



## **UK Environmental Law Association's input to the Department for the Environment Food and Rural Affairs review of the implementation of the Habitats Directive**

### **UKELA**

UKELA is the UK's foremost membership organisation working to improve understanding and awareness of environmental law, and to make the law work for a better environment. As such, UKELA has a keen interest in ensuring the effectiveness of the legal framework in securing nature conservation. The observations and comments set out below are provided by UKELA's nature conservation working group whose members have considerable experience in applying and interpreting the Habitats Directive.

### **Introduction**

The Habitats Directive requires the application of rigorous tests to protect wildlife of European importance. The associated processes are complex but do not preclude damaging plans and projects being progressed, only that the necessary checks and balances are in place to identify and avoid risks to European wildlife. One of the fundamental problems is the interpretation of the often mis-quoted precautionary principle. However, this aside, there are many examples where damaging plans and projects have progressed, such as developments at Immingham and the Wightlink case, where pragmatic and more flexible approaches have been adopted.

In terms of the review we would like to offer one note of caution. The aim to provide greater clarity and understanding is to be applauded, but any initiatives to weaken or circumvent the provisions in the Directive would be counter productive and result in greater risk of infraction measures by the European Commission.

### **Legal issues**

In our view the Habitats Directive 92/43/EEC is accurately transposed into national law by means of the Conservation of Habitats and Species Regulations 2010.

However, Regulation 63 etc (which requires the review of existing decisions and consents) do appear to go beyond that required by the Directive. It is understood that the provisions were introduced to address Article 6.2 of the Directive which requires Member States to take appropriate steps to avoid, within Natura 2000 sites, the deterioration of natural habitats and habitats of species as well as significant disturbance of those species for which the sites

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are designated. To our knowledge no other Member State has review provisions in their national legislation.

The processes set out in the Directive are complex enough but in transposing the legislation into national law they are underpinned by existing provisions and processes which further confuse their interpretation and application. In the main the underpinning is provided by the Wildlife and Countryside Act 1981 (as amended), thereby duplicating protection and management measures for European Protected Species (in particular) and also for European sites.

As regards this European Protected Species duplication, simply to remove European Protected Species from the Schedules of the Wildlife and Countryside Act so that they are only subject to the tests set out in the 2010 Regulations would avoid duplication and confusion. This has been undertaken in Scotland (where all EPS provisions are found in the Conservation (Natural Habitats Etc) Regulations 1994) with no apparent problems arising.

As you are aware the Law Commission plans to address the codification and consolidation of wildlife law under its 11<sup>th</sup> programme of work. This exercise is well overdue and is to be welcomed.

### **Data and evidence**

The improvement in availability, accessibility and transparency is also to be welcomed. However, the key concern is the different approaches experienced within England and between the devolved countries, on the data required to inform judgements and the interpretation of data. The variations cause confusion and dismay and need to be addressed.

For example the critical document for Natura 2000 is the site's nature conservation objectives. These should set out the contribution made by the site to securing the favourable conservation status of the European features hosted there and the measures needed to maintain or restore those features. The conservation objectives must also provide a benchmark by which the impact of plans and projects are assessed. The quality of these key documents varies considerably within England and the standard adopted there is different to that in the devolved countries.

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Under Article 2.2 of the Directive, measures are required to be taken to maintain or restore at favourable conservation status (fcs), natural habitats and species of Community importance. Whilst there is a definition of fcs in the Directive and detailed assessments for each natural habitat and species are contained in the most recent UK Article 17 report on the implementation of the Directive, there is a lack of transparency and consistency as to how this data is being used to inform judgements and decisions.

For example under Regulation 53(9)(b) any European species derogation to be licensed by Natural England must not be "detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range". Note that it is this requirement which drives each developer to deliver compensatory land for the European species affected by the development. There is a possible mismatch between Natural England's policy of "*no net loss in the local population status of the species concerned*" / "*mitigation aiming to maintain a population of equivalent status on or near the original site*" (see NE's "How to Get a Licence") and (i) the European Commission guidance on this requirement (February 2007), and (ii) the interpretation of favourable conservation status under the Defra guidance for the Environmental Damage Regulations 2009, which whilst addressing a different regime, nevertheless defines the concept of favourable conservation status. Both these documents ((i) and (ii)) would suggest that there could be more flexibility in the way in which this licensing test is being applied so that a more strategic approach to the provision of compensatory habitats for species such as great crested newts could be developed, rather than each developer providing a piece of habitat which more often than not is not maintained or protected adequately into the future.

In the marine environment there are clearly problems because of the availability of a reduced amount of data and quality data to inform judgements and decisions. Applying terrestrial standards to marine is not currently sensible and therefore in the absence of adequate data the opinion of experts should be given weight.

## **Process**

In the main the process as set out in the Directive is clear and correctly transposed into national law. There is therefore little or no flexibility to make changes. However, see above issues regarding the relationship between the Regulations and the underpinning national legislation.

Very unusually for an environmental permitting regime, there is no appeal process in existence to allow applicants for European Protected Species licences to appeal NE licensing decisions. In addition NE does not ever "refuse" licences. NE instead sends to the applicant a "request for further information" letter and the applicant must respond. This can go on over a number of months with a number of such letters. Otherwise the only recourse

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available to a developer is to the courts by way of judicial review. This route is expensive and time consuming. For that reason consideration should be given to introducing an appeal route.

### **Guidance and interpretation**

To aid developers and competent authorities to understand the processes and interpret the terms and tests, clear and accessible guidance needs to be made available. It is equally important, to ensure the provision of consistent advice, Natural England staff also need to have a clear understanding of the Regulations.

Currently the only reliable source of guidance is from the European Commission who have produced guidance on the interpretation and application of Article 6 (see Managing Natura 2000; Assessment of plans and projects, and Ports guidance) and Article 12 (species provisions). Guidance placing the process in an England context is not available. English Nature produced a series of guidance notes in the late 1990s (see HRGNs) but these are no longer available. These guidance notes need to be updated and supplemented in the light of case law and best practice. We are aware that guidance on species protection and management provisions (as contemplated by Regulation 41(9) 2010 Regulations) has been drafted in England but has yet to be issued.

For example guidance on the strict liability offence of damaging or destroying breeding or resting places of a European species (see Regulation 41) is critical as is the need to provide further clarification on what constitutes a breeding site or resting place. For example it is unclear which parts of Dormice habitat are to be regarded as breeding sites or resting places. Great crested newts are another example - whilst their breeding ponds are their "breeding sites", it is unclear which discrete areas of their terrestrial habitat are to be regarded as their resting places.

### **Communication and awareness**

The availability of guidance is not enough in itself. Workshops and training events need to be held to demonstrate how the complex processes for the management and protection of sites and species work or should work, in practice. These events should in the first instance be held with Natural England staff before being rolled out to competent authorities and developers.

### **Capacity building**

It is critical that good science and good scientists inform judgements and decisions made by Natural England and competent authorities. Specialist skills and knowledge are needed to

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collect and interpret data. It is therefore imperative that in a period of public sector cuts these resources and skills are safeguarded so far as possible. Failure to do so may lead to poor or incorrect advice being given resulting ultimately in costly infraction action being taken against the UK government.

I. Wyn Jones  
Conveynor,  
Nature Conservation Working Group

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