Marine Management Organisation

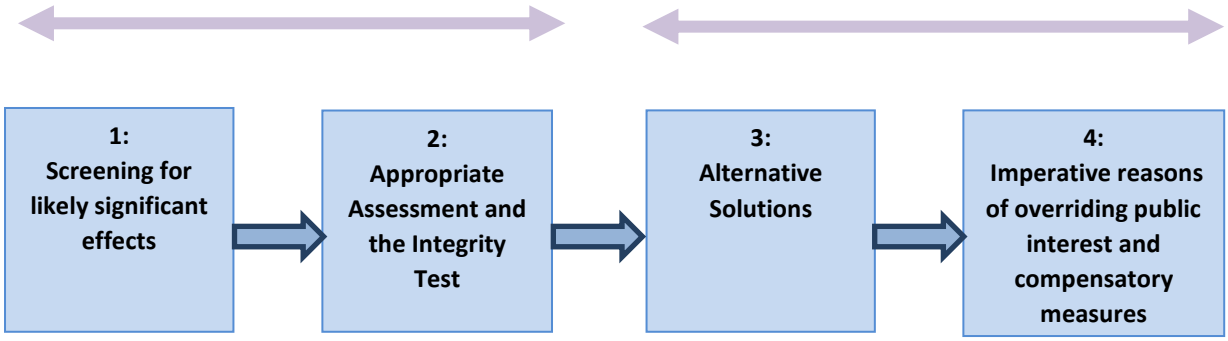
Overview of the Derogation Provisions under the Habitats Regulations

Overview of the Derogations Process

The derogation provisions within the Habitats Regulations Assessment process

This summary document is intended to assist readers in understanding statutory duties placed upon the Marine Management Organisation (MMO) when taking decisions under the Conservation of Habitats and Species Regulations 2017(1) and under the Conservation of Offshore Marine Habitats and Species Regulations 2017 in respect of plans and projects which serve a public interest. Figure 1 below summarises the step wise assessment process provided for within the Habitats Regulations which apply to all consents, permissions or other authorisations issued by MMO.

Figure 1
Outline of the 4 stage approach to an assessment under the Habitats Regulations



The scope of this summary document is limited to stages 3 and 4 in figure 1 above and the interpretation and application of what is widely referred to as the 'derogation provisions' contained in Article 6(4) of the Habitats Directive and regulations 64 and 68 of Conservation of Habitats and Species Regulations 2017. This guidance does not consider stages 1 and 2 of a Habitats Regulations Assessment.

What are the Derogation Provisions?

The derogations recognise the existence, in principle, of proposals (plans and project) which are of a sufficient importance that they justify the possibility (or certainty) of damage to a European site. The derogation tests are sequential in nature and are considered after an appropriate assessment has been completed and the integrity test has been applied.

The derogations are summarised in figure 2 below; they set out a three step process which is relevant to a situation where the outcome of an appropriate assessment is negative. That

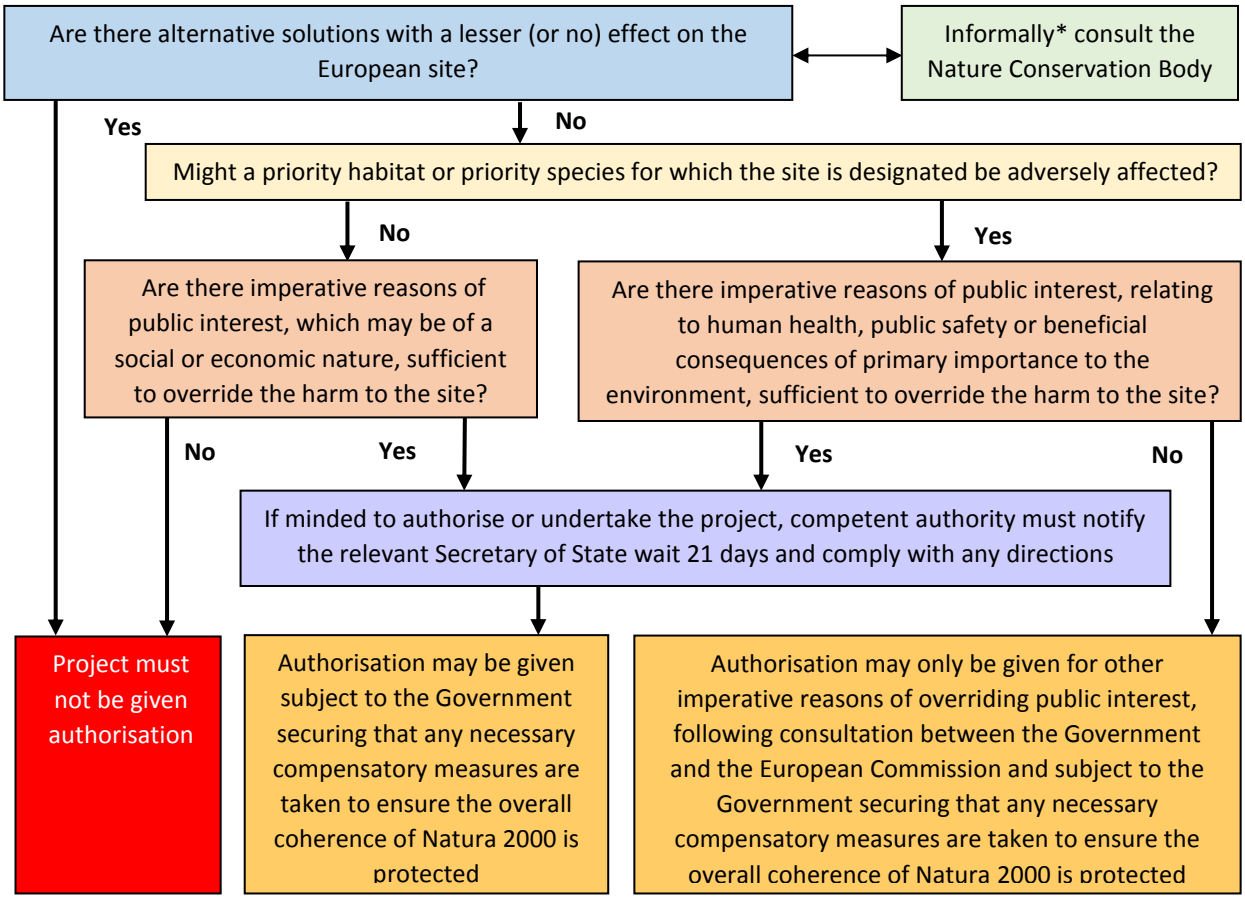
[1] SI No 1012 The Conservation of Habitats and Species Regulations 2017

is to say, that it was not possible, following an appropriate assessment, to ascertain that a plan or project would have no adverse effect on the integrity of a European site.

The application of the derogation provisions is not automatic, MMO has the option of applying the derogation provisions where it considers it is appropriate to do so. Where this is the case, MMO will need to:

- Satisfy itself that there are no alternative solutions to the plan or project.
- Take a decision as to whether the plan or project must be carried out for imperative reasons of over-riding public interest (subject to certain criteria); and
- Satisfy itself that necessary compensatory measures which ensure that the 'overall coherence of Natura 2000 is protected' have been secured.

Figure 2: Overview of the derogations



** The consultation with the nature conservation body is informal as there is no statutory requirement to do so*

Step 1 – Demonstrating the Absence of Alternative Solutions

Understanding what needs to be done

The requirement at this first test is for MMO to satisfy ourselves as to the absence of alternative solutions. This is a different question to the absence of 'alternatives' in a more general sense. To be able to identify alternative solution it is first necessary to understand what it is which needs to be solved in a different way. In other words, what is the objective that the plan or project is seeking to deliver and is there another way of delivering it?

Having defined the 'objective' of the project in question, potential alternative solutions can then be put forward and evaluated to establish if there are, or are not, feasible alternative solutions. The level of detail required to exclude potential alternative solutions will increase the more suitable those alternatives are for achieving the aims of a proposal with less damaging effects (2).

An alternative solution within the context of the derogations is one which delivers the objective that the plan or project is seeking to deliver in a way which is less damaging to European site(s) when compared to the original proposal.

Roles and Responsibilities

It is for MMO to satisfy ourselves as to the absence of alternative solutions so, ultimately, the responsibility for making this decision rests with us. That does not mean that the MMO is responsible for gathering all the relevant information and undertaking the investigative work to identify and explore potentially available alternative solutions. In most cases MMO will expect a project proposer to provide relevant justification as to the absence of alternative solutions. The Statutory Nature Conservation Body will normally advise on the examination of alternative solutions as the search is for an alternative solution with less damaging effects on the site concerned, which is an ecological judgment.

The defining of the 'objective' of a given proposal will involve close liaison with the plan/project proposer. They will feed into the process, and may even take the lead role, but the final decision as to the objective or a plan or project rests with MMO as the competent authority. In other words, MMO may need to look beyond the objective identified by the plan or project proposer. The potential for MMO to reach a different decision to that put forward by a project proposer has been explicitly recognised by the Advocate General of the European Court (3).

[2] Advocate General Opinion Case C-239/04 EC v Portugal, (para 43) April 2006
[3] Case C-241/08 EC v French Republic, Opinion of the Advocate General (paras 98-99)

Step 2 – Imperative Reasons of Over-Riding Public Interest

Understanding what needs to be done

This step which involves a judgment to be made by MMO. This judgment requires the public interest served by a proposal to be weighed against the conservation interest which will be put at risk. With reference to the term 'imperative', guidance from the European Commission notes:

> *'It is reasonable to consider that the 'imperative reasons of overriding public interest, including those of social and economic nature' refer to situations where plans or projects envisaged prove to be indispensable*
> - *within the framework of actions or policies aiming to protect fundamental values for the citizens' life (health, safety, the environment);*
> - *within the framework of fundamental policies for the State and the society;*
> - *within the framework of carrying out activities of an economic or social nature, fulfilling specific obligations of public service'*

The 'overriding' element of the decision is a judgment which essentially asks whether the need for the project outweighs (or overrides) the conservation interest that might be lost/damaged. This weighing is important; it means that a decision as to whether the public interest overrides (or not) must balance the public interest which is served against the damage that might be caused taking account of the particular circumstances in each case. The Court of Justice of the European Union has ruled (4):

> *'…the assessment of any imperative reasons of overriding public interest and that of the existence of less harmful alternatives require a weighing up against the damage caused to the site by the plan or project under consideration.'*

In considering imperative reasons of overriding public interest put forward by a proposer, MMO must be satisfied that the proposal serves a public interest. It is not necessary for the proposal to serve a solely public interest (which is unlikely) but there must be a public interest which is delivered. Plans and projects which deliver solely private interests will not be considered further. In this regard Defra guidance (5) notes:

> *'Public interest can occur at national, regional or local level; as can imperative reasons of overriding public interest provided the other elements of the test are met'*

[4] Case C-304/05 EC v Italy, 20th Sept 2007.
[5] Guidance on the application of Article 6(4), Defra, December 2012.

Where the site hosts a priority habitat or species (and that priority feature is negatively affected) (6), imperative reasons of overriding public interest must be reasons relating to human health, public safety or beneficial consequences of primary importance to the environment, OR, any other reasons having due regard to an opinion of the European Commission (7). Subject to seeking such an opinion therefore, other reasons of public interest (including those of a social or economic nature) can be taken into consideration.

Roles and Responsibilities

As the component authority, MMO is responsible for making this judgment. In making this decision the MMO will take account of information submitted by the proposer, setting out the public interest which is served and the justification for how it 'overrides' the conservation interest that is put at risk. However the decision will be made impartially and will not be unduly influenced by the opinion expressed by the proposer.

The nature conservation body has no formal role in this step. Whilst the initial decision is taken by MMO, the appropriate authority (the Secretary of State) must be notified of any proposal to agree to a damaging plan or project; so a final decision rests with them.

[6] Refer 5.8.1 of EC guidance Managing Natura 2000 (2018) and para 21 of Defra IROPI guidance (2012)

[7] The draft Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019 substitutes 'European Commission' with 'appropriate authority'.

Step 3 – Identifying and Securing Compensatory Measures

Understanding what needs to be done

The derogations provide an exception regime whereby plans and projects which represent a risk to European sites can, nevertheless, be implemented. The need to secure the 'necessary compensatory measures ensures that 'the overall coherence of the network is protected' in spite of such decisions.

Compensatory measures are different to mitigation measures. For the derogations to have been triggered it is implicit that, in the case of the project concerned, it was not possible to identify mitigation measures which could be relied upon to avoid adverse effects to the integrity of the site(s) potentially affected. Case law has established that, in order to identify what compensatory measures are 'necessary', the potential for damage to the site (from the plan or project in question) must firstly be 'precisely identified'[8].

The 'damage' from the proposed plan or project must therefore been seen as rendering the network no longer 'coherent'. The objective of compensatory measures is to restore that coherence. EC guidance provides helpful criteria against which compensatory measures should be defined and states that compensatory measures should be targeted, effective, technically feasible, spatially sufficient, well located and temporally sufficient.

Roles and Responsibilities

Strictly speaking, the legal responsibility for securing compensatory measures rests with the appropriate authority. In line with the polluter pays principle, the appropriate authority will look to MMO, as the competent authority, to provide reassurance that necessary compensatory measures will be delivered through the conditions attached to the marine licence or, in exceptional circumstances, via some other legally enforceable mechanism.

The role of MMO is to consider the compensatory measures which have been identified by the project proposer and come to a decision as to whether they are sufficient to ensure that the overall coherence of the network is protected (or not), and advise the appropriate authority accordingly.

Advice from the statutory nature conservation body will be important in informing any such decision and MMO will have regard to any advice provided.

[8] Case C-304/05 EC v Italian Republic, Sept 2007, para 83.

Consultation with the Appropriate Authority

The consultation process

Once MMO is satisfied that each of the derogation tests are met, if it is minded to grant authorisation for a damaging plan or project on the basis of a derogation it must notify the Appropriate Authority of its intentions (9).

Having notified the Secretary of State, MMO may not agree to the plan or project for a period of 21 days, beginning with the day notification was received. MMO can only agree to the plan or project during this 21 day period if notified by the Appropriate Authority to do so. The Appropriate Authority may issue directions prohibiting MMO from agreeing to the plan or project, either indefinitely or for a specified period of time (10).

Further sources of relevant guidance

- EC Guidance 'Managing Natura 2000' the provision of Article 6 of the Habitats Directive, Nov 2018
- Habitats and wild Birds Directives – guidance on the application of Article 6(4), Defra, Dec 2012.
- The Habitats Regulations Assessment Handbook.

[9] Refer regulation 64(5)
[10] Refer regulation 64(6)