

The condition imposed on Permitted Development by The Conservation (Natural Habitats, & c.) Regulations 1994 (Regulations 60-63)

1. Introduction

1.1 This Guidance Note has been prepared to assist competent authorities (decision making bodies), developers, landowners, statutory undertakers, English Nature staff and others involved in permitted development. It is intended to help to explain the restrictions that may apply as a result of Regulations 60 to 63 of the *Conservation (Natural Habitats, & c.) Regulations 1994*, as amended (*The Habitats Regulations*). 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 Planning Policy Guidance Note No. 9, *Nature Conservation* (referred to as PPG 9 published in October 1994) and the Ministerial Guidance Note, *The Birds and Habitats Directives: Outline Government Position*, placed in the Parliamentary Libraries and circulated to local authorities on 12 May 1998.

1.2 This Guidance Note should also be read in conjunction with others in English Nature's Habitats Regulations Guidance Note series:

Habitats Regulations Guidance Note 1 The Appropriate Assessment (May 1997)

Habitats Regulations Guidance Note 2 The Review of Existing Planning Permissions and other Consents (May 1997)

Habitats Regulations Guidance Note 3

The Determination of Likely Significant Effect (November 1999)

Habitats Regulations Guidance Note 4 Alone or in combination (May 2001)

Habitats Regulations Guidance Note 5 The determination of "not directly connected with or necessary to the management of the site" (in draft)

2. What is Permitted Development?

2.1 Permitted development is development, within the meaning of the *Town and Country Planning Act 1990*, which requires planning permission, but which is deemed, generally, to be non-controversial and usually acceptable. It is, therefore, granted a general planning permission by the Secretary of State (Transport Local Government and the Regions). The permission is granted by Article 3 and Schedule 2 of *The Town and Country Planning (General Permitted Development) Order 1994*, the "Order". Through the grant of this general planning permission, such development as described in Schedule 2 of the Order may proceed without the need for a planning application. The Order has been amended a number of times and when checking to find out what constitutes permitted development it is important always to

check the latest amendment.

2.2 The lists of permitted developments in Schedule 2 are very long and very complex. The Schedule is divided into 33 Parts. Most Parts are further subdivided into Classes, A, B, C etc. Examples of permitted development include many routine operations undertaken by local authorities or statutory undertakers on their operational land, the temporary use of land for other purposes, a variety of agricultural development and building or other operations (except dwellings) for forestry purposes on land used for forestry.

2.3 Many forms of permitted development are subject to conditions, limitations and exceptions. Many of the conditions require prior submission of a notice of intent to carry out the development, to enable the planning authority to control certain aspects of the development, such as siting or design. These are clearly described and explained in the Order. They operate in the same way as a condition on a planning permission granted on an application, by a planning authority. Development carried out under the authority of the permission granted in the Order must comply with the conditions. If it does not it would be a breach of planning control and the planning authority could take enforcement action against the developer.

3. The Role of the Developer

3.1 PPG 9 cautions that developers should bear in mind that if they proceed with a development in or near a European Site on the assumption that it benefits from a permitted development right, without first checking whether it is likely to have a significant effect on the site, they run the risk of undertaking the project without the benefit of planning permission and being liable to enforcement proceedings.

3.2 If developers wish to rely on the benefit of the general planning permission for permitted development they should check compliance with conditions in the same way that they would following the grant of planning permission on an application. The onus is on the developer to be sure that the development is lawful. If developers are uncertain whether their proposal is likely to have a significant effect on the site, PPG 9 urges them to seek an opinion from English Nature. English Nature will do all they can to help to ensure that permitted development that will not have a significant effect on a European Site may proceed.

4. The Condition on Permitted Development Relating to European Sites

4.1 Regulation 60 imposes a condition on all permitted development which:

- a) is likely to have a significant effect on a European Site (either alone or in combination with other plans or projects), and
- b) is not directly connected with or necessary to the management of the site for nature conservation.

4.2 For any such development the condition imposed by that Regulation requires that it shall not be begun until the developer has received written notification of the approval of the local planning authority, under Regulation 62.

4.3 If the development has already begun under the Order, when the site becomes a European Site, the development shall not be continued until the developer has received written notification of the approval of the planning authority, under Regulation 62.

5. What Permitted Development does the Condition apply to?

5.1 The condition imposed by Regulation 60 applies to ALL forms of permitted development. There are no exceptions.

5.2 The condition does not apply to any permitted development already completed before the Regulations came into force in respect of any particular European Site. There is no need to obtain any kind of retrospective approval.

6. What sites does Regulation 60 apply to ?

6.1 Regulation 60 applies only to European sites as defined by the Habitats Regulations. As a matter of policy though it should also be applied to pSPA and Ramsar sites.

7. How Can a Developer Find Out if a Permitted Development is Likely to have a Significant Effect?

7.1 This is obviously a critical issue. If the permitted development is not likely to have a significant effect on a European Site (either alone or in combination with other plans or projects), it may proceed* and no application for written approval has to be made to the planning authority. Deciding whether a particular development is likely to have such an effect is not always straightforward (see English Nature's *Habitats Regulations Guidance Note 3*). However, provision is made in Regulation 61 for assistance to be provided at this stage.

7.2 Regulation 61(1) states that where it is intended to carry out development in reliance on the planning permission given in the Order, anyone may make an application in writing to English Nature for an opinion on whether the proposed development would be likely to have a significant effect within the meaning of the Regulations. English Nature will be pleased to provide such an opinion.

8. Procedures for Applications for English Nature's Opinion

8.1 There are no set application forms and applications may be made in the form of a letter. English Nature will seek to minimise formalities but the letter needs to state clearly that it is an application, for an opinion, under Regulation 61 of the Habitats Regulations

8.2 Sufficient information will be required about the proposed development in order for English Nature to make a judgement as to its likely effects. Regulation 61(1) requires the application to "give details of the development". Regulation 61(4) enables English Nature to notify an applicant in writing that the information is insufficient. Where they do so they will specify what further information they need, as clearly and as fully as possible.

8.3 If all further information English Nature have asked for is provided they will give an opinion. If it is not, they may be unable to express any opinion as to the likely effects of the development, or they may have to adopt a precautionary approach and say that, on the information available, the proposal would be likely to have a significant effect.

8.4 PPG 9 recommends that developers should provide the following information:

- a) A short description of the proposed development or works showing:
 - i) their broad purpose;
 - ii) their physical extent, including the area of land or water likely to be covered;
 - iii) any residues likely to be produced and proposals for disposal, and any emissions to air, water, soil, and by noise, vibration, heat, light or radiation;
 - iv) the timetable for the proposed development.
- b) A map (or maps) showing the location of the proposed development in relation to the European site boundary and the position of all proposed buildings, service access routes and works (whether permanent or temporary).
- c) A description of possible direct or indirect effects (including disturbance) on the wildlife, water quality, hydrology, geological or landform features of the site.
- d) Information about any measures the developer proposes to incorporate into the project to prevent, reduce, or offset any land take, residues or emissions.

8.5 English Nature welcomes a dialogue with developers who seek their opinion in these matters. This enables them to better understand the proposal and to explain the ecological issues that may need to be addressed. This dialogue can be particularly useful before the formal application for our opinion is made. For example, if carrying out the development in a particular way would avoid effects on the European Site, English Nature may be able to agree this as an integral part of the proposal. Thus, when the application is made, it will be clear that that will be the way

in which the development will be carried out. This enables English Nature to give an opinion which would avoid an application being made to the planning authority.

- 8.6 English Nature will deal with the application expeditiously. Where sufficient information is submitted we would normally expect to be able to issue an opinion within 21 days, as expected by the government in paragraph C.16 of PPG 9. Where English Nature have asked for further information they would normally be able to issue an opinion within 14 days from receipt of the last part of the information. However, some cases are complex and will require consultation with national specialists within English Nature and sometimes externally. English Nature will be pleased to advise on the progress of any case, and the likely timing of the issuing of our opinion.
- 8.7 English Nature will give a clear opinion, together with reasons for it, stating whether the development is likely to have a significant effect or not. English Nature will try to express the opinion and reasons for it in plain English, with the minimum scientific language.
- 8.8 English Nature will provide an opinion in writing, usually in the form of a letter, and will copy it to the planning authority, as required by Regulation 61(3).
- 8.9 There is no charge for applications to English Nature under Regulation 61.
- 8.10 Applications should be made to the local office of English Nature. A list of our local offices, with their address, telephone and fax numbers is found at the end of this guidance note.

9. What is the Effect of English Nature's Opinion Under Regulation 61?

- 9.1 If English Nature gives an opinion that the permitted development is not likely to have a significant effect on a European Site, that opinion is conclusive for the purposes of the Regulations. This means it is not open to appeal or dispute. Developers are able to rely on that opinion and on the permission granted in the Order (see Regulation 61(5)). No application need be made to the planning authority. The authority will have received a copy of the opinion and will, therefore, know that the permitted development may proceed*.
- 9.2 If English Nature is of the opinion that the proposed development would be likely to have a significant effect, the planning authority will have received a copy of this opinion and will, therefore, be expecting an application for approval to be made under Regulation 62, before the permitted development is carried out. Such an application should be made to the local planning authority.

10. How is the Written Approval of the Planning Authority Obtained?

- 10.1 Regulation 62 sets out the provisions for obtaining the

approval of the planning authority.

- 10.2 The application to the planning authority is not an application for planning permission. It is an application for approval under Regulation 62, to enable the development to proceed as permitted development*.
- 10.3 All applications for approval under Regulation 62 must be in writing and must give details of the development which is intended to be carried out. If English Nature has expressed an opinion as to whether the development would be likely to have a significant effect (under Regulation 62) the application must be accompanied by that opinion (Regulation 62(2)(b)(i)).
- 10.4 An application may be made to the planning authority for approval, whether or not the developer has sought an opinion from English Nature under Regulation 61. Where an application is made, Regulation 62(3) provides that the planning authority shall assume that, for the purposes of the Regulations, the proposed development will be likely to have a significant effect on a European site.
- 10.5 There are no set application forms and applications may be made in the form of a letter, but the letter needs to state clearly that it is an application for approval under Regulation 62 of the Habitats Regulations 1994.

11. Is there a Fee for the Application?

- 11.1 Yes, Regulation 62(2)(b)(ii) requires that any application for approval under Regulation 62 must be accompanied by the appropriate fee. Regulation 63(2) fixed the relevant fee at ,30.00, after 2 January 1995. This is not payable to English Nature at any stage.

12. What Does A Planning Authority Have to Do with An Application for Approval?

- 12.1 The planning authority must:
- send a copy of the application to English Nature; and
 - take account of any representations made by English Nature.
- 12.2 If English Nature state their opinion that the development in the application is not likely to have a significant effect on a European Site, either alone or in combination with other plans or projects, the planning authority must send a copy of that opinion to the applicant. Again, as with Regulation 61, English Nature's opinion that the development is not likely to have a significant effect is conclusive for the purposes of the Regulations. This means it is not open to appeal or dispute. If English Nature state their opinion that a development is not likely to have a significant effect, the planning authority must notify the developer of those representations. The developer is then able to rely on the permission granted in the Order and may proceed with the permitted development*. The application need not proceed further.

- 12.3 Unless English Nature is of the opinion that the proposed development would not be likely to have a significant effect, the local planning authority must undertake an appropriate assessment of the proposal. This involves, amongst other things, taking account of any representations made by English Nature and assessing the implications of the development for the European Site, in view of the site's conservation objectives.
- 12.4 Essentially, the planning authority must now see whether it is able to ascertain that the proposed development will not adversely affect the integrity of the European Site. This assessment is very much the same as that undertaken in respect of many other kinds of decision and is explained more fully in English Nature's *Habitats Regulations Guidance Note 1*.
- 13. What If the Planning Authority Ascertains No Adverse Effect on the European Site?**
- 13.1 If the planning authority is able to ascertain that the development will not adversely affect the integrity of the European Site it must give notice of its approval of the permitted development, in writing. The permitted development may then proceed*.
- 13.2 No timescales for response by the planning authority are provided for in the Habitats Regulations or PPG 9.
- 14. What If the Planning Authority Cannot Ascertain No Adverse Effect on the European Site?**
- 14.1 If the planning authority is unable to ascertain that the development will not adversely affect the integrity of the European Site, it is prohibited from giving notice of its approval (Regulation 62(6)). The condition is therefore not satisfied and the permitted development cannot proceed. The Habitats Regulations do not provide that the planning authority must provide written notice that it does not approve the development. If the developer wishes to proceed, the development must be subject to an application for full planning permission. Such an application would be dealt with by the planning authority as a conventional planning application, and Regulations 48 and 49 of the Habitats Regulations would apply.
- 14.2 It should be noted that the Regulations apply the precautionary approach. If the effects are uncertain the planning authority cannot ascertain that there would be no adverse effects on the European Site, the condition imposed on the exercise of the permitted development is not satisfied and a full planning application is required.
- 14.3 Where a planning application is submitted it would be expected that, where the development remains unchanged from that for which approval was sought under Regulation 60, the outcome of the appropriate assessment would also be the same. It would follow that the planning authority would be unable to ascertain that the integrity of the site would not be adversely affected. Seeking approval through this route, Regulation 48 to 53, however may allow the project to proceed, in the absence of alternative solutions, where there are imperative reasons of overriding public interest why it should do so. There are no provisions equivalent to those in Regulation 49 provided for in the process for obtaining the approval required by Regulation 60.
- 15. Is There a Right of Appeal Against A Planning Authority's Decision?**
- 15.1 Regulation 63(3) provides specifically for a right of appeal against Regulation 62 decisions. It does so by clarifying that the approval required under Regulation 60 is the same as any other approval required by a condition on a grant of planning permission. Thus, Section 78 of the *Town and Country Planning Act 1990* applies.
- 15.2 An appeal may be made to the Secretary of State against a refusal to approve the permitted development, or against the planning authority's failure to determine whether to approve the development, within the prescribed time period (8 weeks or such extended period as may be agreed with the applicant).
- 16. Permitted Development and Environmental Impact Assessment**
- 16.1 There are other restrictions on permitted development which may apply in close association with the Habitats Regulations. For example, the *Town and Country Planning (Environmental Impact Assessment) Regulations 1999* (the *EIA Regulations*) prescribe detailed procedures for ensuring that environmental effects of certain projects are taken into account before they are granted planning permission. These Regulations list relevant projects in two Schedules. All projects listed in Schedule 1 always need to be subject to Environmental Impact Assessment, to meet the requirements of the EIA Regulations and the European Directives (Council Directives 85/337/EEC as amended by 97/11/EC). Consequently, Regulation 35(3) of the *EIA Regulations* effectively withdraws all permitted development rights for any project that is a Schedule 1 project.
- 16.2 The same Regulation also has the effect of withdrawing permitted development rights for some projects that are listed in Schedule 2 unless:
- a) the planning authority has adopted what is called a "screening opinion" and in this has said that it is not a project that requires EIA; or
 - b) the planning authority has said that it is a project that requires EIA but, on appeal, the Secretary of State has overridden that screening opinion and directed that it is not an EIA development; or
 - c) the planning authority failed to give a screening opinion in the specified time period and, on appeal, the Secretary of State has directed that it is not an EIA development.
- 16.3 In deciding whether a particular project is an EIA development, the planning authority will have regard to the requirements of the EIA Regulations and Circular 2/99.

Relevant to the considerations can be the location and potential effects of the proposed development. PPG 9 makes it clear that EIA would normally be required for development likely to have a significant effect on a European Site, Ramsar site or pSPA. The EIA Regulations (Schedule 3) and Annex B of Circular 2/99 indicate that "*particular attention*" should be paid to European Sites in screening decisions.

16.4 Some permitted developments, such as certain forestry, drainage, waste disposal, coal or gas developments, are controlled through other environmental impact assessment regulations and Regulation 35(3) does not apply to them.

* To keep the text of this Note flowing through some complex explanations we have stated in several places that permitted development "may proceed". By this we mean it may proceed subject to compliance with other conditions in the *General Permitted Development Order*; subject to any conditions that may have been imposed on any relevant planning permission in the past; subject to the terms of any Article 4 Direction that may be in force on the land at the time; and subject to any other consents which may be required under consenting regimes other than Town and Country Planning, for example land drainage consents. It also means that where the permitted development would be an operation likely to damage any Site of Special Scientific Interest, whether a part of a European Site or not, it may only proceed subject to the provisions of Section 28 of the *Wildlife and Countryside Act, 1981/85*, as amended by the *Countryside and Rights of Way Act, 2000*. We are simply indicating that the requirements of the condition in Regulation 60 of the Habitats Regulations have been met.

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