

Department for Environment, Food and Rural Affairs

Habitats Directive: guidance on the application of article 6(4)

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

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Introduction

1. The purpose of the Habitats Directive¹ is to enhance Europe's biodiversity by protecting its most important habitats and species. This is achieved, in part, through the designation of protected sites². The directive requires competent authorities (those with decision making powers) to assess the impact of plans or projects that may have a significant effect on these "European sites", either alone or in combination with other plans or projects. Competent authorities cannot consent to plans or projects they determine may have an "adverse effect on the integrity of a European site" following such an assessment.
2. However the directive provides a derogation under article 6(4) which allows such plans or projects to be approved provided three tests are met:
 - There are no feasible alternative solutions to the plan or project which are less damaging.
 - There are "imperative reasons of overriding public interest" (IROPI) for the plan or project to proceed.
 - Compensatory measures are secured to ensure that the overall coherence of the network of European sites is maintained.
3. These tests must be interpreted strictly and developments which may result in an adverse effect on the integrity of a European Site can only be authorised once the above tests have been met. 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). It is not intended to provide an authoritative statement of the law and should be read in conjunction with the Habitats Directive and its transposing regulations. The Government recommends competent authorities and statutory nature conservation bodies have regard to this guidance when considering making a derogation under article 6(4). This guidance does not apply to article 16 of the directive which concerns European Protected Species.
4. 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 that this interest is met.

¹ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora. The Habitats Directive is 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.

² 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, potential SPAs and RAMSAR 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>.

5. Developers and competent authorities should engage closely when an application is made for an article 6(4) derogation. 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. Early engagement with statutory nature conservation bodies (Natural England, Joint Nature Conservation Committee, as appropriate) is strongly recommended, since their view should be obtained on the extent of any adverse effect, and the compensatory measures required. The Government expects the statutory nature conservation bodies to have a role in helping the competent authorities to identify adequate compensatory measures.

Test 1: alternative solutions

6. 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 affected.
7. It is the competent authority's responsibility to assure itself there are no feasible alternative solutions. 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. In addition the 'do-nothing' option must be considered.
8. Alternatives must be considered objectively and broadly. This could include options that would be delivered by someone other than the applicant, or for example at a different location, using different routes, scale, size, methods or timing.

Example: 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.

9. Alternatives can also involve different ways of operating a development or facility.

Example: 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 did not meet objectives, were unfeasible or would result in an economic disadvantage to the port as ships would go elsewhere.

10. Alternative solutions are limited to those which would deliver the same overall objective as the original proposal. For example, in considering alternative solutions to an offshore wind renewable energy development the competent authority need only consider alternative offshore wind renewable energy developments. Alternative forms of energy generation are not alternative solutions to this project as they are beyond the scope of its objective. Similarly, alternative solutions to a port development will be limited to other ways of delivering port capacity, and not other options for importing freight. Likewise, the assessment of alternative solutions for a proposed motorway would not need to include the assessment of alternative modes of transport. This approach was followed in the Nuclear Energy National Policy Statement where the consideration of alternative solutions was limited to alternative sites for nuclear development.
11. 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.
12. Having undertaken its assessment of the alternative solutions a competent authority must decide whether any are feasible while also being less damaging. In taking this decision a competent authority may decide that options are not feasible alternative solutions if, despite being less damaging, they do not deliver the overall objective of the original proposal.
13. If the competent authority decides that there are feasible alternative solutions to the plan or project which would have lesser effects on the European site, 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: 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

14. Having established there are no feasible alternative solutions, the competent authority must be able to identify “imperative reasons of overriding public interest” (IROPI) that justify the plan or project despite the environmental damage it will cause.
15. The type of IROPI that a competent authority can consider will depend on the nature of the site that will be affected:
 - If the site hosts a priority habitat or species³, the competent authority can only consider reasons relating to human health, public safety, or beneficial consequences of primary importance to the environment; or other imperative reasons of overriding public interest only after having regard to the opinion of the European Commission. Annex 1 lists the European Sites which host priority habitats and species in England (including cross-border sites).
 - For other sites the 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.
16. When identifying IROPI a competent authority must consider whether all three elements of IROPI are met:
 - Imperative: the plan or project is necessary (whether urgent or otherwise) for one or more of the reasons outlined above (paragraph 15).
 - Overriding: the interest served by the plan or project outweighs the harm to the integrity of the site as assessed in light of the weight to be given to the protection of such sites under the directive.
 - Public Interest: a public good is delivered rather than a solely private interest.
17. Public interest can occur at national, regional or even local level, provided the other elements of the test are met.

³ I.e. if the site has been designated, at least in part, due to the presence of a priority species or habitat.

18. In practice, plans and projects which enact or are consistent with national strategic plans or policies, may be more likely than others to show IROPI – e.g. those covered by or consistent with a National Policy Statement or identified within the National Infrastructure Plan, especially if the plan itself has been assessed using the Habitats Regulations. Plans or projects which fall outside national strategic plans, including those at a lower geographic scale may also be able to show IROPI, depending on the particular case. Plans or projects which only deliver short term benefits are unlikely to be able to show IROPI. In each case, the public interest of the plan or project would need to be assessed and weighed against its particular impacts on a European site.
19. Although they are separate tests, in practice it may be helpful initially to consider alternative solutions and IROPI together. This is because the consideration of alternative solutions includes identifying the overall objective that a plan or project would deliver, and judging alternative solutions against whether they would achieve the same objective. It is wasted effort to assess alternative solutions if they will not deliver the same objective or if it is very clear that a plan or project will not meet the IROPI test due to the nature of its objective. This does not change the requirement that the competent authority's decision demonstrates that alternative solutions have been ruled out before considering justifying a plan or project on IROPI grounds.

Test 3: compensatory measures

20. The Habitats Directive seeks to create a coherent ecological network of protected sites. Therefore if harm to one site is allowed – because there are no alternatives and IROPI can be shown – it must be compensated for so the coherence of the network as a whole is maintained.
21. Compensatory measures can include, among other things:
 - The re-creation of a comparable habitat, which can in time be designated as a European site.
 - The re-creation of a comparable habitat as an extension to an existing European site.
 - In exceptional circumstances the classification of a new European Site for comparable features.⁴
22. The competent authority (liaising with the statutory nature conservation body and others as necessary) 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:

⁴ This applies only to Special Areas of Conservation.

- 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 re-creation / restoration methodology is technically proven or considered reasonable.
- If there is uncertainty or a time lag between harm to the site and the establishment of compensatory measures, a larger area of compensation may be needed, coupled with a monitoring and management strategy that would require the applicant to take action if the compensation is not successful.

23. Competent authorities should not require more compensation than is needed to ensure the integrity of the network of European sites is maintained. However, compensation can also provide an opportunity to improve the network of protected sites and wider biodiversity. Competent authorities are encouraged to explore these opportunities with applicants on a case-by-case basis. The re-created or restored habitat must be sustainable or reasonably so, given natural changes – it will therefore be necessary to secure medium to long term management of the area concerned.
24. Compensation must be secured before damage occurs. This includes ensuring all legal, technical and financial arrangements are in place. Compensation measures should normally be delivered before the adverse effect on the European site occurs, as this reduces the chance of harming the network of sites and also ensures there is no loss during the period before the compensatory measures are implemented.
25. In certain situations 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 statutory nature conservation bodies.
26. Having agreed what compensatory measures are required, the appropriate authority must ensure they will be delivered. This will require the competent authority to demonstrate that secure and binding plans are in place to deliver and manage the measures on an ongoing basis. The competent authority should put in place monitoring and reporting requirements to ensure the plans are fulfilled.

Roles

27. A number of parties are involved in the assessment of a plan or project under the Habitats Directive. Their specific roles in the consideration of a derogation under article 6(4) are set out below.

Developer

28. The developer must supply any information required by the competent authority to allow it to consider a derogation under article 6(4). The competent authority can only consider such a derogation after concluding that the plan or project may have an adverse effect on the integrity of a European site.
29. 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 statutory nature conservation bodies, as appropriate from an early stage in the plan, to ensure issues are worked through collaboratively.

Statutory nature conservation bodies

30. Statutory nature conservation bodies 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 statutory nature conservation bodies will be beneficial, and may speed up the consideration and eventual delivery of the plan or project. The Government expects statutory nature conservation bodies to engage constructively with developers and competent authorities to identify compensatory measures.

Competent authority

31. The competent authority decides whether a derogation under article 6(4) is appropriate. It must ensure each of the tests have been met and clearly set out how it has reached its decision. Before it grants permission on the basis of a derogation under article 6(4) it must inform the appropriate authority⁵ 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 period. If no direction is received the competent authority may grant permission on the basis of an article 6(4) derogation.

⁵ In England, the appropriate authority is the relevant Secretary of State.

32. 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 will not be material to its decision.
33. Competent authorities should work cooperatively with developers, the appropriate authority, statutory nature conservation bodies 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.

Appropriate authority

34. 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.
35. Once a derogation has been used the appropriate authority is responsible for informing the European Commission that the compensation has been secured.
36. The appropriate authority may seek the opinion of the Commission, following a request from a competent authority, on a plan or project can be approved for 'other' IROPI reasons, where priority species or habitats are concerned (see paragraph 15).

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