Department for Environment, Food and Rural Affairs

Habitats & Wild Birds Directives: Guidance on the application of article 6(4)

Summary of responses to public consultation

December 2012

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Introduction

1. This document summarises responses to a Defra public consultation seeking views on draft guidance on the application of Article 6(4) of the EU Habitats Directive as it applies in England and its seas. The consultation was published on the Defra website. It ran from 7 August to 30 October 2012.

2. The Article 6(4) guidance is closely linked to other guidance measures from the Review. It was "fast tracked" to clarify these legal tests, particularly in relation to infrastructure projects, and initially it will exist as a stand-alone document. However, in March 2013 it will be absorbed into the new "overarching guidance" on the Directives as they affect businesses and others (the overarching guidance will be subject to a public consultation starting in November 2012, and is expected to be published in March 2013).

3. The consultation sought views on the draft guidance and in particular views were sought on:

    - The overall approach to allowing plans or projects to go ahead on grounds of imperative reasons of overriding public interest (IROPI)
    - The relationship between alternative solutions and IROPI
    - The definition of IROPI
    - Compensatory measures.

4. The consultation sought views from anyone with an interest, in particular developers of nationally significant infrastructure, developers of other plans or projects, competent authorities, and other parties with interests in infrastructure, development or nature conservation.

5. For each major issue raised this paper gives a summary of: (a) the consultation proposal; (b) the consultation response; and (c) how Defra has responded to consultation suggestions.

6. A list of respondents is at Annex 1. A complete set of responses to the written consultation (other than where respondents requested confidentiality) are available from the Defra Information Resource Centre and can be supplied in response to personal callers or in response to phone or e-mail requests. An administrative charge will be made to cover photocopying and postage costs. Where possible, personal callers should give at least 24 hours notice of their requirements. To arrange this, please contact the Defra Information Resource Centre, Lower Ground Floor, Ergon House, Horseferry Road, London SW1P 2AL. Telephone 020 7238 6575. E-mail defra.library@defra.gsi.gov.uk

General issues

7. Defra has made stylistic changes throughout the article 6(4) guidance to make it consistent with the style of the draft overarching guidance, into which it will be absorbed from the end of March 2013 (explained in paragraph 2 above).

8. A flow chart setting out the derogations process has been added as Annex 1 of the article 6(4) guidance to help illustrate the process.

9. Defra has clarified in the guidance that the derogations procedure in article 6(4) of the Habitats Directive also applies to European sites protected under the Wild Birds Directive (e.g. in the title of the guidance and throughout the document). This responds to calls from some respondents.

10. Some respondents thought the guidance should have a wider remit. For example:

    - Some thought it should give more background e.g. on the broad aims of the Habitats and Wild Birds Directives and the "habitats regulations assessment" (HRA) process which precedes any consideration of derogations under article 6(4).

    - Some thought it should cover how the alternatives and IROPI tests apply under European Protected Species licensing (not just how they apply to European sites).

    - Some asked for the guidance to explain the distinction between "mitigation" and "compensation" in terms of habitats requirements.

    Defra has not made changes to reflect these views in the interim stand-alone version of the article 6(4) guidance. The overarching guidance will cover these issues. Anyone wishing to know more about these intended changes should look for the consultation on the overarching guidance on Defra's website at http://www.defra.gov.uk/consult/.

Issue 1: Overall approach

11. **Consultation proposal:** The consultation paper explained that existing guidance could be misunderstood to mean that use of article 6(4) was discouraged – e.g. by stressing that projects should only proceed under article 6(4) in "exceptional circumstances" or "as a last resort". The new guidance would clarify the language to explain that competent authorities and developers should give serious consideration using article 6(4) when it is appropriate to do so. Consultees were asked whether they agreed with this approach.

12. **Consultation response:** Most developers and potential competent authorities agreed the guidance should simply give a straightforward account of what the legislation required, and avoid any "extra" suggestion that use of the derogation tests was discouraged. Others, including most environmental NGOs thought the guidance should stress strongly that article 6(4) should only be used in "exceptional circumstances" and "as a last resort". These respondents thought this would reflect the

spirit of the Directives, although some recognised there was a lack of case-law in this specific area.

13. **Defra response:** Defra will proceed with the proposal because it is important that the guidance reflects the legislation, which does not say the derogation tests would only be passed in very unusual circumstances. Having said this, Defra recognises the tests must be interpreted strictly, and in practice the derogations are only likely to be used rarely – i.e. only a small minority of proposals would reach this stage of consideration because most would either have been approved by this stage, or the applicant would have withdrawn their application. The text has been amended to reflect this.

Issue 2: Consideration of alternative solutions and IROPI

14. **Consultation proposal:** The consultation paper explained that 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 clarify that the two tests are closely interlinked, and that the public interest is highly relevant to both. The draft guidance seeks to clarify that this is the case. Consultees were asked whether they agreed that linking alternatives and IROPI as set out in the guidance is sensible?

15. **Consultation response:**

- Many respondents agreed there was a strong public interest element to both the alternatives and IROPI tests, and some (e.g. RSPB) thought this should be brought out more clearly in the alternatives section of the guidance. For example it was recognised that alternative solutions must achieve the overall objective as the original proposal, and any public interest served by a proposal would be a key part of the objective. It was also recognised that if it was obvious that a proposal would fail the IROPI test on grounds of insufficient public interest, there would be no point in spending time looking into possible alternatives. **Defra response:** Defra intends to proceed with the proposal, subject to the changes discussed below.

- Some respondents thought that (despite public interest being relevant to both tests) the guidance should spell out more clearly that the alternatives and IROPI tests are separate and sequential tests. In other words, the competent authority would first need to decide formally that there is no alternative solution, taking account of public interest elements of this test as appropriate, before it goes on to decide formally whether the public interest served by the proposal is *overriding* in relation to the harm it would cause. They suggested a clarification of the final paragraph of the IROPI section of the guidance. **Defra response:** Defra has clarified this paragraph to spell out more clearly that the tests are separate and sequential. The guidance will still recognise that if it is very obvious at the alternatives stage that a proposal will fail the IROPI test there would be no point in considering the application further.

- Some respondents strongly supported the part of the guidance saying that the range of alternatives could be focussed in some circumstances (e.g. the words saying that alternatives to offshore wind turbines need only consider alternative offshore wind turbines, rather than, for example, other forms of energy generation). Others thought the wording on limiting consideration of alternatives was too stark, and seemed to dismiss the possibility of a broader consideration even in cases where it might be appropriate. Others went further to say that consideration of alternatives should always be as broad as possible. **Defra response:** Defra has clarified the wording to make clearer that the competent authority should use its judgement to frame the consideration of alternatives according to what is reasonable in the circumstances. In some cases this may involve a very broad consideration if such alternatives would be feasible and deliver the overall objective of the original proposal. However, in some cases the consideration may be less broad. For example, alternatives 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 relocating the population of the village.

- One respondent thought the guidance should clarify how the financial cost of an alternative relates to its feasibility, and others thought there should be more explanation of what factors are relevant to “feasibility”. They suggested the guidance should state that an alternative that was so very expensive or technically difficult that it would not be feasible, cannot sensibly be regarded as an alternative solution. However, it is not necessary for an alternative solution to be the equivalent cost in order to be feasible. **Defra response:** Defra agrees and words have been added to the guidance to make this clear.

- Some respondents thought the sentence in the guidance on consideration of the “do nothing” option needed further explanation. **Defra response:** Defra agrees and further explanation has been added to illustrate how “do nothing” should be taken into account when considering alternatives.

- A number of respondents said the guidance should stress the need to consider alternatives from the earliest stages of project development. **Defra response:** Defra agrees and wording has been added to the introduction of the guidance to stress the need to consider alternatives etc as soon as it becomes clear that the derogation tests may need to be applied. This will also be dealt with when the article 6(4) guidance is absorbed into the overarching guidance, the introduction of which will stress the need to consider all relevant habitats issues from the earliest possible stage.

Issue 3: Definition of IROPI

16. **Consultation proposal:** The consultation paper explained that 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. 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. Consultees were asked whether they agreed with the guidance on IROPI.

17. **Consultation response:**

- Many respondents were content with the proposal, including many from industry.

- Some respondents, including most environmental NGOs and some others, were not content with the concept of "imperative" in IROPI being defined merely as "necessary". They thought the definition should be strengthened e.g. to mean "indispensible" or a similar term. **Defra response:** The guidance has been amended to make clear that the imperative part of the IROPI test means that it must be "essential (whether urgent or otherwise) that the plan or project proceeds".

- One respondent asked for greater clarity on when the presence of "priority habitat or species" might cause the stricter IROPI test to apply. The respondent also suggested making clear that the Birds Directive does not specify priority habitat or species and so this restriction does not apply to non-Habitats Directive protected sites such as SPAs. **Defra response:** Defra agrees and the guidance has been amended accordingly.

Issue 4: Compensatory measures

18. **Consultation proposal:** The consultation paper explained that Article 6(4) requires that 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. Consultees were asked whether they agreed with the guidance on compensatory measures.

19. **Consultation response:**

- Some respondents, from business and some local authorities, were pleased that the guidance advised that the degrees of compensation required should not exceed what is actually needed to compensate any habitat losses or sites damage. Others, including from environmental NGOs, thought this aspect of the guidance should be clarified to say that compensation on a merely 1:1 ratio should only be applied where there was a 100% chance it would be effective, but if this were not the case "overcompensation" would be needed to deal with the chance that some of the compensation may be ineffective. **Defra response:** Defra stands by the point that competent authorities and SNCBs should seek to ensure that compensation should

not go further than necessary, because this would put an unjustified burden on the applicant. However, there may be some cases where uncertainty over the outcome of compensation measures means that more rather than less compensation may be required to be confident of achieving adequate compensation (i.e. in order to guarantee 1:1 compensation it may be necessary to apply compensation to an area of land larger than the area of the European site affected). In other cases it may be that harm to the site is less than feared, or that compensation works better than anticipated, in which case compensation requirements may need to be scaled back. The guidance has been amended to reflect more clearly that flexibility may need to be built into compensation requirements to ensure that adequate compensation occurs without causing an unjustified burden.

- Some respondents asked for the guidance to be clearer on the requirement for adequate compensation to be "secured" before consent can be granted. They asked for clarity that this means that compensation should be guaranteed, rather than necessarily physically completed. In other words, the competent authority should be satisfied that the necessary legal, financial and technical arrangements are in place to ensure the compensation measures are developed and remain in place over the full timescale needed. This recognises that (e.g. in the case of the creation of new replacement habitat) it may take many years to complete compensation. **Defra response:** Defra agrees and the guidance has been clarified to reflect this.

- Some respondents thought the guidance (in the last paragraph of the introduction) should not say the Government expects the statutory nature conservation body (SNCB) to have a role in helping competent authorities to identify adequate compensation measures. For example, some thought this may be misinterpreted to suggest that the applicant was not responsible for identifying compensation, and others thought it was not the SNCB's role to help identify adequate compensation proactively (i.e. the SNCB role should be confined to assessing the adequacy of the applicant's proposals). **Defra response:** This wording has been clarified. Identification of compensatory measures is primarily the responsibility of the applicant. However, the Government expects the SNCB, as far as it reasonably can, to help applicants and authorities e.g. in the interests of saving time and avoiding wasted effort. For example, if the SNCB knows that compensation can be achieved in a certain way, it should make this clear. Similarly, if compensation would be very difficult or impossible to achieve this should also be made clear as early as possible.

- Some respondents asked for clarification of what happens if it is not possible to provide for adequate compensation. **Defra response:** Defra has clarified the guidance to make clear that where this is the case a derogation cannot be granted (e.g. see the new flow diagram in the annex of the guidance).

Annex 1: List of Respondents

Blythe Estuary Group
Breck District Council
Bristol Port Company
British Ports Association
Centrica
City Of London Law Society
Colchester Borough Council
Cornwall Seal Group
Countryside Council for Wales
David Tyldesley Associates
EDF Energy
Highways Agency
Imerys Minerals Ltd
Mineral Products Organisation
National Grid
New Forest District Council
Perham Harding
Portsmouth City Council
Private Individual
Renewable Energy Association - Ocean Energy Group
Renewable Energy Systems Ltd
RSPB
RTPI
RWE Npower plc and RWE Npower Renewables Limited
Sea Bed User and Developer Group
Thames Water
The Crown Estate
The Law Society
Transport for London
UK Environmental Law Association's nature conservation working group
UK Major Ports Group
United Utilities plc
Wildlife Trusts
WWF-UK

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www.defra.gov.uk

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