

Review of existing planning permissions and other consents The Conservation (Natural Habitats &c) Regulations, 1994

Introduction

1. This Guidance Note has been prepared to assist competent authorities (decision making bodies) and English Nature staff when undertaking the *review of planning permissions and other consents* required by Regulations 50-51, 55-59, 69, 71, 75, 79, 83, 84 and 85 of the *Habitats Regulations 1994*. 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. This Guidance Note should be read in conjunction with English Nature's Habitats Regulations Guidance Note No. 1: The Appropriate Assessment.

What Consents are Subject to Review?

2. The Regulations require the review of outstanding decisions, permissions, consents and other authorisations, not yet completed, which would be likely to have a significant effect on a European Site (either individually or in combination with other plans or projects); and which would not be directly connected with or necessary to the management of the site. (See paras 11, 12 and 13 below).

3. The decisions, permissions, consents and other authorisations are those under the *Town and Country Planning Act 1990*, *Pipelines Act 1962*, *Control of Pollution Act 1974*, *Highways Act 1980*, *Electricity Act 1989*, *Environmental Protection Act 1990*, *Water Resources Act 1991*, and the *Transport and Works Act 1992*. All of these are referred to in this Guidance Note as "consents". Many of the examples and explanations in this Guidance Note refer to the review of planning permissions. This reflects the more detailed statutory provisions in the Regulations and the planning guidance in PPG 9. However, it is emphasised that a wide range of competent authorities are involved in reviewing the many other types of consent issued under the above Acts.

When are Consents Subject to Review?

4. The Regulations require the review to be undertaken, as soon as reasonably practicable, for:

- a. all existing SPAs; and
- b. all future SPAs when they are classified;
- c. Special Areas of Conservation (SACs) when the Government and the Commission agree the site as a Site of Community Importance to be designated as an SAC (which should happen before May 1998 - local authorities will be notified when agreement has been reached).

Who Identifies Which Consents To Review?

5. Generally, the competent authority responsible for the consent, eg the Environment Agency or the Highway Authority, is the

authority which identifies the consents to be reviewed. The main exception is that planning permissions deemed to be granted under S.90(1), (2) or (2A) of the Town and Country Planning Act 1990, as specified in Regulation 55(3), will be reviewed by the Secretary of State (SoS). Local planning authorities must consider whether any of these deemed permissions should, in their opinion, be reviewed. If so they must refer the matter to the relevant Government Department or the SoS. (Reg. 55(4)).

What If More Than One Competent Authority Is Involved?

6. If the plan or project relies on consents from more than one competent authority, Regulation 52 provides for the most appropriate authority to undertake the "appropriate assessment" and for the other authority, or authorities, to have regard to the views of the authority that carried out the assessment. (Regs. 48(1), 50, 52 & 55).

What is the Role of English Nature?

7. English Nature **may be** consulted by a competent authority at any stage in the review process. For example, to help assess whether completion of a project would have a significant effect on the European site, or whether planning obligations, conditions or restrictions could overcome any harm to the integrity of a site. However, at the stage when the competent authority undertakes the appropriate assessment (see paras 14 and 15 below and English Nature's Habitats Regulations Guidance Note No. 1) it **has a duty** to consult English Nature and to have regard to English Nature's representations.

What Should the Developer or Project Proposer Do?

8. The developer should provide such information as the competent authority may reasonably require for the purpose of the appropriate 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.

Again, English Nature can advise on what information is already available and what may be required.

What is the Review Procedure?

9. Regulation 50 requires that any review should be carried out under existing statutory procedures where they exist and, if none exist, the SoS may give directions as to the procedure to be followed. Thus, for example, a review of the various pollution control consents may draw upon the procedures for review in the Control of Pollution Act, Water Resources Act and the Environmental Protection Act. A review of a planning permission may draw upon the statutory provisions for review, modification and revocation of planning permissions in the Town and Country Planning Act 1990 (TCPA 1990). However, in addition to those procedures, the Regulations require the review to follow the procedures set out in Regulations 48 and 49, with appropriate modifications. In all cases, the review must conclude with one of three courses of action: to affirm, to modify or to revoke the decision, consent or authorisation.

10. Review procedures would normally include the following steps which are summarised on the attached flowchart:

I. Identifying Relevant Consents

11. Selecting the relevant consents may include working through past consents in a structured and systematic way, identifying which consents have been started and which have been fully implemented. If a large number of consents are likely to be involved, it may be necessary to establish priorities, in consultation with English Nature. For example, the Environment Agency may firstly concentrate on cases where English Nature expressed concerns on consultations. Planning authorities could prioritise those consents which were, or would now be, subject to a statutory consultation with English Nature. (See PPG 9 paras 30-32).

II. Significant Effect

12. Competent authorities are encouraged to consult English Nature and to take account of their advice as to whether completion of a project with consent would be likely to have a significant effect on the European Site and/or whether it would be directly connected with or necessary to the management of the site. (PPG 9 box C10).

13. English Nature's Habitats Regulations Guidance Note No.1 contains further advice about assessing whether particular plans and projects would be likely to have a significant effect on a designated site, including those cases where a fuller assessment is required to establish this.

III. Consultation With English Nature and the Public

14. During the appropriate assessment (see para 15 below) the competent authority **must** consult English Nature and may, if they consider it appropriate, take the opinion of the general public. (Regs. 48(3) & (4) & 50 (2) and PPG 9 paras C3, C8 & C10). English Nature's role in the appropriate assessment, and the consultation processes, are more fully explained in English Nature's Habitats Regulations Guidance Note No.1. The competent authority must have regard to English Nature's representations and take account of public comment.

IV. The Appropriate Assessment

15. The competent authority must make an appropriate assessment of the implications of completing the consent in view of the conservation objectives of the European Site. English Nature's Habitats Regulations Guidance Note No. 1 provides detailed advice on the appropriate assessment which is not repeated here. However, attention is drawn to the provisions for cases where information is inadequate, or incomplete. The competent authority should request submission of additional information reasonably necessary to complete the assessment (Reg. 48(2)). The competent authority must ascertain whether or not the completion of the development would adversely affect the integrity of the European Site. (See Regs. 48(3), (4) & (5) & 50(2) and PPG 9 para C3 & box C10).

V. Concluding the Assessment

16. 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.

VI. Other Actions by Competent Authorities

17. If the completion of the plan or project would adversely affect the integrity of the site, the competent authority may consider whether any other action it, or any other competent authority (such as the Environment Agency or a Waste Regulation Authority), has taken or will take may avoid the harm to the integrity of the site. Such action may be as a result of other duties under the Habitats Regulations or as a result of other legislation. For example, the plan or project may be subject to other consents that have expired, or will soon expire, and any extension or renewal of the other consent, on which the plan or project relies, has been or will only be granted subject to conditions or obligations that would avoid harm to the European Site. However, any such action taken should be the least onerous to those affected. The SoS may issue guidance to competent authorities on appropriate ways of taking such action. (Regs. 48(5), 51(2) & (3) and PPG 9 para C3 & box C10).

VII. Affirming Consent if No Adverse Effects

18. The competent authority may affirm the consent at this stage only after having ascertained that:

- a. its completion would not adversely affect the integrity of the European Site (at para 15 above), or
- b. other action taken, or to be taken, by the competent authority, or by another authority, will secure that the completion of the project will not adversely affect the integrity of the European Site (at para 17 above).

VIII. No Likelihood of Consent Proceeding

19. If the appropriate assessment ascertains that the completion of the consent would adversely affect the integrity of the European Site, the competent authority should consider the likelihood of the plan or project not being implemented or completed. If the competent authority consider that there is no likelihood of that part of the project which would adversely affect the integrity of the European Site being carried out, or continued, they do not need to proceed further with the review for so long as this remains the case. (Reg. 56(3) and PPG 9 para C3).

IX. Using Agreements to Avoid Harm

20. If the appropriate assessment ascertains that the completion of the consent would adversely affect the integrity of the European Site, the competent authority should consider whether any adverse effects could be overcome by one or more legal agreement, such as a local authority agreement, a management agreement or a planning obligation. The competent authority may consult English Nature. If adverse effects on the integrity of the European Site may be overcome, in whole or in part, by an agreement the competent authority has a duty to invite the developer and others concerned to enter into such an agreement. (Regs. 48(6), 51(2) & 56(1) and PPG 9 paras C4, C5 & box C10).

X. Modifying Consent to Avoid Harm

21. If all of the adverse effects on the integrity of the European Site would not be overcome because:

- a. the completion of an agreement is insufficient; or
- b. the parties indicated that they did not wish to enter into an agreement when invited to

then the competent authority must follow the decision making process set out in Reg. 48(6) and consider whether the imposition of new or different conditions or other kinds of restrictions on the consent would overcome the adverse effects on the integrity of the European Site.

22. If conditions or restrictions would overcome the adverse effects, in whole or in part, the competent authority must modify the consent by imposing them, for example, by making a Modification Order under S.97 of the TCPA 1990. A S.97 Order cannot apply to any development already undertaken before the Order takes effect. The Order shall modify the consent only to the extent necessary to avoid adverse effects on the integrity of the European Site. The effects of the Order should be the least onerous, on those affected, consistent with safeguarding the integrity of the European Site. (Regs. 48(6), 51(3) & 56(1) and PPG 9 paras C4, C5 & box C10).

23. If, whilst agreements and conditions are being considered, the developer is proceeding with damaging development an Order should be served to restrain it. (PPG 9 para C4).

XI. Considering Alternatives and Reasons for Affirming Consent

24. If all of the adverse effects on the integrity of the European Site would not be overcome because:

- a. the completion of an agreement would be insufficient; and/or
- b. the parties indicated that they did not wish to enter into an agreement; and/or
- c. new or revised conditions would be insufficient;

the competent authority must follow the decision making process set out in Regulation 49 as follows.

25. The competent authority must first satisfy itself that there are not, or are not likely to be:

- “ suitable and available sites which are reasonable alternatives; or
- “ different practicable approaches to the completion of the proposal which would have a lesser impact on the European Site.

26. If there are alternative solutions **the competent authority cannot affirm the consent** and must proceed to step XIII at para 30 below.

27. If the competent authority is satisfied that there are no alternative solutions then the consent may only be affirmed if the competent authority decides that the project must be completed, in the way that it has been granted consent, for imperative reasons of overriding public interest, sufficient to override the ecological importance of the designation. [See Reg. 49(2) for the considerations applicable to sites that host a priority natural habitat type or priority species within the meaning of Article 1 of the Directive. Briefly, for these sites, the only imperative reasons of overriding public interest that may justify affirming a consent are those relating to human health, public safety and beneficial consequences of primary importance to the environment, or reasons specifically approved by the EC. (Reg. 49 and PPG 9 box C10)]

XII. Notification to the Secretary of State

28. If the competent authority is minded to affirm the consent for imperative reasons of overriding public interest, despite a negative assessment, they must first notify the SoS. (Regs. 49(1), 51(2) and PPG 9 box C10).

29. Having notified the SoS the competent authority may only affirm the consent if:

- “ the SoS has notified the competent authority that it may affirm the consent; or
- “ at least 21 days have elapsed since the date which the SoS notified the competent authority as being the date on which he received their notice; and
- “ the SoS has not issued any Directions to the competent authority under Reg. 49(6) or other statutory provisions. (Regs. 49(5) & (6), 51(2) and PPG 9 para C9).

XIII. Revocation or Discontinuance Orders

30. If:

- a. The competent authority concludes that there are alternative solutions; or
- b. The competent authority concludes that there are no alternative solutions but there are no imperative reasons of overriding public interest

the competent authority must resolve to take such action as is necessary to overcome the adverse effects on the European Site, for example, by making an order under S.97 (Modification or Revocation

Order) and/or S.102 and para 1 of Sch. 9 (Discontinuance Order) of the TCPA 1990.

31. A S.97 Order cannot apply to any development already undertaken before the Order takes effect. A S.102 Order cannot affect anything done prior to the 30 October 1994.

32. The actions taken shall modify or revoke or discontinue the consent only to the extent necessary to avoid adverse effects on the integrity of the European Site. The effects of the Order should be the least onerous on those affected, consistent with safeguarding the integrity of the European Site. (S.97 & Sch. 5 Pt II and S.102 and para 1 of Sch. 9 TCPA 1990; Regs. 50(1), & (3), 51(3) & (5), 56(1), 57(5) & (6) and PPG 9 paras C4 & C5).

XIV. Claims and Reimbursement for Compensation

33. Where such action has been taken under the TCPA 1990, the developer may make a claim for compensation for any loss or damage directly attributable to:

- a. the consent being suspended or temporarily modified, for Orders not confirmed by the SoS, in respect of that period of time that the Order(s) were in force;
- b. the consent being permanently modified, revoked or discontinued, for Orders confirmed by the SoS. (S.97/S.102, Sch. 9 TCPA 1990; Reg. 59(1), (2) & (3) and PPG 9 para C4).

34. Claims for compensation in respect of Orders (whether or not confirmed by the SoS) must be referred by the competent authority to the Lands Tribunal unless the SoS indicates otherwise. (Reg. 59(1), (2) & (3) and PPG 9 para C4).

35. The Lands Tribunal determines the amount of compensation to be paid for losses or damages temporarily or permanently attributable to the Order(s). The competent authority should pay the compensation determined by the Lands Tribunal. (S.97/S.102, Sch. 9 TCPA 1990; Reg. 59(1), (2) & (3) and PPG 9 para C4).

36. The competent authority may apply to the SoS for reimbursement of any compensation paid by the competent authority. The SoS has indicated that he will consider reimbursement of compensation paid if "*the compensation costs were high and the action taken was no more than necessary to overcome the adverse effects of the planning permission*". (DoE News Release No 387, 6 July 1994).

Securing Compensatory Measures

37. If the consent is affirmed against a negative assessment the SoS must ensure that any necessary compensatory measures are taken to ensure that the overall coherence of Natura 2000 is protected. (Reg 53 and PPG 9 box C10).

Habitats regulations guidance note No. 2

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