

Department for Environment, Food and Rural Affairs

Habitats Directive: consultation on draft guidance on the application of article 6(4)

Alternative solutions, imperative reasons of overriding public interest (IROPI) and compensatory measures

August 2012

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Introduction

1. The Habitats and Wild Birds Directives are European legislation that protect the continent's rarest and most threatened habitats and species to enhance biodiversity, and thereby help maintain the economic value of the natural environment. However, implementation of the directives in relation to proposed development can be complex, and there has sometimes been a lack of clarity over how the regime should be applied, including among regulators and developers.
2. The Government therefore launched a review of the implementation of directives in England last year. The review aimed to reduce burdens on business while maintaining the integrity of the directives. The Habitats and Wild Birds Directives Implementation Review was published in March 2012 (<http://www.defra.gov.uk/habitats-review>).
3. Investing in infrastructure is a key part of the Government's economic strategy and the review identified a number of measures specifically to facilitate nationally significant infrastructure. It also committed the Government to improving guidance on the directives. Currently it can be confusing to understand the directives' requirements as more than 1,600 pages of guidance have been issued by the European Commission, Government agencies and third parties.
4. One of the Government's commitments to improve guidance was to publish new guidance on the derogation under article 6(4) of the Habitats Directive. The derogation allows plans or projects which may have a negative effect on a site protected by the directive ("European sites") to go ahead if there are "no alternative solutions" and "imperative reasons of overriding public interest" (IROPI), and compensatory measures have been secured. This guidance will eventually form one part of new overarching guidance on the directives which will be published in March 2013 following consultation starting in November 2012. It has been brought forward more quickly than the overarching guidance to clarify these legal tests, particularly in relation to infrastructure projects.
5. This consultation seeks views on the draft guidance which applies in England and relevant UK waters. General comments are welcomed and questions are asked on:
 - The overall approach to allowing plans or projects to go ahead on IROPI grounds
 - The relationship between alternative solutions and IROPI
 - The definition of IROPI
 - Compensatory measures
6. The draft guidance only applies to the derogation under article 6(4) of the Habitats Directive. Similar tests relating to European protected species will be covered in the overarching guidance.

Overall approach

7. Existing guidance says that projects should only go ahead under article 6(4) in “exceptional circumstances” or “as a last resort”¹.
8. This may be misunderstood to mean that use of article 6(4) is discouraged. The Government therefore wishes to clarify the language so competent authorities and developers give serious consideration to the use of article 6(4) when it is appropriate to do so.

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

Alternative solutions

9. Before a project can be approved under article 6(4) the competent authority needs to be content there are no alternative solutions – i.e. no other way of achieving the objectives of a plan or project that would have less effect on a European site. It has often proved complex to apply the alternative solutions test. For example, an alternative solution to a port development might include building a port at a different location, or using a different means of operating at the same location such as partial unloading of ships in deeper water to reduce the draught of ships entering the port.
10. The guidance sets out what should and should not be considered in thinking about alternative solutions. This includes advice on the limits within which alternative solutions should be considered. Taking the example above, it would not be necessary to consider other modes of transport as alternative solutions to ports. Similarly, in the case of electricity generation, alternative solutions should be constrained to one form of generation (e.g. hydroelectric or offshore wind). In addition, competent authorities should have regard to National Policy Statements and other documents setting out Government policy (e.g. the UK Renewable Energy Roadmap) which will set the context for the assessment of feasible alternative solutions.

Consideration of alternative solutions and IROPI

11. Article 6(4) sets out alternative solutions and IROPI as sequential tests: i.e. IROPI is considered only after it has been demonstrated that there are no feasible alternative solutions that would be less damaging. However, existing guidance does not always make clear that the two tests are closely interlinked, and that the public interest is highly relevant to both. The draft guidance seeks to clarify this.

¹ Only 30 cases have occurred in England between transposition of the Habitats Directive in 1994 and May 2012.

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

Definition of IROPI

12. There is no simple definition of the concepts in the IROPI test. Nor is it possible to prescribe a threshold above which IROPI exists. This is because the IROPI test involves weighing the public interest of each plan or project against the adverse effect it would have on the integrity of a European site. Competent authorities must therefore judge on a case-by-case basis whether IROPI has been demonstrated.
13. The draft guidance also explains that the IROPI test is, in effect, about judging the balance of interest. The size of the public interest associated with a plan or project, whether large or small, does not in itself determine whether the IROPI test has been passed. What matters is that the public interest outweighs the adverse effect on the integrity of the site.

Question 3 Do you agree with the guidance on IROPI?

Compensatory measures

14. Compensatory measures should be secured before harm is caused to a European site. The guidance sets out the issues to be considered when planning compensatory measures.

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

Responding to this consultation

15. The Government is interested in views on the draft guidance, in particular from:
- Developers of nationally significant infrastructure
 - Developers of other plans or projects
 - Competent authorities
 - Other parties with interests in infrastructure and development, and nature conservation
16. Comments are welcomed to explain responses to the specific questions set out in the document or to provide views on other elements of the draft guidance. A response form is included at Annex A. Responses will be made publicly available unless a specific request is received not to publish a response.

17. Responses should be sent to:

Major Infrastructure and Environment Unit
Defra
Area 3B, Nobel House
17 Smith Square
London
SW1P 3JR

HDimplementationreview@defra.gsi.gov.uk

18. Responses should be received by 30 October 2012.

Next steps

19. Responses to this consultation will inform final guidance on the article 6(4) derogation which will be published in November 2012. It is the Government's intention to incorporate guidance on the article 6(4) derogation into overarching guidance on the Habitats and Wild Birds Directives that will be subject to a separate consultation in November 2012.

Annex A: response form

Name / organisation:

Question 1 The draft guidance sets out the circumstances in which Article 6(4) may apply. Do you agree with this overall approach?	Yes / no
Comments	

Question 2 Do you agree that the approach linking alternatives and IROPI as set out in the guidance is sensible?	Yes / no
Comments	

Question 3 Do you agree with the guidance on IROPI?	Yes / no
Comments	

Question 4 Do you agree with the guidance on compensatory measures?	Yes / no
Comments	

Do you have any other comments on the draft guidance?
Comments

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