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Department  
for Environment  
Food & Rural Affairs

## **Habitats and Wild Birds Directives: guidance on the application of article 6(4)**

### **Alternative solutions, imperative reasons of overriding public interest (IROPI) and compensatory measures**

**December 2012**

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Any enquiries regarding this document/publication should be sent to us at:

Habitats Directive Implementation Review Team  
Defra, Area 4D, 4<sup>th</sup> Floor,  
Ergon House, 17 Smith Square,  
London, SW1P 3JR

[HDimplementationreview@defra.gsi.gov.uk](mailto:HDimplementationreview@defra.gsi.gov.uk)

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**Explanatory note:** This guidance is issued as a stand-alone document on an interim basis. In early 2013 it will be absorbed into the new “overarching guidance” on the Habitats and Wild Birds Directives as they affect businesses and others (due for public consultation in December 2012 and expected to be published in March 2013). This interim article 6(4) guidance has been fast tracked to clarify the article 6(4) legal tests, particularly in relation to infrastructure projects.

# Introduction

1. The purpose of the Habitats and Wild Birds Directives<sup>1</sup> is to restore and maintain Europe's biodiversity by protecting its most important habitats and species. This is achieved, in part, through the designation of protected sites<sup>2</sup>. The Directives require competent authorities (those with decision making powers) to assess the impact of plans or projects that would be likely to have a significant effect on these "European sites", either alone or in combination with other plans or projects. Normally, competent authorities cannot consent to plans or projects without first having ascertained that they will not have an "adverse effect on the integrity of a European site" (AEoI) following such an assessment.
2. However, article 6(4) of the Habitats Directive provides a derogation which would allow a plan or project to be approved in limited circumstances even though it would or may have an AEoI on a European site. Article 6(4) applies to sites protected under both the Habitats and Wild Birds Directives. A flow chart showing the article 6(4) process is at Annex 1.
3. Under article 6(4) a plan or project can only proceed provided three sequential tests are met:
  - There must be no feasible alternative solutions to the plan or project which are less damaging to the affected European site(s)
  - There must be "imperative reasons of overriding public interest" (IROPI) for the plan or project to proceed
  - All necessary compensatory measures must be secured to ensure that the overall coherence of the network of European sites is protected.
4. These tests must be interpreted strictly and can only be formally considered once an appropriate assessment in line with article 6(3) of the Directive has been undertaken. In practice (based on use of article 6(4) in England to date) it is likely that only a small minority of plans and projects will reach this stage of consideration. However,

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<sup>1</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (the "Habitats Directive"); and Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds ("the Wild Birds Directive"). The Directives, as they relate to European sites, are primarily transposed in England under the Conservation of Habitats and Species Regulations 2010 and in the offshore marine area by the Offshore Marine Conservation (Natural Habitats, &c) Regulations 2007.

<sup>2</sup> European sites include: special areas of conservation (SACs), special protection areas (SPAs), sites of Community importance (SCIs), and candidate SACs. As a matter of Government policy, possible SACs, potential SPAs and listed and proposed Ramsar sites and sites identified or required for compensatory measures for adverse effects on European sites are also treated as European sites. A list of European sites in England can be found at: <http://jncc.defra.gov.uk/page-4>.

applicants should not be daunted by the derogations process, and if the tests are met a plan or project can be approved.

5. This document provides guidance on how these tests should be applied in England and UK offshore waters (except in relation to functions exercised by devolved authorities).
6. Following this guidance will help businesses and others comply with habitats legislation, although it cannot cover every situation and it should be read in conjunction with the relevant legislation. The Government recommends competent authorities, appropriate authorities and statutory nature conservation bodies (SNCBs)<sup>3</sup> have regard to this guidance when considering making a derogation under article 6(4).
7. Competent authorities should be aware that there may be circumstances where a development that may be damaging to a European site is needed for an imperative reason of overriding interest. As long as the other requirements of article 6(4) are met, such developments can be approved to ensure this interest is met.
8. Developers and competent authorities should engage closely at the earliest possible stage if it is anticipated that an article 6(4) derogation will be considered. This might be in the early stages of developing a proposal, or otherwise as soon as it becomes clear that a derogation may be needed. They should also ensure that the tests are fully explored and documented, since this will help avoid delays to the decision making process and ensure a transparent and robust decision.
9. Early engagement with SNCBs is strongly recommended, since their view should be obtained on the extent of any AEol and the compensatory measures required. The Government expects SNCBs to have a role in helping applicants and competent authorities to identify and assess the adequacy of compensatory measures.

## Test 1: alternative solutions

10. The purpose of the alternative solutions test is to determine whether there are any other feasible ways to deliver the overall objective of the plan or project which will be less damaging to the integrity of the European site(s) affected. For the test to be passed the competent authority must be able to demonstrate objectively the absence of feasible alternative solutions. The applicant is primarily responsible for identifying alternatives.
11. The first step is to identify the objective of the plan or project to help frame the consideration of alternatives. Alternative solutions are limited to those which would deliver the overall objective as the original proposal.

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<sup>3</sup> Natural England is the SNCB in England and the marine area up to 12 nautical miles from the coast, and the Joint Nature Conservation Committee is the SNCB over 12 nautical miles from the coast.

12. Many proposals put forward for derogations may have a public interest element as part of their objective, or potentially as their sole objective. For example, roads, flood defences, power stations or ports would normally serve a public need, and potential alternative solutions should be assessed against whether they would deliver a similar objective.
13. In some cases wide ranging alternatives may deliver the same overall objective, in which case they should be considered. However, the competent authority should use its judgement to ensure that the framing of alternatives is reasonable. For example:
- Alternative solutions 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 reducing the works to protect fewer homes, or relocating the population of the village.
  - In considering alternative solutions to an offshore wind renewable energy development the competent authority would normally only need consider alternative offshore wind renewable energy developments. Alternative forms of energy generation (e.g. building a nuclear power station instead) are not alternative solutions to this project as they are beyond the scope of its objective.
  - Alternative solutions to a port development would normally be limited to other ways of delivering port capacity, and not other options for importing freight.
  - Alternative solutions for a proposed motorway would not normally include the assessment of alternative modes of transport (e.g. building a new railway line instead).
14. National Policy Statements and other documents setting out Government policy (e.g. the UK Renewable Energy Roadmap) provide a context for competent authorities considering the scope of alternative solutions they will assess.
15. Having framed the consideration of alternatives, it is the competent authority's responsibility to assess whether there are any alternative solutions which would have less impact on European sites. The competent authority should determine the range and type of possible alternatives that should be considered, and use its judgement to decide what is reasonable in any particular case. Where necessary it may consult others on potential alternative solutions. In some cases the competent authority may need to consider options that have not been identified by the applicant.
16. Alternatives must be considered objectively and broadly. This could include options that would be delivered by someone other than the applicant, or at a different location, using different routes, scale, size, methods, means or timing. Alternatives can also involve different ways of operating a development or facility.

### **Example: Dibden Bay**

A proposed project in Dibden Bay sought to increase the number of deep water berths at Southampton. The project could only proceed with an article 6(4) derogation as the harm it would have caused to European protected sites could not be mitigated.

The derogation was rejected by the Secretary of State as the assessment of alternatives had not included the assessment of alternative facilities at other ports on the south and east coasts that would have provided increased shipping capacity for southern England. However an alternative solution on the Isle of Grain was not considered credible as there were no formal proposals to develop container handling capacity there.

### **Example: Dredging the River Elbe**

In Germany it was proposed to dredge the River Elbe to increase shipping capacity at the port of Hamburg. The dredge could only proceed with an article 6(4) derogation. Six alternatives, plus a “do-nothing” option were considered:

- Reduction of speed and use of sea tugs
- Additional dams and floodgates
- International convention limiting ship size
- Different dimensions of dredge
- Use of other German ports
- Partial unloading downstream to reduce draft of ship

In that case, all alternatives were rejected as either they were unfeasible or the objectives of the project would not have been met (e.g. because ships would be discouraged from using the port).

17. The “do-nothing” option should be included as part of the consideration of alternatives.

Normally this would not be an acceptable alternative solution because it would not deliver the objective of the proposal. However it can help form a baseline from which to gauge other alternatives. It can also help in understanding the need for the proposal to proceed, which will be relevant to any later consideration of the IROPI test (discussed below).

18. The consideration of alternatives should be limited to options which are financially, legally and technically feasible. An alternative should not be ruled out simply because it would cause greater inconvenience or cost to the applicant. However, there would come a point where an alternative is so very expensive or technically or legally difficult that it would be unreasonable to consider it a feasible alternative. The competent authority is responsible for making this judgement according to the details of each

case. If the authority considers an option is not feasible, it would not be necessary to continue to assess its environmental impacts.

19. The consideration of alternatives should also be limited to options which would be less damaging to the affected site(s) or to any other site(s) that could be affected by a given alternative. If the competent authority decides that there are feasible alternative solutions to the plan or project which would have lesser effects on European sites, it cannot give consent for the plan or project to proceed. Early discussion between the applicant, competent authority and statutory nature conservation bodies should minimise the prospects of an application reaching this stage only to be turned down.

#### **Example: Motorway bridge in Germany**

In assessing alternatives to the replacement of an unsafe motorway bridge in Germany the competent authorities concluded that there were no alternatives to the project. This was because in that case the restoration or maintenance of the existing bridge was considered as being technically impossible, and the “do-nothing” option would lead to a closure of the bridge and an increase in traffic on the remaining routes causing greater harm to the affected European site.

## **Test 2: imperative reasons of overriding public interest**

20. If it can be established that there are no feasible alternative solutions, the competent authority must next be able to show that there are “imperative reasons of overriding public interest” (IROPI) that justify the plan or project despite the environmental damage it will cause. This requires consideration of the objective of the plan or project, as identified for Test 1.
21. For Special Areas of Conservation (SACs) designated under the Habitats Directive, the IROPI grounds on which a plan or project can proceed depends on the nature of the site that will be affected:
- Where a plan or project will negatively affect a “priority” habitat or species<sup>4</sup> on a site for which they are a protected feature, the competent authority can normally only consider reasons relating to human health, public safety, or beneficial consequences of primary importance to the environment. Other imperative reasons of overriding public interest can only be considered having obtained and had regard to the opinion of the European Commission.

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<sup>4</sup> i.e. if the site has been designated, at least in part, due to the presence of a priority species or habitat. Habitats legislation differentiates between “priority” habitats and species and other protected habitats and species, with the former receiving a higher level of protection. A list of the European Sites which host priority habitats and species in England (including cross-border sites) can be found on the Defra website.

- In all other cases competent authority can consider other imperative reasons of overriding public interest including those relating to social or economic benefit in addition to those of human health, public safety, or beneficial consequences of primary importance to the environment. This would include cases where priority habitats and species are present on a European site but they would not be affected by the proposal.
22. The Birds Directive does not identify priority habitat or species and so this differentiation does not apply to Special Protection Area (SPA) features or any other site not relevant to the Habitats Directive.
23. When identifying IROPI a competent authority should consider the different elements of the term:
- Imperative: it must be essential (whether urgent or otherwise), weighed in the context of the other elements below, that the plan or project proceeds
  - Overriding: the interest served by the plan or project outweighs the harm (or risk of harm) to the integrity of the site as identified in the appropriate assessment
  - Public Interest: a public benefit must be delivered rather than a solely private interest.
24. Public interest can occur at national, regional or local level; as can IROPI provided the other elements of the test are met.
25. IROPI must be assessed on a case by case basis in light of the objective of the particular plan or project and its particular impacts on the European site(s) affected as identified in the appropriate assessment.
26. In practice, plans and projects which enact or are consistent with national strategic plans or policies (e.g. covered by or consistent with a National Policy Statement or identified within the National Infrastructure Plan) are more likely to show a high level of public interest. However consideration would still need to be given to whether, in a specific case, that interest outweighs the harm to the affected site(s) and therefore whether IROPI can be demonstrated. Plans or projects which fall outside national strategic plans, including those at a lower geographic scale, may also be able to show IROPI. Plans or projects which only deliver short term benefits are unlikely to be able to show IROPI.
27. The alternatives and IROPI tests are separate and sequential tests, and the competent authority must decide whether there is an alternative solution before (if necessary) it formally decides whether IROPI exists. However, in limited circumstances it may be helpful to consider the IROPI test alongside the assessment of feasible alternative solutions. This would only apply where it is very clear that a plan or project will not meet the IROPI test. In such cases there would be no point in spending time looking into possible alternatives.

## Test 3: compensatory measures

28. The Habitats Directive seeks to create a coherent ecological network of protected sites. Therefore if harm to one site is to be allowed (because there are no alternatives and IROPI can be shown) the Directive requires that all necessary compensatory measures are taken to ensure the overall coherence of the network of European sites as a whole is protected.
29. The competent authority is initially responsible for ensuring that suitable compensation is identified. However, the appropriate authority also has a role in ensuring that compensation is secured (see paragraphs 42-43 below).
30. Competent authorities and SNCBs should help applicants to identify suitable compensatory measures. Such measures must be decided on a case by case basis and aim to offset the negative effects caused by the plan or project. They can include, among other things:
- The creation or re-creation of a comparable habitat which can in time be designated as a European site and in the meantime is protected as a matter of Government policy as if it were a fully designated European site
  - The creation or re-creation of a comparable habitat as an extension to an existing European site.
31. The competent authority, liaising with the SNCB and others as necessary (and, before consent is granted, consulting the appropriate authority) must have confidence that the compensatory measure will be sufficient to offset the harm. This can be a complex judgement and requires consideration of factors including:
- The technical feasibility of the compensatory measures as assessed based on robust scientific evidence. Measures for which there is no reasonable expectation of success should not be considered
  - Whether there is a clear plan for undertaking the compensation, with the necessary provision of management and objectives for the duration over which compensation will be needed
- Distance from the affected site. In general compensation close to the original site will be preferable, but there may be instances where a site further away will be better suited, in which case it should be selected. This judgement must be based solely on the contribution of the compensatory measures to the coherence of the network of European sites
- Time to establish the compensatory measures to the required quality
  - Whether the creation, re-creation, or restoration methodology is technically proven or considered reasonable.

32. Competent authorities should not require more compensation than is needed to ensure the integrity of the network of European sites is maintained.
33. In designing compensation requirements competent authorities and SNCBs should ensure the requirements are flexible enough to ensure adequate compensation without going further than necessary. This recognises that in some cases compensation requirements will need to cater for uncertainty over the harm that might be caused by a proposal or the effectiveness of compensation measures, or to account for any time lag before compensatory habitat becomes established. For example:
- If there is uncertainty about the success of the proposed measures, the compensation area might need to be larger than the area damaged
  - Potential actions may be required as a condition of consent in case compensation proves to be less successful than anticipated
  - It may be that anticipated harm to a site proves to be less than anticipated, or compensation measures are more successful than expected. Where feasible, compensation requirements should be sufficiently flexible to scale back the compensation required in such cases. Habitats legislation should not be used to force applicants to over-compensate.
34. The compensatory measures must be sustainable, or reasonably so given natural changes, so they maintain the integrity of the network in the long term. It will therefore be necessary to secure medium to long term management of the area concerned.
35. Compensation must be secured before consent is given for a proposal to proceed. In other words, the competent authority should be satisfied that all the necessary legal, technical, financial and monitoring arrangements are in place to ensure compensation measures proceed as agreed and remain in place over the full timescale needed. If it is not possible to secure adequate compensatory measures, a derogation allowing the proposal to proceed must not be granted.
36. Where possible, compensation measures should be complete before the adverse effect on the European site occurs. However, in some cases damage to European sites may necessarily occur before the compensatory measures are fully functioning. There may also be circumstances where the compensatory measures will take a long time to become fully-functioning (e.g. re-creation of woodland). In such circumstances it may be acceptable to put in place measures which do not provide a complete functioning habitat before losses occur – provided undertakings have been made that the measures will in time provide such a habitat, and additional compensation is provided to account for this. Such cases require careful consideration by the competent authority in liaison with SNCBs.

## Roles

37. A number of parties are involved in the assessment of derogations under the Habitats Directive. Their roles are set out below.
38. The **developer** must supply any information required by the competent authority to allow it to consider a derogation under article 6(4). The developer may be asked by the competent authority to supply the evidence it needs to make a decision on an article 6(4) derogation. This will include the evidence needed to confirm any assessments of impact. The Government advises developers to liaise with competent authorities and SNCBs as appropriate from an early stage in the plan, to ensure issues are worked through collaboratively.
39. **SNCBs** should be asked to provide advice to developers, competent authorities and appropriate authorities on the likely impacts of alternative solutions and the adequacy of compensatory measures. Early engagement of SNCBs will be beneficial, and may speed up the consideration and eventual delivery of the plan or project.
40. The **competent authority** decides whether each of the derogation tests under article 6(4) are met, and should clearly set out how it has reached its decision. Before it grants permission on the basis of a derogation, it must inform the appropriate authority (see below) and may not grant permission for 21 days. In that period, the appropriate authority may direct the competent authority not to agree to the plan or project either indefinitely or a specific period of time. If no direction is received the competent authority may grant permission on the basis of an article 6(4) derogation.
41. The competent authority is responsible for ensuring its decision takes account of all relevant evidence. It should not therefore request information from the developer or other parties which is unlikely to be material to its decision. Competent authorities should work cooperatively with developers, the appropriate authority, SNCBs and other interested parties when reaching its decision. Where more than one competent authority is involved the competent authorities should have regard to the Government's advice on competent authority coordination.
42. On receipt of a notice from a competent authority that it intends to use an article 6(4) derogation, the **appropriate authority** may, within 21 days or such longer period as stated, direct the competent authority not to agree to the plan or project. If the appropriate authority is content with the competent authority's decision it must ensure compensatory measures are secured and sufficient to maintain the coherence of the network of European sites.
43. Once a derogation has been used, the appropriate authority is responsible for informing the European Commission that the compensation has been secured. The appropriate authority may seek the opinion of the Commission, following a request from a competent authority, on whether a plan or project can be approved for "other" IROPI reasons, where priority species or habitats are concerned (see paragraph 21).

# Annex 1: the derogations process

