indispensable' rather than 'necessary'. This would then follow the EU guidance, which sets a higher threshold through its use of 'indispensable'.
- 4.3. The guidance fails to recognise and give sufficient emphasis to the fact that it is the 'public interest' associated with a plan or project that must be both 'imperative and 'overriding'. Disconnecting 'public interest' from 'imperative' and 'overriding' runs the risk that a plan or project could meet the IROPI test if there is simply a public interest element. This would clearly be a lower threshold than that set by the Directives. The 4th recital to the Habitats Directive confirms this point in referring to the 'community's natural heritage', which it is necessary to conserve at a 'community level.' Local and often regional public interest will therefore not be sufficient to meet the IROPI test.
- 4.4. Furthermore, Article 3(1) requires the establishment of a coherent *European* ecological network of Special Areas of Conservation (SACs) to enable natural habitat types and species to be maintained at, or restored to, favourable conservation status in their natural range. Thus, Natura 2000 protects species and natural habitat types of European significance. A plan or project must therefore have a superior public interest (i.e. at least national level) in order to outweigh the destruction of, or damage to, features of European significance.
- 4.5. Paragraph 18 also seeks to set a lower threshold for IROPI than is found in the EU guidance, saying that 'plans or projects which only deliver short term benefits are unlikely to be able to show IROPI' (emphasis added). We believe that short-term economic interests, or other interests which would only yield short-term benefits for the society, are not sufficient to outweigh the long-term conservation interests protected by the Directive. The draft guidance should therefore specify, in line with the EU Guidance, that public interest can only be overriding if it is *long-term interest*.

5. Question 4: Do you agree with the guidance on compensatory measures?

- 5.1. We do not agree with the guidance on compensatory measures as currently drafted.
- 5.2. As noted above, the coherence of the ecological network is designed to achieve and maintain favourable conservation status. Article 6(4) of the Directive requires Member States to take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected, and thus the favourable conservation status of the species and habitats it contains. Since the Directive presumes that the 'original' Natura 2000 network has been coherent, any compensatory measures must fully restore the coherence of the network. In addition, any compensation proposed should refer to the site's conservation objectives and to the habitats and species negatively affected, in comparable proportions in terms of number and status. The role played by the site concerned in relation to the biogeographical distribution has to be adequately replaced.

- 5.3. Competent authorities should, therefore, be looking at these criteria when designing the compensatory measures for a project, and should ensure that they provide the properties and functions comparable to those which had justified the selection of the original site. The functional integrity of the overall network must not be damaged as a consequence of allowing loss or damage to the site for which compensation is proposed.
- 5.4. Paragraph 21 of the draft guidance needs to clearly reflect the fact that while designations of new Natura 2000 sites can be part of a compensation package under Article 6(4), the designations on their own are insufficient without the accompanying measures set out in the EU's Guidance document on Article 6(4) of the Habitats Directive 92/43/EEC.⁸
- 5.5. In relation to bullet point one of paragraph 21, we recommend that the wording is amended to show that re-created habitat must be such that it *will* be designated as a European Site.
- 5.6. In relation to bullet point three of paragraph 21, the wording should clarify the meaning of 'in exceptional circumstances', which refers to the fact that it is normally not possible to compensate for an impact on one European site through designating a new one for comparable features.⁹
- 5.7. Paragraph 22 states that competent authorities must have confidence that the compensatory measures will be sufficient to 'offset the harm'. There is a risk that the obligation on competent authorities in terms of compensatory measures will be misunderstood due to the brevity of the draft guidance. There is helpful information in the EU guidance on this point, which should be used to amplify the draft guidance.¹⁰
- 5.8. Paragraph 23 refers to the extent of compensatory measures, stating that 'Competent authorities should not require more compensation than is needed to ensure the integrity of the network of European sites is maintained.' This sentence is ambiguous and risks a departure from EU Guidance¹¹; in particular, there is wide acknowledgement that ratios should be generally well above 1:1.¹² Thus, compensation ratios of 1:1 or below should only be considered when it is demonstrated that with such an extent the measures will be 100% effective in reinstating structure and functionality within a short period of time (e.g. without compromising the preservation of the habitats or the populations of key species likely to be affected by the plan or project).
- 5.9. There is some confusion in the draft guidance over timing around compensatory measures. In most cases compensatory habitat should be fully functioning before harm occurs to the original site. As paragraph 25 notes, there are 'certain situations' where damage to the site may occur before the compensatory habitat is fully functional, but this is the exception.

⁸ In terms of the 'Birds' Directive, this could include, as a compensation, work to improve the biological value of an area, which is either designated or will be designated, so that the carrying capacity or the food potential are increased by a quantity corresponding to the loss on the site affected by the project. A fortiori, the re-creation of a habitat favourable to the bird species concerned is acceptable provided the created site is available at the time when the affected site loses its natural value.

In terms of the 'Habitats' Directive, the compensation could, similarly, consist of the recreation of a comparable habitat or the biological improvement of a substandard habitat within an existing designated site, or even the addition to the Natura 2000 Network of a new site of comparable quality to the original site. In the latter case, one could argue that overall, the project will result in a loss for this habitat type at Member State level. However, at Community level, a new site will benefit from the protection provided for in Article 6, thus contributing to the objectives of the directive.

⁹ See CJEU judgement on *Basses Corbieres*, Case C-374/98, *Commission v France*, paras 51-52

¹⁰ *Managing Natura 2000 Sites*, section 1.4.2 "Overall coherence" of the Natura 2000 network

¹¹ *Managing Natura 2000 Sites*, section 1.5.4 Extent of compensation

¹² See, for example, the DASA/Hamburg opinion of 2000 "*the area foreseen for the compensation is significantly larger than the area exposed to the significant impact.*"

Where such exceptions are allowed, the delayed measures must not have a negative impact on maintaining or achieving favourable conservation status of the species or habitat(s) concerned. However, bullet point four of paragraph 22 confuses this position by suggesting that ‘uncertainty or a time lag’ is acceptable and can be mitigated through a larger area of compensation. In the limited circumstances where such a delay is unavoidable interim/ transitional measures will be required.

5.10. We welcome the statement in paragraph 24 that ‘compensation must be secured before damage occurs’; this must include adequate funding arrangements and all measures should last for the duration of the impact.

6. Do you have any other comments on the draft guidance?

6.1. We are somewhat perplexed about the contents of paragraph 32, which states that the competent authorities should not request information from the developer or other parties which will not be material to its decision. We assume that at an early stage of the project it is not always possible to discern whether information is relevant or not, but that the application of the precautionary principle may require competent authorities to request information in order to refine its decision. This information may be deemed to be unnecessary at a later stage, but they should not be discouraged from requesting such information in the first instance. We therefore request that the second sentence in paragraph 32 be deleted from the draft guidance.

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