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for Environment
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The Habitats and Wild Birds Directives in England and its seas

**Core guidance for developers, regulators &
land/marine managers**

December 2012 (draft for public consultation)

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Consultation note: As explained in the consultation paper, this guidance will sit in a “pyramid structure” of government, and government approved, guidance. This is likely to be primarily web-based, with clear sign-posting to point customers quickly to the guidance they need. The overarching guidance will provide a common reference point which sets the scene for:

- “Quick start” guides explaining in simple terms when the requirements apply and what people need to do to comply, and giving newcomers enough information to decide whether they should read further
- “1st level of detail” guidance (for non-experts) e.g. web tools to help locate European sites or find out where individual protected species are likely to be found; licence application forms; tips for successful applications etc
- Sign-posting to detailed technical guidance if needed. This would be mainly for experts, such as regulators, specialist consultants or company environmental managers. There would be no expectation for non-experts to read it, although it would be accessible if they wish to. This recognises that implementing habitats legislation will continue to raise complex issues and there will be a need for detailed technical guidance (e.g. on how to undertake assessments, or detailed legal guidance to support the interpretations in the overarching guidance).

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Introduction

1. The EU Habitats and Wild Birds Directives¹ aim to protect and improve Europe's most important habitats and species. They primarily achieve this by requiring:
 - The designation and protection of a network of land and marine habitats ("European sites")
 - The protection of certain animals and plants of European importance ("European protected species" or "EPS") and all naturally occurring wild birds. These species are referred to collectively in this guidance as "protected species".
2. The Directives are mainly transposed in England and the UK offshore area by the "Habitats Regulations"², the "Offshore Regulations"³ and the Wildlife and Countryside Act 1981⁴. This EU and national legislation is referred to collectively in this guidance as "habitats legislation".
3. The aspects of habitats legislation most likely to be encountered by developers and members of the public are:
 - The "**Habitats Regulations Assessment (HRA) requirements**" – which require the assessment of "plans or projects" that may have a "likely significant effect" on a European site. Such plans or projects can only proceed if the competent authority is convinced they will not have an "adverse effect on the integrity of a European site". If the plan or project will have adverse effects, or if there is uncertainty over its effects, it can only be granted consent if certain "derogations" apply. The requirements are explained in Section 1 below, and derogations in Section 2.
 - The "**protected species requirements**" – which require that certain activities that would disturb or harm protected species can only proceed in accordance with a licence (which can only be granted in limited circumstances) or if a "defence" applies. The offences, licensing process and defences are explained in Section 3.
4. The requirements particularly affect developers and other land/marine managers, and they are normally encountered when a plan or project is being considered under planning requirements or similar consenting regimes. They may also affect others, for example activities undertaken by home owners or local community groups may be affected by the rules on disturbing or harming protected species.
5. Habitats legislation may have a significant influence on how and when development and other activities can proceed, and may block them in some cases. The Government strongly encourages developers and others to consider possible habitats implications from the earliest possible stages of developing their proposals, and to engage with regulators and other interested parties to design the proposals so they are compatible with habitats requirements. Late recognition of habitats issues can lead to significant

delays and additional costs. Successful navigation of the requirements and positive outcomes often depend on early engagement.

This guidance

- 6. This guidance gives an overview of the main requirements of habitats legislation, when they are likely to apply, and the regulatory processes. It is intended to be accessible to the non-expert, and it focuses on how habitats requirements are likely to affect developers, land managers and others. Habitats legislation can give rise to complex considerations, and this guidance will be supported by more detailed guidance where appropriate. In some cases businesses and people affected will need expert help.
- 7. This guidance focuses only on EU based habitats legislation as applied in England and the UK offshore waters. It does not apply to functions devolved to Scotland, Wales or Northern Ireland. Following the guidance will help businesses and others comply with habitats legislation, although it cannot cover every situation and it should be read in conjunction with the relevant legislation.
- 8. This guidance does not cover national legal requirements which protect sites and species only under domestic (i.e. non-EU based) legislation. In some cases these national requirements may apply in addition to habitats legislation (e.g. a site may be both a European site and a national Site of Special Scientific Interest, and both sets of rules may need to be followed). Guidance on these requirements can be found at [reference to be inserted when this guidance is published]

Parties involved in the regulatory process

- 9. A number of parties are involved in the process of reaching decisions under the habitats legislation (see Table 1).

Table 1: Parties involved in the regulatory process

HRA requirements

- The “competent authority” is the decision maker under the HRA requirements. It determines if an “appropriate assessment” is required, decides whether proposals would have an adverse effect if necessary, and whether or not derogation tests are met. Competent authorities include local authorities, harbour authorities, and other public bodies (see Annex 1 for more detail on competent authorities)
- The “statutory nature conservation body (SNCB)” must be consulted by the competent authority during an appropriate assessment. Its role is to give expert advice, for example on possible effects on European sites and on what evidence should be gathered to inform the relevant decisions. Natural England is the SNCB in England and its inshore marine area (up to 12 nautical miles from shore) and the Joint Nature Conservation Committee (JNCC) is the SNCB for the offshore area (more than 12 nautical miles from shore)

- The “appropriate authority” is the relevant Secretary of State. Under the HRA requirements, the competent authority must inform the appropriate authority before it consents to a plan or project (despite it having adverse effects on the integrity of a European site) on grounds of the derogation tests being met. The appropriate authority could allow the derogation to proceed, or direct that the plan or project is not approved. In some cases the appropriate authority may also be the competent authority.

Protected species requirements

- The “licensing body” is the decision maker under the protected species requirements. It is responsible for issuing licences to authorise activities which may harm protected animals, wild birds or plants. Natural England and the Marine Management Organisation (MMO) are the licensing bodies for land and sea respectively. (In some specific circumstances other organisations may have licensing functions e.g. the Department for Energy and Climate Change for offshore licences relating to oil and gas and carbon dioxide storage activities).
- The Police, the Marine Management Organisation and Natural England have responsibilities for enforcing the protected species requirements.

Both sets of requirements

- The “applicant” is the person seeking consent for a plan or project subject to the HRA requirements, or for a licence under the protected species requirements. They are responsible for providing information, as may reasonably be required by competent authorities and licensing bodies, to inform assessment of their applications. They are advised to engage early with decision makers, SNCBs and others to ensure the evidence they supply is suitable to inform regulatory decisions. They may sometimes employ expert consultants to work on their behalf.
- “Third parties” are other people or organisations with an interest in the applications for consents or licences (e.g. environmental organisations, members of the public). The general public may be consulted as part of an appropriate assessment.

Decision making under habitats legislation

10. Habitats legislation sets out the requirements under which regulatory decisions must be made, but it relies on the competent authority and licensing body to make specific decisions in individual cases. For example, plans or projects must be assessed to see whether they may have a “likely significant effect” on a European site, but it is left to the judgement of the competent authority to decide what is (or is not) “significant” for the site concerned. The same approach of case-by-case judgements is taken for all other key decisions under the habitats requirements. Often the facts will clearly point to one answer, but sometimes the evidence may be less clear and in borderline cases the competent authority’s or licensing body’s judgement will be the deciding factor.
11. The Government expects competent authorities and licensing bodies to exercise their duties under habitats legislation to help deliver its biodiversity policy by protecting European sites and protected species. They should **proceed in accordance with the**

precautionary approach required by the Directives and, if there is doubt about the impacts of proposed activities, precautionary decisions should be taken to protect relevant sites and species. The absence of information is not a basis to assume no negative effect.

12. Within this context, a pragmatic approach can and should also be adopted. The legislation should not necessarily be seen as a barrier to development or other legitimate activities, rather it aims to ensure that any such activities are compatible with the protection of European sites and protected species. With this in mind, without compromising the precautionary approach, competent authorities and licensing bodies should also apply the following principles:

- Take a pragmatic approach and **seek to enable development and other relevant activities to proceed** in line with Government policy (e.g. on economic growth, environment and climate change policy). For example, they should work with developers to find solutions which enable development whilst still protecting relevant sites and species, e.g. by applying planning conditions to any consent
- Apply a **risk-based approach to implementation** with an aim to minimise regulatory burdens (e.g. being confident in allowing development to proceed where the legal tests are met, only seeking information that is necessary to reach a view on compliance with the legislation, and targeting resources where compliance needs to improve)
- Implement the legislation in a **customer-friendly and transparent manner** (e.g. engage with applicants, help them navigate the regulatory process, minimise delays in decision making, and give them certainty on the outcome and timing of decisions as soon as possible).

13. Competent authorities are responsible for making decisions under the HRA requirements. However, the relevant SNCB provides advice and assistance on some decisions, and must be consulted as part of an appropriate assessment. In giving advice, the SNCB should also apply these principles. This means if the SNCB considers the facts in a case clearly point towards a particular regulatory decision it should make this clear to the competent authority with evidence to support this view. Similarly, if the evidence is less clear-cut (i.e. in borderline cases where a decision could reasonably be taken either way) it should make this clear.

Section 1: Habitats Regulations Assessment (HRA) requirements

14. The Habitats Regulations Assessment (HRA) requirements protect European sites from plans and projects, such as developments and other activities, which may harm them directly or indirectly.

Table 2: European sites

There are various types of European site:

- Special Areas of Conservation (SACs) – animal and plant habitats designated under the Habitats Directive
- Special Protection Areas (SPAs) – wild bird habitats designated under the Wild Birds Directive
- Sites in the process of becoming SACs or SPAs; and sites identified or required as compensatory measures for adverse effects on European sites⁵
- listed and proposed “Ramsar” sites – wetlands of international importance

Location details for European sites in England and its marine area can be found at *[Consultation note: the guidance will link here to part of Defra website explaining how to locate European sites? (e.g. linking to interactive maps such as www.eea.europa.eu/themes/biodiversity/interactive/natura2000gis/znatura-2000-european-protected-areas)]*

15. The HRA requirements protect these European sites by requiring that any plan or project which may have a “likely significant effect” on a site (either individually or in combination with other plans or projects) must be made subject to an “appropriate assessment” of its implications for the site in view of the site’s conservation objectives. Such plans or projects may only proceed if they will not adversely affect the integrity of the site concerned, unless the derogation tests apply (as explained in section 2).

16. This section explains how the HRA requirements should be applied, taking account of European and domestic court interpretations of some of the key terms used in habitats legislation.

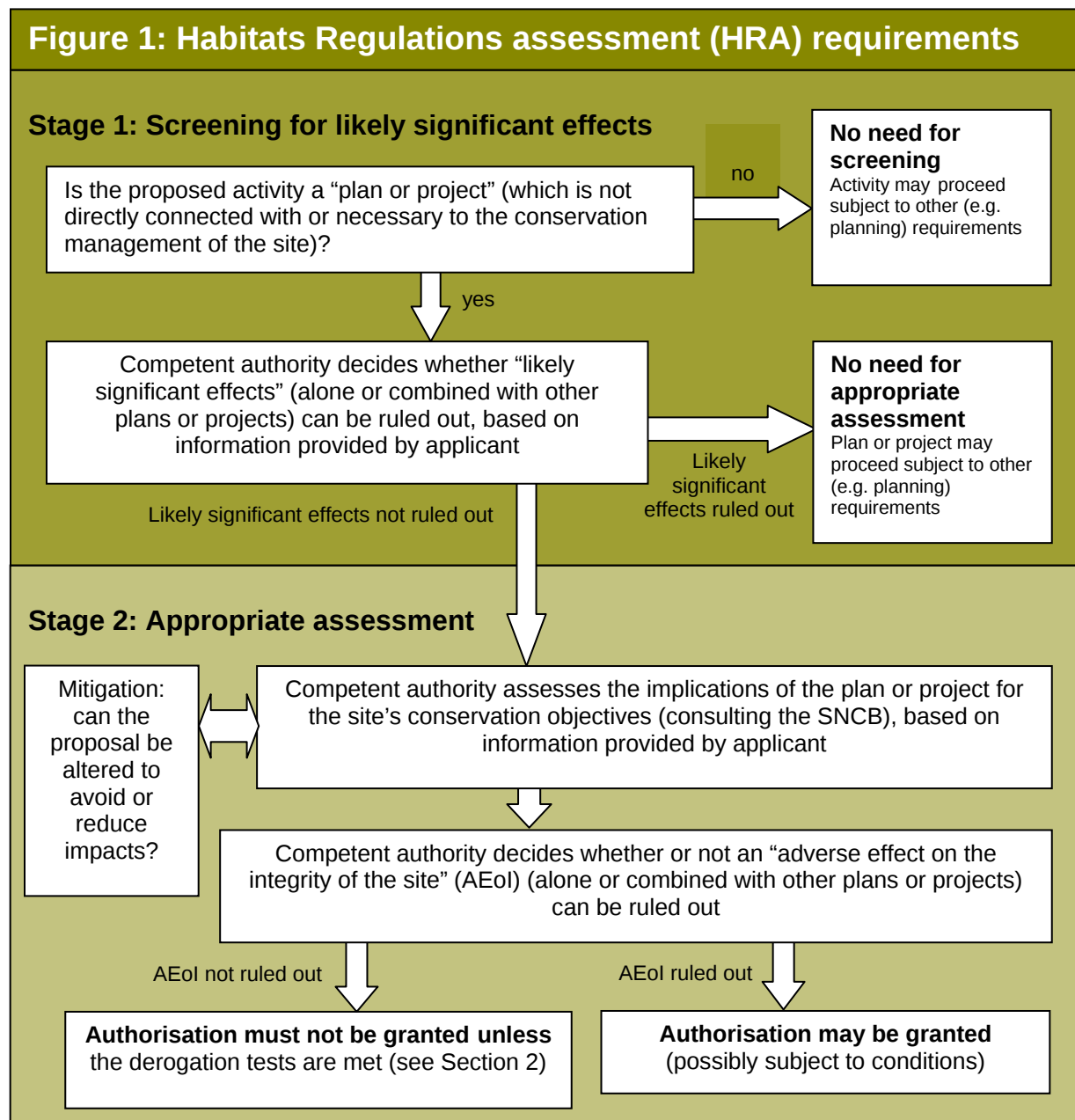
17. In most cases applicants will not need to make a separate application for consent under habitats legislation. Instead, habitats issues will be one of the factors considered by the decision maker as part of an application for consent under the planning system, environmental permitting or other consenting regime. In such cases it is the competent authority’s responsibility to ensure compliance with the HRA requirements before the planning (or other) consent can be granted. Annex 1 gives more information on competent authorities. Often the HRA will be conducted alongside an environmental impact assessment.

18. In other cases, separate consideration of the HRA requirements will be needed. In particular it should be noted that plans or projects covered by **general development orders** (GDOs) must still comply with the HRA requirements. If activity development permitted by a GDO may have a “likely significant effect” on a European site, the development must not begin until the local planning authority has provided its written approval. If an application for such an approval is received, the process and outcomes described in Figure 1 would apply. This is an area where persons wishing to undertake activities under a GDO need to take a risk-based judgement of whether the HRA requirements might apply. Such persons may obtain the opinion of the SNCB on the issue, which must notify the applicant and local planning authority of its opinion following such a request.
19. Figure 1 summarises the HRA requirements, starting with a screening stage followed by an appropriate assessment stage if necessary. At each stage, applicants for a proposed plan or project are required to supply the competent authority with reasonable information needed to make the relevant decisions.

Stage 1: Screening for likely significant effects

20. The purpose of the screening stage is for the competent authority to decide whether an appropriate assessment is required. This depends on whether the activity in question:
- Is a “plan or project”;
 - Is not directly connected with or necessary to the management of the site; and
 - May have a “likely significant effect” on a European site, either alone or in combination with other plans or projects.
21. There is no formal requirement for a screening stage in habitats legislation, and no set rules on how long it should take or how detailed it should be. It is for the competent authority to decide how screening should be applied in each case, depending on the likelihood of significant effects on a European site:
- For the vast majority of plans or projects undertaken in England it will be immediately clear that there is no likelihood of a significant effect. In such cases, there will be no point in undertaking a formal screening assessment and they should be screened out of the HRA process as soon as possible
 - If it is clear there will / may be a likely significant effect, the competent authority should consider moving straight to the appropriate assessment stage to minimise delays. This approach should be discussed with the applicant
 - If it is unclear whether an appropriate assessment should be required, a more formal screening assessment may be needed, as discussed below.

22. It is strongly in applicants' interests to ensure that any need for formal screening is identified as early as possible. In practice they should seek to confirm this during pre-application discussions with the competent authority to help minimise delays.



Is the development or activity a “plan or project”?

23. Only activities which qualify as “plans or projects” are subject to the HRA requirements. The legislation does not define the term “plan or project”, but it should be taken to have broad meaning to cover a wide range of activities.
24. A “plan” would include a development plan which requires adoption under planning or similar legislation. Often such plans will encompass more than one project. Examples of plans which could be subject to the HRA requirements include: (a) local and neighbourhood plans under the national planning policy framework; (b) local development plans; (c) National Policy Statements; and (d) Marine Plans. It also

includes other plans which influence the development and/or management of land, such as flood and coastal erosion risk management plans.

25. A “project” should be taken to mean more than just construction projects. It would include activities that are projects under the EU Environmental Impact Assessment Directive⁶. These are defined as “the execution of construction works or of other installations or schemes, and other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources”.
26. The term “plan or project” may also apply to proposals to change the intensity of ongoing operations or the renewal of licences for ongoing activities⁷.
27. Early stage plans or projects which are still being developed as ideas should be viewed as proposals which may or may not mature into “plans or projects”. This means that (even if they may affect a European site) there is no formal need for consideration under the HRA requirements until just before they are formally adopted or enacted. However, it would normally be strongly in the interests of the applicant to take habitats considerations into account from the very earliest stages of developing such potential plans or projects, and to discuss them with the competent authority, SNCB and others as necessary.

Necessary for the management of the site?

28. Plans or projects directly connected with or necessary to the management of a European site are not subject to the appropriate assessment requirements. This exception applies only to plans or projects being undertaken wholly for the purposes of managing a European site in the interests of maintaining and restoring (if necessary) its favourable conservation status. Any elements of such plans or projects having a non-conservation component may require separate assessment. In most cases land/marine managers will be aware of what activities are covered by the conservation management exemption because they will need to have been discussed and agreed with Natural England. If in doubt they should consult the relevant competent authority before assuming that an activity is covered.

The likely significant effects decision

29. If an activity is a plan or project (not covered by the conservation management exemption), the competent authority must decide whether it will be “likely to have a significant effect alone or in combination with other plans or projects” (the “likely significant effects decision”) and therefore whether it must be subject to an appropriate assessment. European case law has ruled that the likely significant effects decision must be applied on a precautionary basis, and a plan or project must be assumed to have a likely significant effect unless such effects can be ruled out (as explained below).
30. If it is clear that a plan or project would, or would not, have a likely significant effect on a European site the decision can be made very quickly. Where the nature of the impact

is less clear, more time, information and consideration will be necessary to determine the issue.

31. Unless General Development Orders apply⁸, the competent authority is not required to consult the relevant statutory nature conservation body (SNCB) before assessing significant effects. However it may choose to do so to improve the robustness of its decision, or to involve the SNCB as soon as possible if a plan or project is likely to proceed to later stages of consideration.

Assessing effects

32. Before reaching the likely significant effect decision the competent authority should assess the likely effects of the plan or project on a European site.

33. An “effect” would include anything which would impact upon a European site.

Temporary, permanent, direct and indirect effects need to be considered. A plan or project does not need to be located on a site in order to impact on it. Generally the closer an activity is, the greater the chance it will affect a site. However, operations taking place far from a European site may still be capable of having a significant effect (e.g. a project which extracts water may affect a site some distance away by altering the water table, and emissions to air or water may impact on sites distant to the source of the emission).

34. Normally a screening assessment should be seen as a simple assessment to check whether a more detailed appropriate assessment is justified. In many cases it may require little more than a brief consultation with a relevant expert (such as the SNCB). As far as possible, the competent authority should seek to rely on existing information and expert opinion at the screening stage, rather than require detailed new evidence to be gathered, unless the applicant requests otherwise. The assessment should:

- Identify what (if any) European sites may be affected by the proposal
- Identify the conservation objectives of any site that may be affected, and the condition of the site (see box below)
- Identify the potential effects of the plan or project on the site, alone or in combination with other plans or projects (“in combination” effects are explained in Table 3 on page 11). This will need to include consideration of each of the features for which the site is designated
- Identify how those effects may impact on the site’s conservation objectives
- Make a high level assessment of whether likely significant effects can be ruled out

35. At the screening stage, it will often be appropriate to consider whether proposed plans or projects can be adapted so that any likely significant effect can be ruled out. Ideally such adaptations should be incorporated into plans or projects before screening takes

place but, where this is not the case, they can and should be considered during the screening stage. There would be no point in conducting an appropriate assessment if likely significant effects can be ruled out, and there is no requirement for it.

Conservation objectives

The conservation objectives of a European site are the specific actions / targets that have been devised to protect and enhance the species or habitats that led to the sites European designation. Part of the SNCB's role is to advise on the conservation objectives.

[Drafting note: This box will be expanded in the final version of the guidance. To date, conservation objectives for most European sites tend to have been expressed at a high level, with more detail expressed in associated Site of Special Scientific Interest (SSSI) "favourable condition tables". Natural England is currently changing this approach, and is in the process of creating more detailed conservation objectives. See Natural England announcement of June 2012 at http://www.naturalengland.org.uk/Images/action-14-announcement_tcm6-32928.pdf]

Deciding whether effects are “significant”

36. European case law has ruled that the question of whether an effect would be “significant” is linked to the site’s conservation objectives⁹. Under this test:

- A “significant effect” only includes effects which would undermine a European site’s conservation objectives, for example by reducing the area or quality of protected habitat for which the site was designated, or by the disturbance or displacement of species for which the site was designated
- A plan or project with effects which do not impact on a European site’s conservation objectives would not be considered to be “significant” for the purpose of this decision¹⁰. For example, this might be the case for low-impact temporary effects, or effects such as the loss of a small area of land which is not an interest feature of the site and has no effect, or an insignificant effect, on the habitat or species which are an interest feature

Likelihood of significant effects

37. European case law has interpreted the threshold of “likelihood” of significant effects at a low level. Accordingly, a plan or project must be considered to be “likely to have a significant effect” where, “it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned”¹¹. In other words, if it may have a significant effect, an appropriate assessment should be carried out.

38. As stated above, the screening decision must be made on the basis of “objective information”¹². At the screening stage there is likely to be a wide range in the volume and quality of available evidence on which to assess particular plans or projects. In some cases there will be enough evidence to conclude that there is likely to be a

significant effect, or that such effects can be ruled out. In other cases there will not be sufficient evidence to reach this conclusion. This is an area where expert opinion (e.g. from the SNCB) and / or evidence may be helpful.

39. Competent authorities may encounter borderline decisions where it is not immediately obvious whether or not significant effects can be ruled out. In such cases, the authority's judgement will be the deciding factor and it should take its decision on an objective assessment of risk, and bearing in mind the principles set out in paragraphs 11-12 in the introduction to this guidance.

Table 3: "In combination" effects

At both the screening (for likely significant effects) and appropriate assessment stages, the effects of a plan or project must be considered both individually and in combination with other relevant plans or projects. This is a requirement of the Habitats Directive which helps ensure that European sites are not damaged by the additive effects of multiple plans or projects. In considering "in combination" effects:

- The competent authority should take account of all current and proposed plans or projects of which it is aware (and the applicant is responsible for making the authority aware of such plans or projects). This would include proposals where planning permission (or a similar regulatory consent) has been applied for or granted
- It is not necessary to take account of plans or projects for which there have been no formal applications under an approvals process
- The authority should take account of the effects of past plans or projects if they are having an ongoing effect on the conservation objectives of the site

Consideration of "in combination" effects may mean that an appropriate assessment is required even though a proposal, by itself, would not have a significant effect. It may also mean that proposals are not granted consent even though by themselves they would not have an AEoI.

It is possible that a competent authority could be taking AEoI decisions on more than one plan or project (put forward by one or more applicant) at roughly the same time, and that the "in combination" effects mean that some but not all of these proposals could be granted consent. Normally a rule of "first mover advantage" would apply – i.e. consents would be granted in the order that AEoI decisions are taken until one plan or project tips the balance and would cause an "in combination" AEoI. Strategic planning can help to avoid this situation and competent authorities may wish to take such an approach where feasible.

Stage 2: Appropriate assessment

40. A plan or project must be made subject to an appropriate assessment if likely significant effects on a European site cannot be ruled out at the screening stage. The

purpose of the appropriate assessment is to allow the competent authority to decide whether the plan or project may have an adverse effect on the integrity of the site, alone or in combination with other plans or projects (the “AEoI decision”).

41. The European Court has ruled that a plan or project can only be authorised if the competent authority has made certain that it will not adversely affect the integrity of any affected European site, and that “no reasonable scientific doubt” remains as to the absence of such effects¹³ (unless a derogation applies as set out in section 2).
42. The competent authority is required to consult the relevant SNCB when it is carrying out the appropriate assessment, and must have regard to its advice. The authority may also consult the general public, if it considers it appropriate.

General approach to assessment

43. In undertaking appropriate assessments, the competent authority and the SNCB should bear in mind the principles in the introduction to this guidance.
44. As good practice, the competent authority, applicant and SNCB are advised to agree up-front what information needs to be gathered, and a rough timetable for the process. Each party should seek to stand by this agreement, although it may need to change if the situation changes. In some cases it may be appropriate to involve third parties with relevant expertise in agreeing what information needs to be gathered e.g. to inform the process and potentially to reduce the risk of obstacles later in the process.
45. The assessment (in terms of length, detail and duration) should be sufficient to ascertain the anticipated effects of the plan or project on the conservation objectives of the site, and to inform the AEoI decision. However, the competent authority should not require more information than is necessary. A detailed and lengthy assessment may be needed if a plan or project is likely to have large or complex effects on a site. In other cases a relatively quick and simple assessment may suffice if the effects on the site are easily understood.
46. If it is clear to the competent authority (advised by the SNCB) that a plan or project would have an AEoI which cannot be mitigated, and would be unlikely to pass the derogation tests, this should be made clear to the applicant as soon as possible. Normally, there would be no point in conducting a long and detailed assessment in such a case and the applicant may wish to withdraw their application.
47. As good practice, assessment reports (e.g. submitted to competent authorities by applicants or consultants working on their behalf) should contain a concise summary of the findings which are pertinent to the AEoI decision and, as far as possible, understandable to the layperson. These summaries should be supported by more detailed material as necessary.

Assessment of effects

48. The appropriate assessment must include consideration of temporary, permanent, direct and indirect effects on the conservation objectives of the potentially affected European site(s) over the life of the plan or project (or what is created by it). Plans or projects do not need to take place on a site to affect it, and even plans or projects far away from a site may be capable of having an AEoI.
49. The principal purpose of the appropriate assessment is to understand the implications of the proposal for the site in view of the site's conservation objectives, in order to inform the AEoI decision. The assessment may also be important for deciding whether the derogation tests may be met, for example, in deciding the nature and scale of compensatory measures.
50. The assessment should normally include consideration of detailed information including:
- Identifying the site's conservation objectives and conservation status¹⁴
 - Identifying what each potential effect of the plan or project is and what aspects of the plan or project causes such effect, and consideration of any cumulative effects
 - Identifying how each potential effect could impact on each of the site's conservation objectives
 - Assessing the scale and seriousness of potential effects, including their magnitude, duration and reversibility
 - Assessing how effects may change over time (e.g. the effects of construction, the ongoing effects of what is constructed, and the effects of deconstruction if relevant)
 - Assessing the likelihood that the effects might occur
 - Identifying the degree of certainty which underpins the assessment of effects
51. Following the appropriate assessment, the AEoI decision can be made. Before taking the AEoI decision it is good practice for the competent authority to produce a summary which explains its reasoning on the potential effects of the plan or project and how they relate to the AEoI decision in light of the appropriate assessment. This should be understandable to non-specialists.

Mitigation

52. The appropriate assessment should include consideration of the effects of any mitigation measures forming part of the plan or project. Mitigation is not specifically mentioned in habitats legislation but it should be considered from the earliest stages of (and during) the assessment to help avoid or reduce potential effects on European

sites. As far as possible, applicants should incorporate mitigation into proposals before the application is made, as this can help speed-up the regulatory process.

53. The concept of “mitigation” is different from “compensation” under habitats legislation:

- Mitigation relates to measures that reduce the effects of a plan or project so that a potential AEoI on a European site can either be ruled out, or (if this is not possible) reduced in terms of likelihood or potential impact. For example, it may involve switching to a less damaging method of construction; or undertaking works at a less sensitive time of year (e.g. outside a breeding season); or not proceeding with some parts of the plan or project; or incorporating additional works into the plan or project to avoid or reduce its impact. The key point is that mitigation is always about avoiding or reducing a potential AEoI on the site(s) potentially affected
- Compensation is only formally considered as part of the derogations process (see section 2). It relates to offsetting any negative effect of the plan or project where it has not been possible to rule out a potential AEoI on a European site. It normally involves the creation of replacement habitat

54. In some cases, mitigation may not be necessary, and in other cases a simple change to a plan or project might have the desired effect. Sometimes there may need to be an iterative process between the relevant parties (applicant, competent authority, SNCB and others as appropriate) to agree suitable mitigation measures to be incorporated into the plan or project to avoid or reduce AEoI.

55. In some cases competent authorities may take a strategic approach to mitigation (e.g. a “zone of influence” approach which allows development to proceed near European sites only provided certain mitigation measures are taken). Where such approaches are taken the competent authority and the SNCB should ensure that they conform with the principles set out in paragraphs 11-12. In other words sufficient mitigation should be required without imposing an excessive burden on applicants.

56. Normally, mitigation measures should be considered in accordance with the “mitigation hierarchy”. In order of preference, the aim should be: (a) to avoid the negative impact; (b) to reduce the negative impact; or (c) to offset the negative impacts at the European site in a way which avoids or reduces an AEoI (e.g. if one small area of habitat would be harmed it may be possible to avoid an AEoI by creating alternative habitat nearby). Depending on the complexity of the mitigation, it may be that one or more of these types of mitigation may be necessary.

57. Applicants are primarily responsible for identifying and proposing the mitigation measures which might be applied, and for deciding whether and how they are incorporated into their proposed plan or project.

58. Competent authorities and SNCBs should be open to mitigation proposals, and should help applicants to find solutions which avoid or reduce negative effects of a plan or project as far as they reasonably can. Where relevant, the authority and the applicant

should consider involving third parties (such as environmental organisations) in developing and commenting on mitigation proposals. This may help identify acceptable mitigation solutions sooner rather than later.

59. It is for the competent authority (taking account of the SNCB's advice) to assess the effectiveness of mitigation measures, and what difference they would make to the anticipated effects of the plan or project. For each mitigation measure (and for any overall package of measures) the competent authority should understand:

- what the measure is, and how it would avoid or reduce effects on the site (taking account of the expected duration of the effects and whether the mitigation would continue to work effectively over time)
- how it would be implemented and by whom
- the degree of confidence in its likely success
- the timescale of when it would be implemented, maintained and managed
- how the measure(s) would be secured, monitored and enforced; and, if the measure(s) failed, how the failure will be rectified

The AEoI decision

60. Following an appropriate assessment, the competent authority must decide whether a plan or project would have an “adverse effect on the integrity of a European site” (AEoI). In making this decision, the authority must take account of the site's conservation objectives. The integrity of a European site means the coherence of its ecological structure and function across its whole area, or the habitats or mixture of habitats and/or populations of species for which the site has (or will be) designated.

61. For example, the following effects might give rise to an AEoI depending on the specific circumstances of the case (in all cases the potential impact would need to be sufficient to undermine the site's integrity):

- Causing harm to the ecological coherence or robustness of a site (e.g. by reducing population size of a key species on the site to a level where it would prevent the achievement of the conservation objectives)
- Substantially reducing the area of a site which supports a key species on the site, or the areas of a particular habitat within the site
- Substantially changing the physical environment of a site (e.g. changing its hydrology, or the chemical or biological characteristics of its soil), pollution risk and emissions to air or water

- Having a substantial negative effect on the wider network of European sites (e.g. by creating a barrier between sites which hinders the movement of species between sites)
- Disrupting or preventing the restoration of part of the site if this is a conservation objective

62. A plan or project which does not undermine a European site's conservation objectives (alone or in combination with other plans or projects) would not be considered to have an AEoI for the purpose of the decision. This would include effects that are too small or short-lived to impact on the achievement of the conservation objectives. For example, it may include operations which may have short term effects but no significant long term negative effects (each case would need to be judged on its own merits, but for example this might include certain drainage maintenance works undertaken outside of breeding seasons to minimise effects, or construction works which cause minor temporary noise impacts).

63. The AEoI decision must be considered on a case-by-case basis, taking account of the potential effects of the particular plan or project on the particular site and its protected features. A type of plan or project which has an AEoI at one site may not have the same effect on another site due to the nature and condition of the affected species or habitat at that other site, so effects need to be assessed at site level.

“No reasonable scientific doubt”

64. As stated above, there must be no reasonable scientific doubt that a plan or project will not have an adverse effect on the integrity of a European site before it can be approved. If such doubt remains as to the absence of such effects, it must not be approved¹⁵.

65. Competent authorities are required to undertake appropriate assessments and make their decisions on the basis of the best scientific knowledge available. There may be a wide range in the volume and quality of available evidence on which to assess plans or projects (although probably much less so than at the screening stage). In some cases there will be enough evidence to conclude that a plan or project would have an AEoI, or that an AEoI can be ruled out. In other cases there will not be sufficient evidence to decide either way, and a precautionary approach must be taken.

66. It may be necessary to undertake field work in respect of particular plans or projects, as part of the assessment, to increase scientific certainty on the baseline situation and the potential effects of a plan or project. In some cases this may take many months or even years. The applicant may be required to do such work, and in some cases they may volunteer to do it given that it may increase certainty and perhaps the chance of obtaining consent (in such cases the SNCB and competent authority should, as far as possible, be open with the applicant about the likely duration and outcomes of such work).

67. It is for the competent authority (taking due account of expert advice from the SNCB) to decide when there is, and is not, any reasonable scientific doubt on which to decide whether AEoI can be ruled out. The authority should proceed on a precautionary basis, and not grant consent for a plan or project if there is doubt over whether AEoI may result. In practice if there are relatively low levels of scientific certainty over how a plan or project might affect a European site, it would be difficult for a plan or project to pass the AEoI test. However, if there is no reasonable scientific doubt that a plan or project will not adversely affect the integrity of the site, consent can be granted. The authority should exercise reasonable judgement in deciding what might be expected to happen. Absolute certainty is not required, nor is it possible to achieve given that all assessments will rest on assumptions of what might happen in the future.
68. Competent authorities may encounter borderline decisions where it is not immediately obvious whether or not AEoI can be ruled out. In such cases, the authority should use its judgement to determine the issue, bearing in mind the principles set out in paragraph 11-12 in the introduction to this guidance, the advice above, and the best available information and advice from the SNCB and others as appropriate.

Post-consent monitoring and conditions

69. As part of determining whether a plan or project may adversely affect the integrity of a site, the competent authority must consider the way in which it is proposed to be carried out and whether conditions or other restrictions should be given¹⁶.
70. This could include ensuring that agreed mitigation measures are secured and implemented as part of the plan or project or that restrictions are placed on the timing of certain activities. The SNCB is likely to have a role in suggesting the scope of such conditions and advising on their effectiveness. Such conditions may include:
- Timing obligations – e.g. restricting the timing of construction activity to avoid bird disturbance, fish spawning etc
 - Monitoring obligations – e.g. conditions under which the consent holder must monitor the effects of a plan or project to check whether the assumptions on which the consent was based hold true in practice and that, if not, the situation is recognised and brought to the attention of the competent authority if necessary
 - Action obligations – e.g. agreed measures to reduce the likelihood of adverse effects happening, and/or to ensure that suitable action would be taken if impacts occur or if impacts prove to be greater than expected
71. Such conditions of consent can be used as part of a precautionary and risk-based approach discussed in paragraphs 11-12 above. In particular, they can be used to allow consents to be granted in circumstances where there is some scientific uncertainty on the likelihood or impact of possible effects of plans or projects – i.e. some activities may be allowed to proceed under managed conditions to reduce the

chance of adverse effects, and to ensure that if such effects did occur they would be identified as soon as possible and action taken to address them.

72. If obligations are used in this way the competent authority should ensure that the applicant is capable of enacting the obligations, and that they are enforceable. They should also consider building flexibility into the conditions. For example, the initial conditions may be set on a precautionary basis, but if it becomes clear over time that the risk of adverse effects is lower than anticipated, the authority (in consultation with the SNCB) should consider easing the requirements whilst still ensuring that the site is safeguarded.

Section 2: Derogations (European sites)

Consultation note: As explained in the consultation paper, we are not seeking views on Section 2 of the guidance. This part of the guidance was fast tracked to clarify the derogations tests, particularly in relation to infrastructure projects. It was subject to public consultation from July-October 2012. It will initially be published as a stand-alone document in December 2012. In March/April 2013 it will be absorbed into the overarching guidance when it is published. We included it here so consultees can see how it would fit into the finished overarching guidance.

73. As explained in Section 1, normally competent authorities can only consent to plans or projects if it can be ascertained they will not have an adverse effect on the integrity of a European site (AEoI). However, article 6(4) of the Habitats Directive provides a derogation which would allow a plan or project to be approved in limited circumstances even though it would or may have such an AEoI.
74. Article 6(4) applies to European site aspects of both the Habitats and Wild Birds Directives. A flow chart showing the derogation process is at Annex 2.
75. A plan or project can only proceed under the article 6(4) derogation requirements provided three sequential tests are met:
- There must be no feasible alternative solutions to the plan or project which are less damaging to affected European site(s)
 - There must be “imperative reasons of overriding public interest” (IROPI) for the plan or project to proceed
 - All necessary compensatory measures must be secured to ensure that the overall coherence of the network of European sites is protected
76. These tests must be interpreted strictly and can only be formally considered once an appropriate assessment has been undertaken. In practice (based on use of article 6(4) in England to date) it is likely that only a small minority of plans and projects will reach this stage of consideration. However, applicants should not be daunted by the derogations process, and if the tests are met a plan or project can be approved.
77. Competent authorities should be aware that there may be circumstances where a development that may be damaging to a European site is needed for an imperative reason of overriding interest. As long as the other requirements of article 6(4) are met, such developments can be approved to ensure that this interest is met.
78. Developers and competent authorities should engage closely at the earliest possible stage if it is anticipated that an article 6(4) derogation will be considered. This might be in the early stages of developing a proposal, or otherwise as soon as it becomes clear that a derogation may be needed. They should also ensure that the tests are fully explored and documented, since this will help avoid delays to the decision making process and ensure a transparent and robust decision.

79. Early engagement with SNCBs is strongly recommended, since their view should be obtained on the extent of any AEoI, and the compensatory measures required. The Government expects the SNCBs to have a role in helping applicants and competent authorities to identify and assess the adequacy of compensatory measures.

Test 1: Alternative solutions

80. The purpose of the alternative solutions test is to determine whether there are any other feasible ways to deliver the overall objective of the plan or project which will be less damaging to the integrity of the European site(s) affected. For the test to be passed the competent authority must be able to demonstrate objectively the absence of feasible alternative solutions. The applicant is primarily responsible for identifying alternatives.

81. The first step is to identify the objective of the plan or project to help frame the consideration of alternatives. Alternative solutions are limited to those which would deliver the overall objective as the original proposal.

82. Many proposals put forward for derogations may have a public interest element as part of their objective, or potentially as their sole objective. For example, roads, flood defences, power stations or ports would normally serve a public need, and potential alternative solutions should be assessed against whether they would deliver a similar objective.

83. In some cases wide ranging alternatives may deliver the same overall objective, in which case they should be considered. However, the competent authority should use its judgement to ensure that the framing of alternatives is reasonable. For example:

- Alternative solutions to flood defence works around a flood-prone village may include less ecologically harmful ways to conduct the works, but would very probably not involve reducing the works to protect fewer homes, or relocating the population of the village
- In considering alternative solutions to an offshore wind renewable energy development the competent authority would normally only need consider alternative offshore wind renewable energy developments. Alternative forms of energy generation (e.g. building a nuclear power station instead) are not alternative solutions to this project as they are beyond the scope of its objective
- Alternative solutions to a port development would normally be limited to other ways of delivering port capacity, and not other options for importing freight
- Alternative solutions for a proposed motorway would not normally include the assessment of alternative modes of transport (e.g. building a new railway line instead)

84. National Policy Statements and other documents setting out Government policy (e.g. the UK Renewable Energy Roadmap) provide a context for competent authorities considering the scope of alternative solutions they will assess.
85. Having framed the consideration of alternatives, it is the competent authority's responsibility to assess whether there are any alternative solutions which would have less impact on European sites. The competent authority should determine the range and type of possible alternatives that should be considered, and use its judgement to decide what is reasonable in any particular case. Where necessary it may consult others on potential alternative solutions. In some cases the competent authority may need to consider options that have not been identified by the applicant.
86. Alternatives must be considered objectively and broadly. This could include options that would be delivered by someone other than the applicant, or at a different location, using different routes, scale, size, methods, means or timing. Alternatives can also involve different ways of operating a development of facility.

Example: Dibden Bay

A proposed project in Dibden Bay sought to increase the number of deep water berths at Southampton. The project could only proceed with an article 6(4) derogation as the harm it would have caused to European protected sites could not be mitigated.

The derogation was rejected by the Secretary of State as the assessment of alternatives had not included the assessment of alternative facilities at other ports on the south and east coasts that would have provided increased shipping capacity for southern England. However an alternative solution on the Isle of Grain was not considered credible as there were no formal proposals to develop container handling capacity there.

Example: Dredging the River Elbe

In Germany it was proposed to dredge the River Elbe to increase shipping capacity at the port of Hamburg. The dredge could only proceed with an article 6(4) derogation. Six alternatives, plus a "do-nothing" option were considered:

- Reduction of speed and use of sea tugs
- Additional dams and floodgates
- International convention limiting ship size
- Different dimensions of dredge
- Use of other German ports
- Partial unloading downstream to reduce draft of ship

In that case, all alternatives were rejected as either they were unfeasible or the objectives of the project would not have been met (e.g. because ships would be discouraged from using the port).

87. The “do-nothing” option should be included as part of the consideration of alternatives. Normally this would not be an acceptable alternative solution because it would not deliver the objective of the proposal. However it can help form a baseline from which to gauge other alternatives. It can also help in understanding the need for the proposal to proceed, which will be relevant to any later consideration of the IROPI test (discussed below).
88. The consideration of alternatives should be limited to options which are financially, legally and technically feasible. An alternative should not be ruled out simply because it would cause greater inconvenience or cost to the applicant. However, there would come a point where an alternative is so very expensive or technically or legally difficult that it would be unreasonable to consider it a feasible alternative. The competent authority is responsible for making this judgement according to the details of each case. If the authority considers an option is not feasible, it would not be necessary to continue to assess its environmental impacts.
89. The consideration of alternatives should also be limited to options which would be less damaging to the affected site(s) or to any other site(s) that could be affected by a given alternative. If the competent authority decides that there are feasible alternative solutions to the plan or project which would have lesser effects on European sites, it cannot give consent for the plan or project to proceed. Early discussion between the applicant, competent authority and statutory nature conservation bodies should minimise the prospects of an application reaching this stage only to be turned down.

Example: Motorway bridge in Germany

In assessing alternatives to the replacement of an unsafe motorway bridge in Germany the competent authorities concluded that there were no alternatives to the project. This was because in that case the restoration or maintenance of the existing bridge was considered as being technically impossible, and the “do-nothing” option would lead to a closure of the bridge and an increase in traffic on the remaining routes causing greater harm to the affected European site

Test 2: Imperative reasons of overriding public interest (IROPI)

90. If it can be established that there are no feasible alternative solutions, the competent authority must next be able to show that there are “imperative reasons of overriding public interest” (IROPI) that justify the plan or project despite the environmental damage it will cause. This requires consideration of the objective of the plan or project, as identified for Test 1.
91. For Special Areas of Conservation (SACs) designated under the Habitats Directive, the IROPI grounds on which a plan or project can proceed depends on the nature of the site that will be affected:

- Where a plan or project will negatively affect a “priority” habitat or species¹ on a site for which they are a protected feature, the competent authority can normally only consider reasons relating to human health, public safety, or beneficial consequences of primary importance to the environment. Other imperative reasons of overriding public interest can only be considered having obtained and had regard to the opinion of the European Commission.
- In all other cases competent authority can consider other imperative reasons of overriding public interest including those relating to social or economic benefit in addition to those of human health, public safety, or beneficial consequences of primary importance to the environment. This would include cases where priority habitats and species are present on a European site but they would not be affected by the proposal.

92. The Birds Directive does not identify priority habitat or species and so this differentiation does not apply to Special Protection Area (SPA) features or any other site not relevant to the Habitats Directive.

93. When identifying IROPI a competent authority should consider the different elements of the term:

- Imperative: it must be essential (whether urgent or otherwise), weighed in the context of the other elements below, that the plan or project proceeds
- Overriding: the interest served by the plan or project outweighs the harm (or risk of harm) to the integrity of the site as identified in the appropriate assessment
- Public Interest: a public benefit must be delivered rather than a solely private interest

94. Public interest can occur at national, regional or local level; as can IROPI provided the other elements of the test are met.

95. IROPI must be assessed on a case by case basis in light of the objective of the particular plan or project and its particular impacts on the European site(s) affected as identified in the appropriate assessment.

96. In practice, plans and projects which enact or are consistent with national strategic plans or policies (e.g. covered by or consistent with a National Policy Statement or identified within the National Infrastructure Plan) are more likely to show a high level of public interest. However consideration would still need to be given to whether, in each specific case, that interest outweighs the harm to the affected site(s) and therefore whether IROPI can be demonstrated. Plans or projects which fall outside national

¹ i.e. if the site has been designated, at least in part, due to the presence of a priority species or habitat. Habitats legislation differentiates between “priority” habitats and species and other protected habitats and species, with the former receiving a higher level of protection. A list of the European Sites which host priority habitats and species in England (including cross-border sites) can be found on the Defra website.

strategic plans, including those at a lower geographic scale, may also be able to show IROPI. Plans or projects which only deliver short term benefits are unlikely to be able to show IROPI.

97. The alternatives and IROPI tests are separate and sequential tests, and the competent authority must decide whether there is an alternative solution before (if necessary) it formally decides whether IROPI exists. However, in limited circumstances it may be helpful to consider the IROPI test alongside the assessment of feasible alternative solutions. This would only apply where it is very clear that a plan or project will not meet the IROPI test. In such cases there would be no point in spending time looking into possible alternatives.

Test 3: compensatory measures

98. The Habitats Directive seeks to create a coherent ecological network of protected sites. Therefore if harm to one site is to be allowed (because there are no alternatives and IROPI can be shown) the Directive requires that all necessary compensatory measures are taken to ensure the overall coherence of the network of European sites as a whole is protected.

99. The competent authority is initially responsible for ensuring that suitable compensation is identified. However, the appropriate authority also has a role in ensuring that compensation is secured (see paragraphs 107-110 below).

100. Competent authorities and SNCBs should help applicants to identify suitable compensatory measures. Such measures must be decided on a case by case basis and aim to offset the negative effects caused by the plan or project. They can include, among other things:

- The creation or re-creation of a comparable habitat which can in time be designated as a European site and in the meantime is protected as a matter of Government policy as if it were a fully designated European site
- The creation or re-creation of a comparable habitat as an extension to an existing European site

101. The competent authority, liaising with the SNCB and others as necessary (and, before consent is granted, consulting the appropriate authority) must have confidence that the compensatory measure will be sufficient to offset the harm. This can be a complex judgement and requires consideration of factors including:

- The technical feasibility of the compensatory measures as assessed based on robust scientific evidence. Measures for which there is no reasonable expectation of success should not be considered

- Whether there is a clear plan for undertaking the compensation, with the necessary provision of management and objectives for the duration over which compensation will be needed
- Distance from the affected site. In general compensation close to the original site will be preferable, but there may be instances where a site further away will be better suited, in which case it should be selected. This judgement must be based solely on the contribution of the compensatory measures to the coherence of the network of European sites
- Time to establish the compensatory measures to the required quality
- Whether the creation, re-creation, or restoration methodology is technically proven or considered reasonable

102. Competent authorities should not require more compensation than is needed to ensure the integrity of the network of European sites is maintained.

103. In designing compensation requirements competent authorities and SNCBs should ensure the requirements are flexible enough to ensure adequate compensation without going further than necessary. This recognises that in some cases compensation requirements will need to cater for uncertainty over the harm that might be caused by a proposal or the effectiveness of compensation measures, or to account for any time lag before compensatory habitat becomes established. For example:

- If there is uncertainty about the success of the proposed measures, the compensation area might need to be larger than the area damaged
- Potential actions may be required as a condition of consent in case compensation proves to be less successful than anticipated
- It may be that anticipated harm to a site proves to be less than anticipated, or compensation measures are more successful than expected. Where feasible, compensation requirements should be sufficiently flexible to scale back the compensation required in such cases. Habitats legislation should not be used to force applicants to over-compensate

104. The compensatory measures must be sustainable, or reasonably so given natural changes, so they maintain the integrity of the network in the long term. It will therefore be necessary to secure medium to long term management of the area concerned.

105. Compensation must be secured before consent is given for a proposal to proceed. In other words, the competent authority should be satisfied that all the necessary legal, technical, financial and monitoring arrangements are in place to ensure compensation measures proceed as agreed and remain in place over the full timescale needed. If it is not possible to secure adequate compensatory measures, a derogation allowing the proposal to proceed must not be granted.

106. Where possible, compensation measures should be complete before the adverse effect on the European site occurs. However, in some cases damage to European sites may necessarily occur before the compensatory measures are fully functioning. There may also be circumstances where the compensatory measures will take a long time to become fully-functioning (e.g. re-creation of woodland). In such circumstances it may be acceptable to put in place measures which do not provide a complete functioning habitat before losses occur – provided undertakings have been made that the measures will in time provide such a habitat, and additional compensation is provided to account for this. Such cases require careful consideration by the competent authority in liaison with SNCBs.

Role of the appropriate authority

107. The competent authority is responsible for deciding whether the derogation tests have been met, and it should clearly set out how it has reached its decision.

108. Before the competent authority grants permission on the basis of a derogation under article 6(4) it must inform the appropriate authority. Having done this, it may not grant permission for 21 days or any longer period as directed by the appropriate authority. In that period, the appropriate authority may direct the competent authority not to agree to the plan or project either indefinitely or a specific period of time. If no direction is received the competent authority may grant permission on the basis of an article 6(4) derogation.

109. If the appropriate authority is content with the competent authority's decision it must ensure compensatory measures are secured and sufficient to maintain the coherence of the network of European sites. Once a derogation has been used the appropriate authority is responsible for informing the European Commission that the compensation has been secured.

110. The appropriate authority may seek the opinion of the European Commission, following a request from a competent authority, on whether a plan or project can be approved for "other" IROPI reasons, where priority species or habitats are concerned (see paragraph 91 and Annex 2).

Section 3: Protected species requirements

111. The protected species requirements protect certain animals and plants of European importance. “Protected species” for the purpose of this guidance include:

- European Protected Species (EPS) – These are animal and plant species protected by the Habitats Directive. EPS with a natural range in Great Britain, including its seas, are listed in Annex 3. They include land animals (e.g. bats, great crested newts, otters and dormice), marine animals (e.g. dolphins, whales, porpoises and turtles), and plants (e.g. fen orchid and yellow marsh saxifrage)
- All species of naturally occurring wild birds¹⁷, as protected by the Wild Birds Directive¹⁸. “Wild birds” include bird species present in a wild state in England or its seas. It does not include poultry or game birds in most circumstances

112. Activities causing certain forms of harm to protected species would normally constitute a criminal offence, unless an appropriate licence has been obtained or a defence applies. The offences most likely to be relevant to developers and members of the public are set out below.

113. The person planning to undertake an activity is responsible for deciding whether or not to apply for a species licence. This decision is taken at the person’s own risk because a criminal offence may be committed if a protected species is harmed and a relevant licence has not been obtained. If in doubt about whether a licence is likely to be required, the person should contact the relevant licensing body. The main stages in applying for a licence are set out in Figure 2 below.

114. An offence could be caused by a wide range of activities, including domestic maintenance and building works, scientific surveys, various land and marine management activities, agriculture, infrastructure development and marine piling or seismic operations. The protected species requirements can significantly affect how, when and whether an activity takes place. As a result, early consideration of whether or not to apply for a licence (or adapt the activity to avoid the need for a licence) is advised as this can avoid unnecessary costs and delays.

Deciding whether to apply for a licence

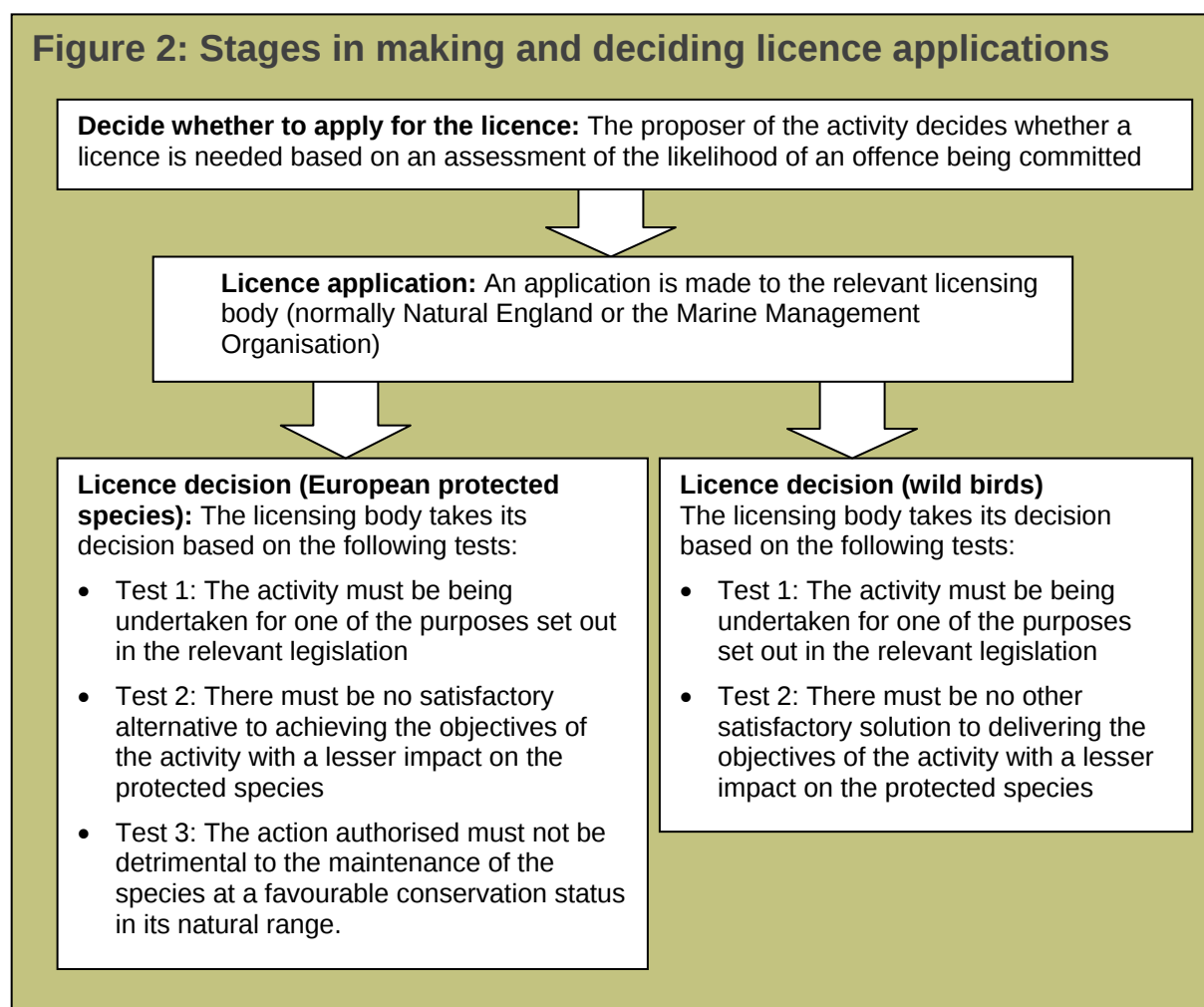
115. Before deciding whether to apply for a species licence, the person should assess how likely it is that the activity might lead to an offence. Having done this:

- If there is a negligible or no chance of an offence being committed the activity can proceed without a licence. The vast majority of activities undertaken in England are likely to fall into this category (e.g. because protected species are not present, or the activity would cause them no harm).

- If it is clear that an activity will lead to an offence, the activity can only go ahead if an appropriate licence is obtained (or a defence applies).
- Where there is uncertainty, careful consideration is needed on whether to proceed. This should include considering whether the activity can be modified to reduce the risk of an offence. If significant risk remains the activity should only proceed with an appropriate licence. Expert advice may help consideration in complex cases.

116. The person should bear in mind that licences are issued as a matter of last resort in order to comply with the Directives and that where possible they should seek to adapt their activity to avoid the need for a licence in the first place.

Figure 2: Stages in making and deciding licence applications



Assessing the risk of offence

117. The likelihood that an activity will cause an offence depends mainly on:

- The nature of the activity. Some activities would pose little or no risk of an offence even if protected species are present. Others would pose higher degrees of risk.
- Whether protected species are, or may be, present. Normally, it would only be possible to commit an offence if the protected species (or a habitat that it uses,

such as a resting place or breeding area) is present near the activity being undertaken¹⁹.

- The nature of the protected species that may be present. Some species are more prone to harm from a given activity than others
- How the protected species use the site. For example, are they permanently on site? Or do they only use it at certain times of year? Or do they simply pass through it on their way from A to B?
- The time of year that the activity is likely to take place. At some times of year there may be a greater likelihood of committing an offence (e.g. when animals are breeding, or when they are very young).

118. In some cases it will be relatively straightforward to find out whether an activity may cause an offence, but in other circumstances a more detailed investigation may be needed.

119. It is for the person wishing to undertake the activity to decide whether a detailed investigation is needed, taking account of factors such as whether the site of the activity is near a habitat likely to host a protected species. Annex 3 explains where to find information on EPS and wild birds which occur naturally in England. Such investigations may require a “survey licence” before they can proceed if there is a risk that they might in themselves disturb or otherwise harm a protected species. In some cases it may be advisable to seek help from a suitably qualified expert, for example a consultant ecologist with experience of habitats legislation.

120. Investigations to support licence applications should not be longer or more complex than necessary. However, potential licence applicants should be aware that in some cases species investigations may take many months, and perhaps more than a year, before there is sufficient evidence on which to base a licence application, particularly if species are only present or identifiable at certain times of year (as may be the case with species such as plants outside the flowering season, or dormice which hibernate).

Offences

121. Tables 4 and 5 provide a summary of the relevant species offences. There are some differences between offences applying to EPS and wild birds. For example, it would be an offence to disturb an EPS deliberately at any time, whereas for wild birds disturbance would only be an offence in relation to certain types of bird (listed in Schedule 1 of the Wildlife and Countryside Act 1981 (as amended)) during the nesting / breeding season. The relevant legislation should be referred to for the full details of these offences – for EPS the Habitats Regulations and the Offshore Regulations; and for wild birds, the 1981 Act and the Offshore Regulations.

Table 4: European protected species offences

These offences only apply to EPS with a natural range including any area in Great Britain (unless otherwise indicated).

It is an offence, in relation to **EPS land or marine animals**, to:

- Deliberately injure or kill any wild animal of an EPS
- Deliberately capture any wild animal of an EPS
- Deliberately disturb wild animals of an EPS
- Deliberately take or destroy the eggs of any wild animal of an EPS
- Damage or destroy a breeding site or resting place of any wild animal of an EPS
- Possess or control or transport any live or dead wild animal of EPS or part thereof (applies to all species protected by the Habitats Directive, not just those with a natural range in Great Britain)

It is an offence, in relation to **EPS Plants** to:

- Deliberately pick, collect, cut, uproot or destroy any wild plant of an EPS
- Possess, control or transport any live or dead wild plant of an EPS or part thereof (with the exception of bryophytes)

Table 5: Wild birds offences

It is an offence to:

In England and its seas up to 12 nautical miles from shore

- Intentionally kill, injure or take any wild bird
- Intentionally take, damage or destroy the nest of any wild bird while that nest is in use or being built
- Intentionally take or destroy an egg of any wild bird
- Possess or control any live or dead wild bird or wild bird egg or part thereof
- Intentionally or recklessly disturb certain wild birds while they are building a nest or are in, on or near a nest containing eggs or young or disturbs the dependent young of such a bird (This only applies to birds listed in Schedule 1 to the Wildlife and Countryside Act 1981 (see Annex 3))
- Intentionally take, damage or destroy the nest of a wild osprey, golden eagle or white-tailed eagle

In the offshore area more than 12 nautical miles from shore

- Deliberately capture, injure, or kill any wild bird
- Deliberately take, damage or destroy the nest of any wild bird while that nest is in use or being built
- Deliberately take or destroy an egg of any wild bird
- Keep any live or dead wild bird or any part of, or anything derived from, such a bird; or an egg of a wild bird or any part of such an egg

122. Some offences only apply to actions which are “deliberate”. As a result of case law for the Habitats Directive, “deliberate” goes further than mere intention and includes subjective recklessness. In other words, “deliberate” for this purpose includes an intentional act knowing that it would or may have a particular consequence. For example, if a person undertook an activity knowing that this may lead to a great crested newt or other EPS being killed, the person may commit the “deliberate killing of an EPS” offence (unless a licence is in place).
123. Offences are normally enforced by the Police on land and the Marine Management Organisation and the Police in the marine area. These organisations are responsible for investigating offences and prosecuting where appropriate. Natural England and the Marine Management organisation would be responsible for enforcement action against breaches of licence conditions. Third parties can also seek to bring prosecutions. If a person is convicted of an offence they may be subject to a fine, and possibly a term of imprisonment²⁰.

Defences

124. Habitats legislation provides for some circumstances (“defences”) where disturbance or harm to a protected species would not result in an offence. Offences will not occur in certain situations where specific defences or exceptions apply²¹. This includes:
- Defences relating to animal welfare. For example, a person would not be guilty of a species “killing offence” if they could show that the killing was done for humane reasons because the animal in question was seriously disabled and had no reasonable chance of recovery (provided this was not the result of the person’s unlawful act)
 - In relation to the wild birds’ offences, the defences under the Wildlife and Countryside Act 1981 include where a person is able to show that the otherwise unlawful act was the incidental result of a lawful operation and could not reasonably have been avoided²². Note that this defence does not apply to wild birds offences in the offshore area, or in relation to EPS offences.

Licence application and decision

125. Licences can allow activities to proceed despite the fact that they may harm a protected species in a way that would normally cause an offence. Licences can only be granted in limited circumstances.
126. Licences might allow a specific activity to proceed or they may cover multiple activities; and they can be granted to particular individuals or organisations, or to a class of persons. For example, a licence may allow a consultant to carry out a number of bat or great crested newt surveys, or to undertake many projects to capture and relocate protected species.

127. Licence applications should be made to the relevant licensing body. Natural England is responsible for issuing licences in England (in the area landward of the mean low water mark). The MMO is responsible in the English marine area (seaward of the mean low water mark), and in the offshore marine area (more than 12 nautical miles from the coast) except the Scottish offshore region.

128. As set out in Figure 2, various tests need to be met before Natural England or the Marine Management Organisation can issue a licence. There are differences in these tests depending on whether the licence being sought relates to EPS or wild birds:

- Test 1 (EPS and wild birds): the activity must be being undertaken for one of the **purposes** set out in the relevant legislation. The purposes are different for EPS and wild birds, as explained below
- Test 2 (EPS and wild birds): there must be **no alternative** to achieving the purpose of the proposed activity. This test is very similar for EPS and wild birds, although there is slight difference in the wording (there must be “no other satisfactory solution” for wild birds; and “no satisfactory alternative” for EPS)
- Test 3 (EPS only): The action authorised must not be detrimental to maintaining or achieving the **favourable conservation status** of the protected species in its natural range. This applies only to EPS and not to wild birds.

Test 1: The purpose test

129. Normally, EPS licences can only be granted for one of the following purposes:

Purposes (European protected species)

- Imperative reasons of overriding public interest (IROPI): including reasons relating to preserving public health or public safety, reasons of a social or economic nature, and beneficial consequences of primary importance for the environment
- Preventing the spread of disease
- Scientific or educational purposes
- Various conservation purposes (ringing or marking, or examining any ring or mark on, wild animals; protecting any zoological or botanical collection; conserving wild animals or wild plants or introducing them to particular areas)
- Preventing serious damage to livestock, foodstuffs for livestock, crops, vegetables, fruit, growing timber or any other form of property or to fisheries.
- For other unspecified reasons but only under strictly supervised conditions, on a selective basis and to a limited extent and in limited numbers (sometimes referred to as “judicious use”)

130. Normally, wild Birds licences may only be granted for one of the following purposes:

Purposes (wild birds)

- | | |
|---|--|
| <ul style="list-style-type: none"> • scientific, research or educational purposes • ringing or marking, or examining any ring or mark on, wild birds • conserving wild birds • the re-population of an area with, or the re-introduction into an area of, wild birds, including any breeding necessary for those purposes • conserving flora or fauna • protecting any collection of wild birds | <ul style="list-style-type: none"> • falconry or aviculture • any public exhibition or competition • photography • preserving public health or public or air safety • preventing the spread of disease • preventing serious damage to livestock, foodstuffs for livestock, crops, vegetables, fruit, growing timber, fisheries or inland waters • taxidermy |
|---|--|

Imperative reasons of overriding public interest (EPS only)

131. Most EPS licence applications in England will be sought on grounds of imperative reasons of overriding public interest (IROPI grounds). A licence can only be issued for this purpose if IROPI exists. This term includes the following concepts:

- Imperative: it must be essential (whether urgent or otherwise), weighed in the context of the other elements below, that the plan or project proceeds
- Overriding: the interest served by the activity outweighs the harm to EPS as assessed in light of the weight to be given to the protection of such species under the Habitats Directive. Only long-term interests would be sufficient to override the interest in protecting EPS, and activities resulting in only short-term benefits would not
- Public Interest: a public benefit is delivered rather than a solely private interest. Only public interests (promoted by either public or private bodies) can be balanced against the conservation aims of the Habitats Directive

132. The IROPI test as it applies to protected species licences is the same as the consideration of IROPI in European sites derogations – i.e. the licensing body must judge whether the public interest in undertaking an activity is imperative and outweighs the harm it would cause to the protected species. In practice the types of harm to which EPS licence applications relate is often on a much smaller scale than some consent applications relating to European sites. This affects the balancing exercise in undertaking the IROPI test and due to the smaller overall impact of an activity, the extent of the public interest necessary to outweigh that impact is often correspondingly smaller too.

133. The Government considers that there will often be a public interest in small-scale socio-economic activities such as domestic development and maintenance. For

example, depending on the nature of the activity, they can contribute to wider imperative public interests such as the efficient operation of the economy, investment in capital goods to support economic growth, improving health and well-being, and other benefits such as conservation. However, this does not mean that all small-scale activities automatically demonstrate IROPI and licences still need to be considered on a case-by-case basis and depend on the nature of the activity, the conservation status of the species in question and the potential impact on that species. For example, it will be harder to show IROPI if an activity would harm a rarer EPS or many members of an EPS.

Activities for socio-economic purposes (wild birds only)

134. Unlike the “purposes” relating to EPS licences, the Wild Birds Directive does not so readily allow licences to be issued for broad “socio-economic” reasons. In other words, some activities being undertaken for socio-economic reasons which do not meet one of the listed purposes (including some development etc) will not be able to get a wild birds licence.
135. Although it may not be possible to obtain a licence, it may still be possible to carry out such activities by avoiding the chance of committing an offence. For example, the offences relating to disturbing certain birds or harming nests only apply during the nesting / breeding season and (provided the activity does not kill or injure a bird) it will often be possible to undertake activities at another time of year. Alternatively, it might be possible to design activities so they can proceed during the nesting season without an offence being committed. If in doubt, it may be seeking advice from the licensing body. In some cases the “defence” mentioned in paragraph 124 above may also be relevant.

Test 2: alternatives

136. There must be shown to be “no satisfactory alternatives” before an EPS licence may be granted, and no “other satisfactory solution” before a wild bird licence may be granted. Similar considerations apply to both tests.
137. A “satisfactory alternative” or “other satisfactory solution” would be a different way of delivering the objective of the activity which has less negative impact on the protected species. The absence of alternatives must be objectively demonstrated and if a less damaging satisfactory option exists, a licence cannot be granted. To help consideration of this test, three questions should be considered: (a) what is the problem or specific situation that needs to be addressed?; (b) are there other solutions?; and (c) if so, will these resolve the problem or specific situation for which the derogation is sought?
138. There may be ways to reduce the impact of an activity. Depending on the circumstances of the case, this could include:

- Alternative locations or routes, different development scales or designs, or alternative activities, processes or methods
- Other ways to reduce the degree of harm. For example, a licence should not authorise higher-impact forms of harm (e.g. killing great crested newts to remove them from a building site) if a lesser degree of harm is a feasible alternative (e.g. capture, remove and resettle the newts instead). Any licence granted must be limited to the extent necessary to resolve the problem or situation for which the licence is required

139. An alternative can only be considered “satisfactory” if it does less harm to the protected species. In addition, the alternative needs to deliver the same objective as the original proposal in a way that is reasonable. This means an alternative that would be prohibitively expensive or legally or technically infeasible would not be satisfactory. However an alternative cannot be ruled out merely because it would cause greater inconvenience or cost to the licensee. A robust argument would be needed to demonstrate objectively that a lower-impact alternative is not “satisfactory” in any particular case. The licensing body is responsible for deciding what is “satisfactory” on a case-by-case basis, drawing on objective evidence²³.

Test 3: Favourable conservation status (EPS only)

140. An activity can only be granted an EPS licence if it will not be detrimental to the favourable conservation status of a species in its natural range. Among other things, this aims to ensure that a series of small decisions will not build up to an overall unsustainable impact on the species.

141. Favourable conservation status for a species in its natural range means:

- The population of the species maintains itself on a long-term basis. This may require maintaining a sustainable population at a sub-national or lower geographical level
- The natural range is (at least) stable and is unlikely to be reduced in the foreseeable future
- The habitats required to support the species are of sufficient size and quality and expected to remain so in the long-term

142. In considering potential effects on favourable conservation status, the species' current conservation status (and whether it is expected to improve, decline or stay roughly the same over the coming years) should be considered. Account should also be taken of the likely impact of the activity on: the population dynamics of the species in question; the range of the species and whether there would continue to be sufficient habitat; and the long term viability of the species.

143. In applying the favourable conservation status test, the licensing body should bear in mind that:

- The test can only be passed if the net result of the activity being licensed, taking into account mitigation and/or compensation, would be neutral or positive for the species. No licence can be granted if the activity would have a detrimental effect on a species' conservation status, or the attainment of favourable conservation status, nationally or locally
- If the population of a species is healthy and unlikely to suffer detrimental effects from an activity, a licence would naturally be easier to justify than if the population concerned was in an endangered and declining state. This would also apply if the population was healthy locally but less so at the national or regional level
- It is possible to grant licences for activities affecting species in an unfavourable conservation status, provided it does not undermine the overall objective of reaching favourable conservation status in the species' natural range
- As a general rule, the less favourable the conservation status, the less likely it is that a licence can be granted. Generally, the more threatened a species, the more sensitive its conservation status would be to activities having an impact on it. For example, if a species is facing a serious risk of extinction any derogation would be likely to have a serious impact on its FCS

Post-licence monitoring and action obligations

144. The licensing body may grant licences subject to conditions which include:

- Timing obligations – e.g. restricting the timing of an activity to avoid or reduce disturbance to protected species
- Monitoring obligations – e.g. conditions under which the licence holder must monitor the effects of a plan or project to check whether the assumptions on which the licence was based hold true in practice, and that if not, the situation is recognised and brought to the attention of the licensing body if necessary
- Action obligations – e.g. agreed measures to be undertaken if the impacts prove to be greater than expected, and/or measures to mitigate the effects of the action

145. Licensing bodies should actively consider using such conditions as part of a risk-based approach to granting licences. For example, in some cases it may be possible to allow activities to proceed despite some degree of scientific uncertainty on possible effects, provided safeguards are built into the licences. Where conditions of licence are used in this way, the licensing body should: (a) ensure that the applicant is capable of executing the conditions as may be necessary; and (b) that they abide by the conditions as necessary.

Annex 1: Competent authorities

A wide range of persons and organisations could be a competent authority for the purposes of the Habitats Regulations Assessment (HRA) provisions. Regulation 7 of the Habitats Regulations gives a non-exhaustive list summarised in the table below.

Possible competent authorities for the HRA requirements and derogations (non-exhaustive list)

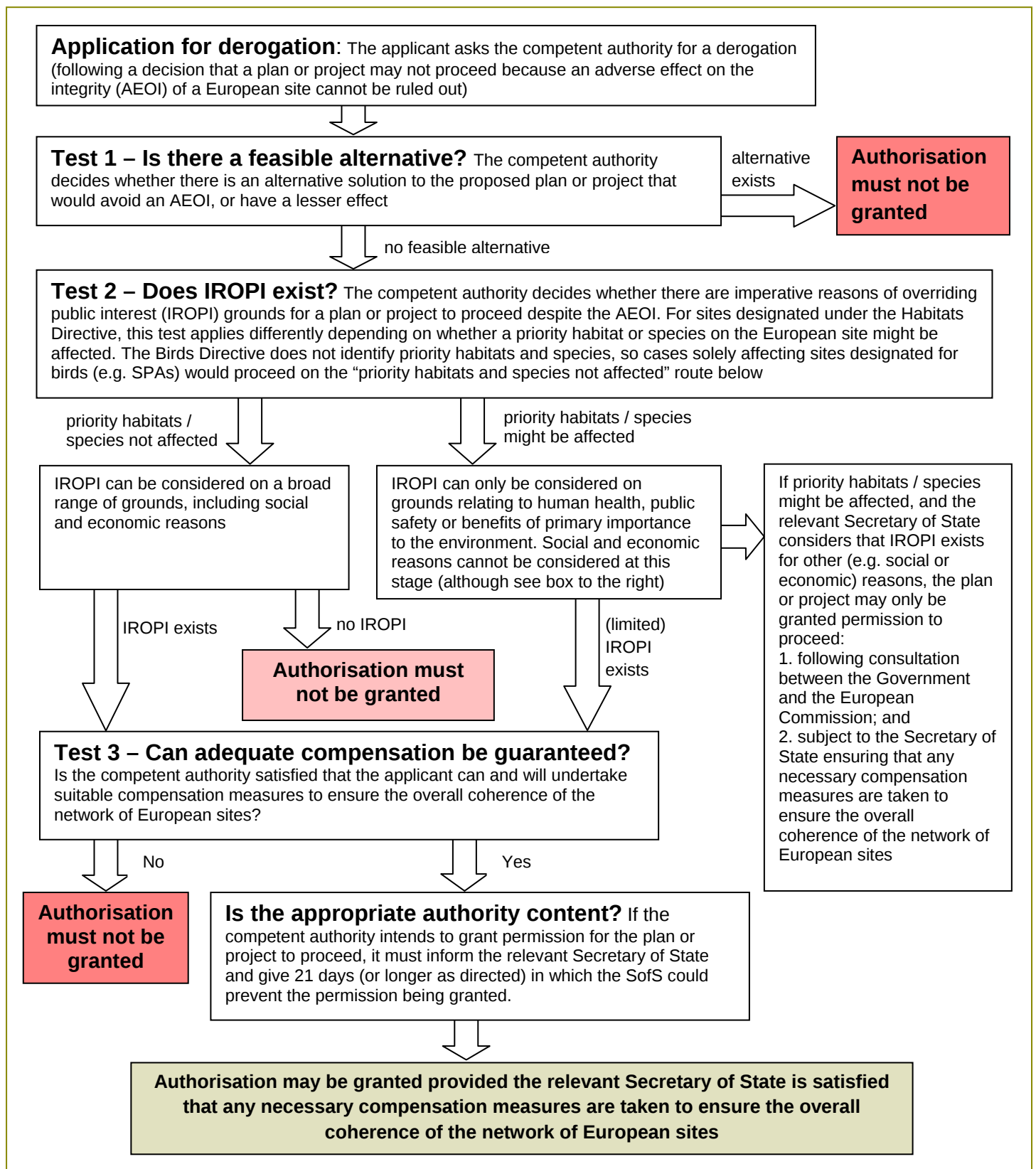
- any Minister of the Crown or government department - local authorities (e.g. a county council, district council, parish council, a London borough council) - National Park authorities - any statutory undertaker - any person holding a “public office” (as defined in regulation 7) - other public bodies of any description	“Joint boards” – i.e. a joint planning board within the meaning of section 2(4) of the Town and Country Planning Act 1990 - a “joint committee” appointed under subsection (1)(b) of section 102 of the Local Government Act 1972 - any person exercising any function of a person or organisation mentioned above. - Scottish Ministers (in limited circumstances as set out in regulation 7)
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Normally: The competent authority under habitats legislation will be the authority dealing with the related planning (or similar) application – e.g. the local planning authority if a plan or project is proceeding through the planning system, the Environment Agency if it is proceeding under environmental permitting legislation, etc. This reflects the fact (as discussed in paragraph 17 of the guidance) that habitats issues must be complied with before a plan or project can be granted consent under the planning system or another similar regime.

Multiple competent authorities: In some cases there may be more than one competent authority – for example if a plan or project would extend across the territories of multiple planning authorities. Defra guidance explains how to proceed in such circumstances, for example how to agree a “lead competent authority”. See “Guidance on competent authority coordination under the Habitats Regulations” (Defra, July 2012).

General development orders (GDOs): In other cases, compliance with the HRA requirements may be needed in cases where plans or projects would otherwise be covered by a GDO. As mentioned in paragraph 18 above, if it cannot be ruled out that such a plan or project would have a likely significant effect on a European site the development cannot proceed unless written approval of the local planning authority has been obtained in accordance with regulation 75 of the Habitats Regulations.

Annex 2: Derogations flow diagram (European sites)



Annex 3: Protected species

European Protected Species present in their natural range

EPS land animals	EPS marine animals	EPS Plants
Bats - all species	Whales – all species	Creeping Marshwort
Great crested (or warty) newt	Dolphins – all species	Early Gentian
Dormouse	Porpoises – all species	Fen Orchid
Common otter	Marine turtles – all species	Floating-leaved Water Plantain
Natterjack toad	Sturgeon	Killarney Fern
Pool frog		Lady's-slipper
Sand lizard		Shore Dock
Smooth snake		Yellow Marsh Saxifrage
Large blue butterfly		
Lesser whirlpool ram's-horn snail		
Fisher's estuarine moth		

Wild Birds included in Schedule 1 of the Wildlife and Countryside Act (as amended)

[Note: All wild birds are protected. This table lists the sub-set of birds covered by the offence of intentionally or recklessly disturbing birds during the nesting/breeding season (see Table 6 in section 3)]

Avocet	Grebe, Slavonian	Sandpiper, Purple
Bee-eater	Grebe, Black-necked	Sandpiper, Wood
Bittern	Greenshank	Scaup
Bittern, Little	Gull, Little	Scoter, Common
Bluethroat	Gull, Mediterranean	Scoter, Velvet
Brambling	Harriers (all species)	Serin
Bunting, Cirl	Heron, Purple	Shorelark
Bunting, Lapland	Hobby	Shrike, Red-backed
Bunting, Snow	Hoopoe	Spoonbill
Buzzard, Honey	Kingfisher	Stilt, Black-winged
Capercaillie	Kite, Red	Stint, Temminck's
Chough	Merlin	Swan, Bewick's
Corncrake	Oriole, Golden	Swan, Whooper
Crake, Spotted	Osprey	Tern, Black
Crossbills (all species)	Owl, Barn	Tern, Little
Curlew, Stone	Owl, Snowy	Tern, Roseate
Divers (all species)	Peregrine	Tit, Bearded
Dotterel	Petrel, Leach's	Tit, Crested
Duck, Long-tailed	Phalarope, Red-necked	Treecreeper, Short-toed
Eagle, Golden	Pintail	Warbler, Cetti's
Eagle, White-tailed	Plover, Kentish	Warbler, Dartford
Falcon, Gyr	Plover, Little Ringed	Warbler, Marsh
Fieldfare	Quail, Common	Warbler, Savi's
Firecrest	Redstart, Black	Whimbrel
Garganey	Redwing	Woodlark
Godwit, Black-tailed	Rosefinch, Scarlet	Wryneck
Goldeneye	Ruff	
Goshawk	Sandpiper, Green	

End notes

¹ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ("the Habitats Directive") and Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds ("the Wild Birds Directive").

² The Conservation of Habitats and Species Regulations 2010 (the "Habitats Regulations") (as amended) apply in England and its seas up to 12 nautical miles from the coast.

³ Offshore Marine Conservation (Natural Habitats, &c) Regulations 2007 (the "Offshore Regulations") (as amended) apply in UK waters more than 12 nautical miles from the coast.

⁴ Part 1 of the Wildlife and Countryside Act 1981 ("WCA") (as amended) primarily transposes the species protection requirements of the Wild Birds Directive in England. The Offshore Regulations transpose these requirements in the UK offshore area.

⁵ Sites formally in the process of becoming SACs include Sites of Community Importance (SCIs) and candidate SACs (cSACs). In addition, it is Government policy to apply the HRA requirements to sites in the early stages of becoming SACs or SPAs, known as "possible SACs" and "potential SPAs". listed and proposed "Ramsar" sites (wetlands of international importance); and sites identified or required as compensatory measures for adverse effects on European sites.

⁶ Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment. This consolidated Council Directive 85/337/EEC

⁷ For example, a UK court has ruled that a proposal to introduce larger, more powerful ferries on an existing ferry route would constitute a "plan or project". See *R (on the application of Akester and another (on behalf of the Lymington River Association)) v Department for Environment, Food and Rural Affairs and another* [2010] EWHC 232

⁸ The competent authority is required to consult the SNCB at the significant effect stage in the case of plans and projects subject to General Development Orders. See regulation 75 of the Habitats Regulations.

⁹ The ECJ Waddenzee judgment says that: "the significant nature of the effect on a site of a plan or project...is linked to the site's conservation objectives...where such a plan or project has an effect on that site but is not likely to undermine its conservation objectives, it cannot be considered likely to have a significant effect on the site concerned ...conversely, where such a plan or project is likely to undermine the conservation objectives of the site concerned, it must necessarily be considered likely to have a significant effect on the site". Paragraphs 46-48 of Case C-127/02 (Waddenzee)

¹⁰ In cases where a site is designated under national legislation as well as European legislation (e.g. if the site is a SSSI as well as a European site) consideration may also need to be given under the relevant national legislation. In practice, effects on SSSIs would often be considered under the process of environmental impact assessment, which would often run in parallel to assessment under habitats legislation

¹¹ Paragraph 44 of Case C-127/02 (Waddenzee).

¹² Paragraph 44 of Case C-127/02 (Waddenzee).

¹³ Paragraph 59 Case C-127/02.

¹⁴ If the competent authority is uncertain about a site's conservation objectives it should contact the relevant SNCB. Part of the SNCB's role is to advise on the conservation objectives.

¹⁵ Waddenzee judgement: "The competent national authorities, taking account of the appropriate assessment of the implications of [the plan or project] for the site concerned in the light of the site's conservation objectives, are to authorise such an activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects".

¹⁶ See regulation 61 of the Habitats Regulations and regulation 25 of the Offshore Regulations.

¹⁷ "Wild bird" is defined in the Wildlife and Countryside Act 1981 as any bird of a species which is ordinarily resident in or is a visitor to the European territory of any Member State in a wild state but does not include poultry or, except in sections 5 and 16 of the Wildlife and Countryside Act 1981, any game bird.

¹⁸ The Directive allows certain exemptions to the general protection afforded to all wild birds. For example it allows for the hunting of certain species (subject to certain conditions) at certain times of year. Further details can be found in the Wildlife and Countryside Act 1981.

¹⁹ This is not always the case when considering cetaceans and noise from underwater piling activities. JNCC advises that EPS licence applications are made for wind farm piling activities to prevent the developer from possibly committing an offence.

²⁰ Under the Habitats Regulations a person may be subject to a term of imprisonment not exceeding six months and/or to a fine not exceeding level 5 on the standard scale. Under section 21 of the Wildlife and Countryside Act 1981 a person may be subject to a term of imprisonment not exceeding six months and/or to a fine not exceeding level 5 on the standard scale. Currently a fine on Level 5 on the standard scale may be up to £5,000, although this figure may change in future. Under the Offshore Regulations a person may on summary conviction be subject to a fine not exceeding the statutory maximum (currently £5,000) or on conviction on indictment to a fine of an uncapped amount.

²¹ Regulations 42 and 46 of the Habitats Regulations, regulations 35 and 40 of Offshore Regulations and section 4 of the Wildlife and Countryside Act 1981.

²² As set out in section 4(2)(c) of the Wildlife and Countryside Act 1981.

²³ In the case of general licences the licensing body does not decide what it a satisfactory alternative on a case-by-case basis