

## The Appropriate Assessment (Regulation 48) The Conservation (Natural Habitats &c) Regulations, 1994

### Introduction

1. This Guidance Note has been prepared to assist competent authorities and English Nature staff when undertaking the “*appropriate assessment*” required by Regulation 48 of the *Habitats Regulations 1994* implementing Article 6(3) of the *Habitats Directive* (92/43/EEC). Only the Courts can provide authoritative interpretation of the Regulations, but these notes have been developed in the light of practical experience and a close examination of the Regulations, the Habitats Directive and central government guidance, particularly in PPG 9.

### When Does An ‘Appropriate Assessment’ Need To Be Undertaken?

#### Types of Proposal

2. Under Regulation 48(1), an appropriate assessment needs to be undertaken in respect of any plan or project which:
- either alone or in combination with other plans or projects would be likely to have a *significant effect* on a European Site, and
  - is not directly connected with the management of the site for nature conservation.
3. Appropriate assessment is required by law for all European Sites (Regulation 48). A European Site is any classified SPA and any SAC from the point where the Commission and the Government agree the site as a Site of Community Importance. Appropriate assessment is also required, as a matter of Government policy, for potential SPAs, candidate SACs and listed Ramsar Sites for the purpose of considering development proposals affecting them. (PPG 9 paras 13 and C7).

#### Timing of the Assessment

4. An appropriate assessment needs to be undertaken in respect of a plan or project described above **before** any “*competent authority*”:
- decides to undertake the plan or project, in cases where no consent, permission or other authorisation is required. (Reg. 48(1));
  - decides to give any consent, permission or other authorisation for the plan or project. (Regs. 48(1) *et al*);
  - reviews the decision to undertake a plan or project or reviews consents, permissions or other authorisations for plans or projects that are incomplete. (Regs. 50(2) *et al* - see also EN Habitats Regulations Guidance Note No. 2);
  - decides whether to approve an application for development that would otherwise be permitted development. (Reg. 62(6)).

#### Significant Effects

5. The plan or project does not have to be located within the designated area. Significant effects may occur even if the plan or project is some distance away and even outside any consultation area defined by English Nature (PPG 9 paras 30-32). The effects may be direct or indirect, temporary or permanent, beneficial or harmful to the site, or a combination of these.

6. The initial determination of likely significance is intended to ensure that all relevant plans and projects likely to have a material effect on these internationally important sites are subject to an appropriate assessment. In all but the most clear cut cases, competent authorities are likely to need advice. English Nature will advise, on request, as to whether any particular plan or project may be likely to have a significant effect on any of these sites. If the decision as to whether or not the development would have a significant effect on the designated site is inconclusive, on the information available, the competent authority should make a fuller assessment; in doing so they may ask the developer or other parties for more information. (PPG 9 para C10).

### Who Undertakes the Appropriate Assessment?

7. The appropriate assessment must be undertaken by the *competent authority*, as defined in Regulation 6(1) of the Habitats Regulations, which includes any Minister, Government Department, public or statutory undertaker, public body of any description or person holding a public office. The developer or proposer of the plan or project is required to provide relevant information. English Nature must be consulted, during the course of the assessment, but it is the duty of the competent authority to undertake the assessment itself.

8. Most competent authorities will not have the technical expertise “in house” to assess the effects of the plan or project on the international nature conservation interests. Most will need to rely heavily on the advice, guidance and recommendations of English Nature, at each stage, including the scope and content of the assessment, the site’s conservation objectives, the information required from the developer or proposer and the effects on the integrity of the site, all of which are discussed below. The appropriate assessment, in many cases, is likely to be an iterative process. In the simplest cases a general statement in a single consultation response from English Nature may suffice to enable the competent authority to complete the assessment. However, in most cases, it is envisaged that a more detailed response from, and dialogue with, English Nature is likely to be necessary.

### What is an ‘Appropriate Assessment’

9. It is a self contained step in a wider decision making process, required by the Habitats Regulations and described more fully in PPG 9, Annex C. Its conclusions must be based only on the scientific considerations under steps laid out in the Habitats Regulations. The assessment should not be influenced by wider planning or other considerations.

10. The Regulations do not specify how the assessment should be undertaken but describe it simply as “an appropriate assessment”. This is taken to mean that the assessment must be appropriate to its purpose under the Regulations (and also the Directive, which originated the use of the term). Its purpose is to assess the implications of the proposal in respect of the site’s “*conservation objectives*”. The conclusions of the assessment should enable the

competent authority to ascertain whether the proposal would adversely affect the integrity of the site.

### Scope and Content

11. PPG 9 indicates that the scope and content of an appropriate assessment will depend on the location, size and significance of the proposed plan or project (PPG 9 box C10). The PPG indicates that English Nature will advise on a case-by-case basis. According to the nature conservation interests of the site, English Nature will identify particular aspects that the appropriate assessment should address. Examples given are hydrology, disturbance and land-take, but there are clearly many other potential matters that may need to be addressed in particular cases.

12. Procedures under the Habitats Regulations should be confined to the effects on the internationally important habitats or species for which the site is or will be internationally designated or classified, including any indirect effects on these interests, for example, via their supporting ecosystems and natural processes. Notwithstanding a favourable assessment in respect of the plan or project's effects on the international nature conservation interests for which the site was classified or designated, decisions to undertake or give consent to the plan or project may need to take account of other international, national, regional or local nature conservation interests in the light of other policy and legislative provisions. (PPG 9 paras 4, 18 and 27).

### Environmental Assessment

13. The appropriate assessment is not the same as an environmental assessment under the provisions of the various *Environmental Assessment (EA) Regulations* (1988-95), in compliance with the Directive 85/337/EEC. In many cases, plans or projects that will be subject to an appropriate assessment will need an Environmental Statement (ES) to be prepared under the EA Regulations. (PPG 9 paras 38 and 39).

14. The ES will address all significant environmental effects. It will be appropriate to use the information assembled for the ES when carrying out the appropriate assessment under the Habitats Regulations. In view of this it would be helpful if the relevant ES clearly identified, under a specific subject heading, the likely significant effects on the internationally important habitats and/or species.

## How is an Appropriate Assessment Undertaken?

### Key Steps

15. Having established that an appropriate assessment is required, the following conclusions may be drawn (from the foregoing considerations and Government guidance) in respect of how it should be undertaken.

#### The Key Steps in An Appropriate Assessment

The competent authority:

I

Must consult English Nature

II

May consult the general public

III

Should clearly identify and understand the site's conservation objectives having regard to the advice of English Nature

IV

Should require the applicant to provide such information as may reasonably be required for the purposes of the assessment

V

Should identify the effects of the proposal on the habitats and species of international importance and how those effects are likely to affect the site's conservation objectives

VI

Should decide whether the plan or project, as proposed, would adversely affect the integrity of the site in the light of the conservation objectives

VII

Should consider the manner in which the plan or project is proposed to be carried out, whether it could be modified, or whether conditions or restrictions could be imposed, so as to avoid adverse effects on the integrity of the site

VIII

Should conclude whether the proposal, as modified by conditions or restrictions, would adversely affect the integrity of the site

IX

Should record the Assessment and notify English Nature of the conclusions

## The Key Steps Explained

These key steps are explained in more detail below.

### I. Consulting English Nature

16. Under Regulation 48(3) the competent authority must consult English Nature and must have regard to any representations made by English Nature. It may be inferred from PPG 9 (box C10 and para C9) that the competent authority would be expected to follow the advice of English Nature and normally to decide the case “*in accordance with the recommendations of English Nature*”. If it does not do so, the competent authority should be prepared to explain its reasons. In cases where it proposes to agree to a plan or project notwithstanding a negative assessment, the competent authority is required to notify the Secretary of State in advance of any decision.

### II. Consulting the General Public

17. Under Regulation 48(4) the competent authority may (if it considers it appropriate) take the opinion of the general public, on the implications of the proposal for the site’s conservation objectives, using whatever steps they consider necessary. This may usefully include taking the opinion of others with relevant knowledge or expertise.

### III. The Site’s Conservation Objectives

18. The Regulations do not define what is meant by the site’s conservation objectives but PPG 9 box C10 describes them as:

*“the objectives.... / the reasons for which the site was classified or designated”*

English Nature will be able to give a clear statement of the site’s conservation objectives in the light of its European Site Register entry (compiled by Government under Regulation 11), its citation, its reasons for recommendation, English Nature’s knowledge of the site, national and international objectives for the international nature conservation interests (such as may be contained in the UK Biodiversity Action Plan) and any Management Plan or Management Statement for the site in so far as they relate to the interests for which the site was selected.

19. The site may also host habitats and/or species of Community interest (see Article 1 of the Habitats Directive) which are not mentioned in the European Site Register, the citation or the reasons for recommendation because they were not, at the time, a reason for classification or designation. Such features are not relevant to the appropriate assessment itself. Nevertheless their presence may be material to the decision as to whether or not to undertake or to consent to the plan or project.

### IV. Requiring Further Information

20. The competent authority, taking the advice of English Nature where necessary, should require the applicant to provide such information as the competent authority may reasonably require for the purposes of making the assessment (Reg 48(2)). The information required may relate to any environmental information, or information about the proposal, relevant to the assessment and may include:

- i. information already available, or
- ii. new information from surveys that may need to be carried out, or
- iii. data analysis, predictions, comparisons or assessments of a technical nature.

### V. Identifying the Effects

21. Having regard to English Nature’s advice and other consultation responses and, where relevant, taking account of the ES or any other information supplied by the developer/proposer, or otherwise available, the competent authority should identify what the effects of the proposal are likely to be. The effects considered should be those of the plan or project, either alone or in combination with other plans or projects, on the habitats and species of international importance and how those effects are likely to affect the site’s conservation objectives. This will involve considering, for example, the nature,

scale, geographic extent, timing, duration and magnitude of direct and indirect effects; considering the degree of certainty in the prediction of effects; considering all mitigating measures already contained in the proposal and the extent to which these measures are likely to avoid, reduce or ameliorate adverse effects on the international nature conservation interests. It is the residual effects, after mitigation, that are considered at this stage.

### VI. Integrity of the Site

22. Having regard to English Nature’s advice, other consultation responses and any other information available, the competent authority should decide whether the plan or project, as proposed, would adversely affect the integrity of the site, in the light of its conservation objectives. That is, whether the plan or project would adversely affect the “*coherence of the site’s ecological structure and function, across its whole area, or the habitats, complex of habitats and/or populations of species for which the site is or will be classified*” (PPG 9 box C10). An adverse effect on integrity is likely to be one which prevents the site from making the same contribution to favourable conservation status for the relevant feature as it did at the time of its designation.

23. The form of words used in Regulation 48(5) implies that a precautionary approach should be taken in considering effects on integrity, in line with the Government’s principles for sustainable development (see *Sustainable Development: the UK strategy* page 33). Regulation 48(5) says that (subject to Regulation 49) projects may only proceed if the competent authority has ascertained that it **will not adversely affect** the integrity of the European site.

### VII. Considering How To Avoid Adverse Effects

24. If the proposal would adversely affect the integrity of the site then, having regard to English Nature’s advice, the competent authority should consider the manner in which it is proposed to be carried out and whether the plan or project could be modified, or whether conditions or restrictions could be imposed, so as to avoid the adverse effects. This may include, for example, changes to the siting, layout, timing or use of the proposal and the use of obligations or legal agreements. (Reg. 48(6)).

25. Compensatory measures that may be offered in the proposal at this stage, seeking to redress but not remove residual harm to the international interests (such as the provision of land for habitat creation purposes), should not be considered in the appropriate assessment, but may be considered later in the decision making process. (See Reg. 53).

### VIII. Conclusion on Effects In The Light of Conditions and Restrictions

26. The competent authority should reassess the conclusions in the light of any such modifications, conditions or restrictions that may be agreed or imposed.

## IX. Recording the Assessment

27. It would be advisable for this conclusion, and the reasons for it, to be recorded. English Nature should be notified of the conclusion of the appropriate assessment and the authority's decision as to the effects on the integrity of the site, before the authority undertakes the plan or project or issues any permission, consent or other authorisation (PPG 9 para 30).

28. The subsequent courses of action open to a competent authority are set out in Regulations 48(5) - (7), 49 and 54(3). The Regulations prohibit a competent authority from undertaking or giving consent to any plan or project unless the appropriate assessment concluded that it would not have an adverse effect on the integrity of the site, or specific criteria are met and the Secretary of State has been informed.

## Good Practice Outline of an Appropriate Assessment Record

29. A suggested model or good practice outline record of an appropriate assessment is set out below. It may be contained in, for example, a planning officer's committee report or the minutes of a competent authority's decision. In other cases it may be a file note, clearly recording compliance with the Regulations. The record may take many different forms because each assessment needs to be appropriate to the type,

scale, location and significance of the proposal and to the relevant nature conservation interests. It is provided here as a guide to assist competent authorities and English Nature staff, not as an authoritative legal formula. Any record made of an appropriate assessment should be copied to English Nature and to any other parties who were consulted on the assessment.

*Title of Plan or Project/Application*

*Location of Plan or Project/Application*

*[With location plan attached showing relationship to the international designation]*

*International Nature Conservation Site*

*Nature/Description of Plan or Project/Application*

*[Including brief description of manner in which plan or project is proposed to be carried out]*

*Date Appropriate Assessment Recorded*

*This is a record of the appropriate assessment, required by Regulation 48 of the Habitats Regulations 1994, undertaken by [name of competent authority] in respect of the above plan/project, in accordance with the Habitats Directive (Council Directive 92/43/EEC). Having considered that the plan or project would be likely to have a significant effect on the [name of international site] and that the plan or project was not directly connected with or necessary to the management of the site, an appropriate assessment has been undertaken of the implications of the proposal in view of the site's conservation objectives.*

*English Nature was consulted under Regulation 48(3) on [date] and their representations, to which this authority has had regard, are attached at Annex 1. The conclusions of this appropriate assessment \* are/are not in accordance with the advice and recommendations of English Nature.*

*\*The applicant was required to submit further information reasonably necessary for this assessment on [date] under Reg.48(2) \* and replied with the information on [date]/but did not supply the information.*

*\* The opinion of the general public was taken under Reg. 48(4) by way of \*public advertisement/further consultation etc and the views expressed (attached at Annex 2) have been taken into account.*

*The site's conservation objectives have been taken into account, including consideration of the citation for the site and information supplied by English Nature (see Annex 1). The likely effects of the proposal on the international nature conservation interests for which the site was designated may be summarised as:*

*[List of Effects]*

*The assessment has concluded that:*

*\*a) the plan or project as proposed would not adversely affect the integrity of the site,*

*or*

*\*b) the plan or project as proposed would adversely affect the integrity of the site.*

*[If (b):]*

*The imposition of conditions or restrictions on the way the proposal is to be carried out has been considered and it is ascertained that:*

*\*a) conditions or restrictions cannot overcome the adverse effects on the integrity of the site.*

*or*

*\*b) the following conditions and/or restrictions would avoid adverse effects on the integrity of the site. [list conditions/restrictions]*

*Signed ..... Date .....*

*(\* delete as appropriate)*

*Annexes to also include relevant correspondence, minutes or meetings with English Nature, the applicant etc.*



## Supplement to Habitats regulations guidance note no. 1 For English Nature staff responding to habitats regulations consultations on the appropriate assessment

### Good Practice Outline of an English Nature Consultation Response

This Supplement should be read in conjunction with the Habitats Regulations Guidance Note No. 1. It is intended to help English Nature staff draw up their response to consultations under Regulation 48 of the Habitats Regulations in respect of an "appropriate assessment" being carried out by a competent authority.

#### General Advice:

- Consultation under Reg. 48 may be explicitly initiated by a competent authority. However it is more likely to be buried or obscured in a more general consultation over a plan or project. In such cases English Nature should respond to the consulting authority by letter/pro forma in the normal way, referring to all relevant nature conservation issues. However our specific advice under the Habitats Regulations should be clearly set out either in the letter, or in a separate Annex to it.
- If objecting to a proposal it is important to distinguish between an objection based on the international nature conservation interests for which the European Site was selected (and to which specific procedures in the Habitats Regulations apply) and one based on other nature conservation interests. If the effects on the international nature conservation interests are such that, although significant, they would not adversely affect the integrity of the site, we should say so.
- In the case of any uncertainty over the application of the Regulations, the use of terms such as "significance", "integrity", "in combination" etc, or the likely impacts of a proposal, feel free to seek further advice from the relevant individuals in English Nature's national office. Our participation in Habitats Regulations cases will come under close scrutiny and it is important that we can demonstrate that we operate within the requirements of the Regulations and take a consistent approach.
- We should involve the Regional Government Office in such cases at an early stage and keep them advised of progress. In some cases, particularly where there is a risk of damage to a European site, we should also consider informing European Wildlife Division at Bristol.

#### Example of a Summary of Representations

If the letter in response to a consultation under the Regulations is long, or an Annex is used for the international considerations, it may be helpful to include summary paragraph(s) early in the covering letter, perhaps along the following lines:

*This letter [and attached Annex] may be taken to be English Nature's formal consultation representations under Regulation 48(3) of the Conservation (Natural Habitats &c) Regulations 1994. English Nature \*objects/does not object to the proposal.*

*English Nature is of the opinion that the proposal \*would/would not be likely to have a significant effect on the [name and status of site] and is/is not directly connected with the management of the site for nature conservation.*

*\*English Nature recommends that the applicant be required under the provisions of Regulation 48(2) to provide the following information which English Nature considers to be reasonably necessary to enable the competent authority to undertake an appropriate assessment.*

*English Nature is of the opinion that the plan or project, as proposed, \*would/would not adversely affect the conservation objectives and the integrity of the site as defined in Annex C of PPG 9.*

*English Nature is of the opinion that \*the following conditions/restrictions/legal agreements/planning obligations could overcome adverse effects on the integrity of the site/conditions or restrictions could not avoid harm to the integrity of the site.*

*English Nature advises that the site \*does/does not host a priority natural habitat type/priority species within the meaning of Article 1 of the Habitats Directive (PPG 9 p.36).*

(\* delete as applicable)

#### Recommended Content of Detailed Representations

Our response to a consultation under the Regulations should clearly state English Nature's position and should generally follow the model response letters outlined in Appendix 4 of the Local Authorities Handbook. That part of the letter relating to the Reg. 48(3) consultation should include the points set out below:

*The Conservation Status of the Site*

Including all relevant designations, dates and area/extent with copy of citation (or reasons for recommendation) and maps attached.

*The International Nature Conservation Importance of the Site*

Including the reasons why the site was or is to be designated as a European site and drawing attention to any priority habitats or species which the site supports.

*The Conservation Objectives of the Site*

Clearly setting out the objectives relating to all habitats and species of Community interest / Ramsar interest etc. drawing on the citation, selection criteria, Site Objective Statement, Site Management Statement, Management Plan or Strategy, BAP targets, national or international policy objectives and other sources as relevant.

*Further Information Required (if any)*

Setting out, as precisely as possible:

- a. what information is currently in the public domain or could be made available but which is not yet submitted to the competent authority, and how they may obtain it; and
- b. what further information is required from the applicant, in your opinion, to enable the competent authority to undertake, and English Nature to further advise on, the appropriate assessment.

*The Effects of the Development as Proposed*

Identifying all direct/indirect, temporary/permanent effects and their significance related to their nature, scale, geographic extent, location, duration, magnitude etc.

*Implications for the Conservation Objectives*

Setting out all implications for the conservation objectives and identifying clearly those which would be adverse to the integrity of the site.

*Conditions or Restrictions*

Identifying clearly which adverse effects on integrity (if any) could be overcome by, for example, conditions, planning obligations, other legal agreements etc. (See Sections D28 and D29 and E2 of the LA Handbook).

*Conclusions and Recommendations*

The summary paragraphs provided as examples above.

*Further Assistance*

Offer to provide further explanation or clarification should this be needed. Always offer to meet with the competent authority to explain our advice and to guide them through the Regulatory procedures.