

Department for Environment, Food and Rural Affairs

Habitats and Wild Birds Directives Consultation on simplification of guidance in England

December 2012

Contents

Introduction	1
The issue being addressed	1
Stocktake of existing guidance	2
Single Government website	3
Principles for the stocktake	3
Structure of rationalised guidance	4
Draft overarching guidance	6
Responding to this consultation	8
Next steps	8
Annex A: response form	9

Introduction

1. This public consultation will run for 8 weeks from 11 December 2012 to 5 February 2013. Details of the how to respond are on page 8 below.
2. The Habitats and Wild Birds Directives are European legislation that protect the continent's rarest and most threatened habitats and species to enhance biodiversity, and thereby help maintain the economic value of the natural environment. However, implementation of the Directives can be complex, and there has sometimes been a lack of clarity over how the requirements should be applied.
3. The Government launched a review of the implementation of Directives in England in November 2011. The aim was to take a fresh look at whether implementation could be made simpler and more efficient without compromising the founding objectives of the Directives. The Habitats and Wild Birds Directives Implementation Review was published in March 2012 (<http://www.defra.gov.uk/habitats-review>).
4. The Review committed the Government to 28 measures to improve implementation, including various measures to improve and simplify government guidance on the Directives. Two of these measures are the subject of this public consultation:
 - Defra's plan and guiding principles for undertaking a "stocktake" of the very large volume of current guidance on habitats requirements, and make proposals by March 2013 for simplifying Government/agency guidance
 - Draft new "overarching guidance" to give an overview of habitats requirements as they apply in England and relevant UK waters. This new guidance will play an important role in the proposed new guidance structure, as discussed below.
5. The stocktake and overarching guidance measures do not seek to change policy on the way the Directives are implemented (this is set by the Directives, which are not expected to change significantly in the foreseeable future). Instead, they seek to explain the existing policy more efficiently, and spread good practice.

The issue being addressed

6. The implementation of habitats legislation can be technically and legally complex, and it is vital that accompanying guidance explains the requirements clearly in a way which caters for all affected parties (including businesses and regulators, newcomers and experts). Some of the current guidance is of a good standard, but the recent review also identified significant problems. In particular:

- There is no “easy to access” summary guidance to provide a starting point for businesses and others affected by habitats requirements
 - There is no authoritative guidance giving a single up-to-date explanation of the key legal provisions affecting businesses, and how the Government expects them to be applied on the ground by regulators and statutory advisers
 - There is an issue with the sheer bulk of guidance from multiple bodies (e.g. the European Commission, government agencies and non-government) which has evolved piecemeal over the last 20 years, without a concerted effort at rationalisation. The guidance amounts to over 100 documents totalling over 2,500 pages
 - There is considerable duplication in the current guidance. For example, most of the documents contain (differing) explanations of legal requirements and regulatory processes
 - There are issues around consistency and quality. Some of the current guidance is fit for purpose, but some of it is incorrect or out of date. Having many descriptions of legal requirements in different documents creates inconsistency, and makes it harder to update guidance e.g. in response to case law
 - Current guidance can be difficult to find because it is spread across many organisations’ websites. It can be difficult for businesses to judge whether or not it is in date, and often even to know of its existence.
7. These failings can create uncertainty and confusion for businesses and regulators, and the Government wishes to address this problem to increase the effectiveness of legislation in protecting nature, and to help businesses navigate the requirements.

Stocktake of existing guidance

8. The aim of the stocktake exercise is to evaluate the clarity and effectiveness of current guidance, and assess whether it encourages insufficient or excessive precaution. It will also identify gaps in the provision of guidance and look specifically at whether the needs of small businesses are being met, and whether there is a need for new sector-specific guidance. Recommendations from the stocktake will be published in March 2013 on how the guidance should be simplified, with actions following thereafter.
9. The stocktake will focus mainly on guidance published by Government departments and agencies. It will also take account of other guidance which the Government does not control, including guidance published by the European Commission.

10. In parallel to the stocktake Defra's Smarter Environmental Regulation Review (SERR) is developing proposals to rationalise guidance on all environmental regulations. These two projects are being taken forward together and the stocktake may contribute to the establishment of a common approach to environmental guidance more widely.

Single Government website

11. The timing of the stocktake coincides with major changes in how Government and its agencies use the internet to communicate with the public. Over the next 18 months, nearly all existing Government and agency web content will be brought together on a new single government website called "gov.uk".

12. The stocktake will help prepare habitats guidance for this transition and the principles of the stocktake (e.g. the strong emphasis on customer focus) are in line with those of gov.uk. However, consultees should be aware that the future shape of habitats guidance will have to be compatible with the emerging structure for environmental guidance on gov.uk being developed through SERR. This means the precise structure of the post-stocktake body of guidance may be different to the indicative structure set out below.

Principles for the stocktake

13. This consultation seeks views on the principles that will guide the stocktake and the proposed new structure of guidance. These principles are set out below. We want to create a body of Government guidance which is:

- Customer focussed: the body of guidance must satisfy the needs of different customers. For example, newcomers should be able to find out very quickly whether the rules apply to them, and if so what they need to do to comply
- Accessible: the body of guidance should be easy to navigate, with a well signposted hierarchical structure which takes customers quickly to the information. Individual documents should as far as possible be concise and in plain English
- Accurate and consistent: duplication in guidance documents should be minimised and it should be easier to update the body of guidance (e.g. if case-law changes)
- Promotes a common understanding of regulatory requirements: the guidance should promote a shared understanding (among applicants, regulators and statutory advisers) of what is needed to comply with the law, and how they should interact to minimise the chance of unnecessary delays and burdens.

14. We recognise that we are not starting from scratch and that much of the necessary information needed by customers is already contained in the current guidance, although it is not always in the most accessible form. For this reason the stocktake recommendations in March 2013 are likely to propose a pragmatic evolution from the current guidance provision.
15. One of the Government's aims is to reduce the volume of guidance substantially and a large amount of existing Government / agency guidance is likely to be amended, condensed or withdrawn. However, some guidance may stay as it is and some concise new guidance may be produced.

Structure of rationalised guidance

16. The intention is to move towards a "pyramid structure" to Government, and government approved, guidance. This is likely to be primarily web-based, with clear sign-posting to point customers quickly to the guidance they need. **The new overarching guidance** (as discussed below) will provide a common reference point which sets the scene for:
 - **"Quick start" guides** explaining in simple terms when the requirements apply and what people need to do to comply, and giving newcomers enough information to decide whether they should read further
 - **"1st level of detail" guidance** (for non-experts) e.g. web tools to help locate European sites or find out where individual protected species are likely to be found; licence application forms; tips for successful applications etc.
 - **Sign-posting to detailed technical guidance** if needed. This would be mainly for experts, such as regulators, specialist consultants or company environmental managers. There would be no expectation for non-experts to read it, although it would be accessible if they wish to. This recognises that implementing habitats legislation will continue to raise complex issues and there will be a need for detailed technical guidance (e.g. on how to undertake assessments, or detailed legal guidance to support the interpretations in the overarching guidance).
17. The indicative new structure for the guidance is outlined in the diagram below.
18. The new structure is intended to be easily updateable and expandable. In particular, the aim is that legal interpretations will be covered primarily in the overarching guidance (and duplicatory explanations will be removed from supporting technical guidance). This should increase consistency and make it much easier to update guidance in response to case-law.

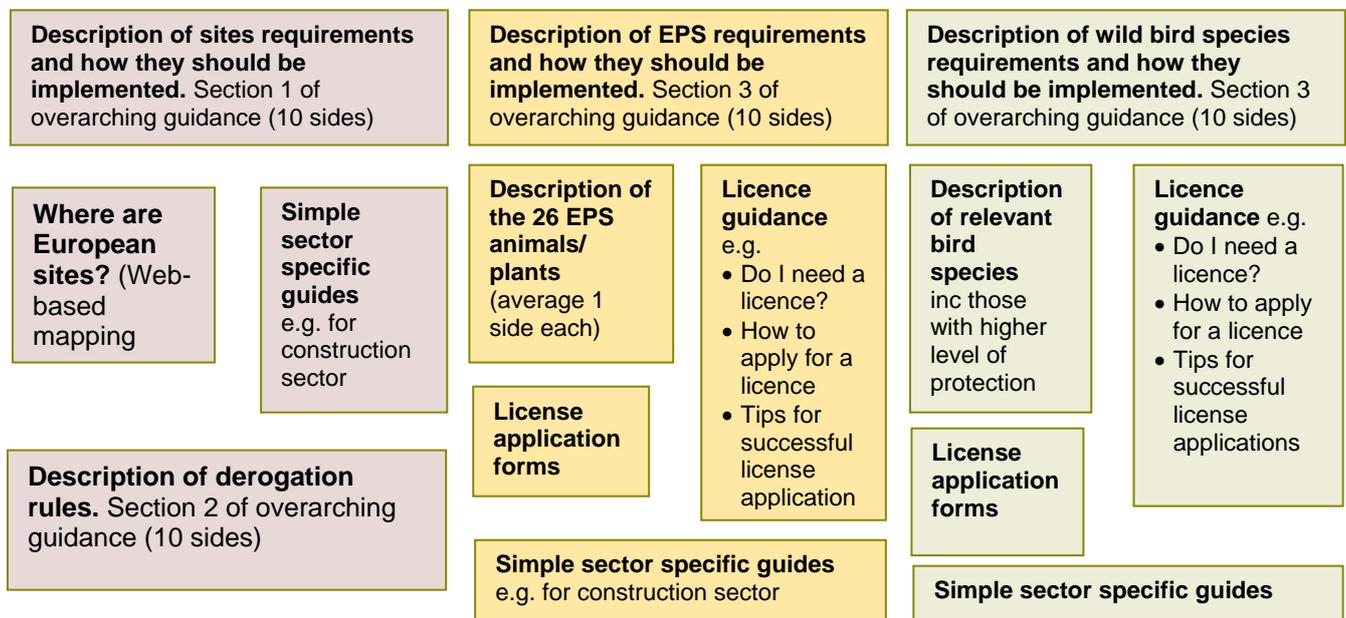
Indicative structure of Habitats & Wild Birds Guidance (post-stocktake)

Link from the introductory pages of Gov.uk website. This website will have customer focussed FAQs to direct people to information at the relevant level. For example, a construction manager wanting to know what legal requirements apply to his/her project would (if the habitats requirements may apply) be directed to the top of the guidance pyramid below and be guided through the minimum number of pages to find out whether the rules apply, and if so what he/she needs to do to comply. The same would be true for other legal requirements as necessary.

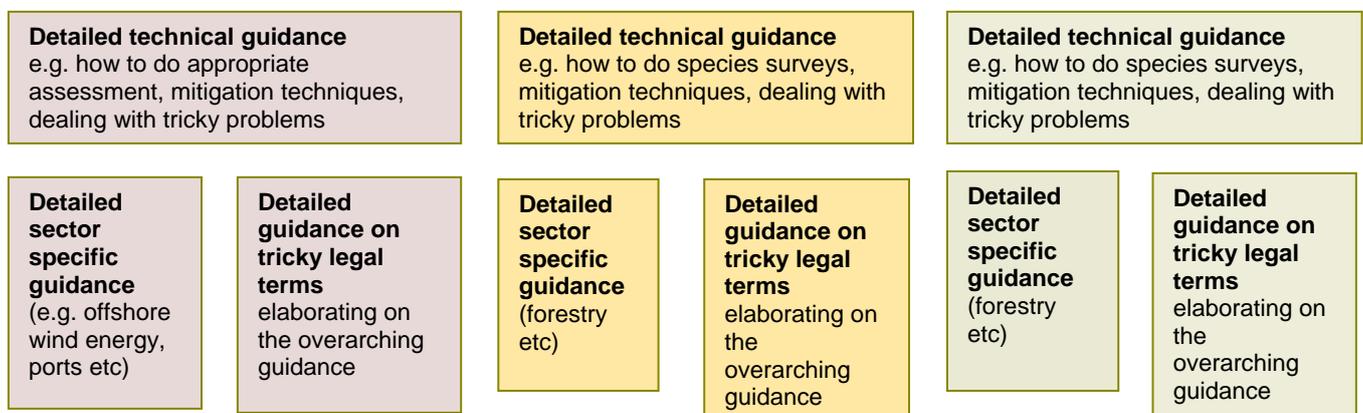
Quick start guides (for non-experts)



1st level of detail (for non-experts)



Specialist / technical guidance (for experts)



19. For the time being the new structure will only apply to sites and species protected by the EU Habitats and Wild Birds Directives – and not other sites and species protected by national legislation, which are currently subject to rationalisation exercises separate to the stocktake¹. However, in future it would be possible to insert guidance on national requirements into the pyramid structure so it would apply to all relevant wildlife law and other legal requirements.

20. The guidance structure is intended to work for different types of customer. For example, a non-expert construction manager who has just discovered a European protected species on a building site may benefit from reading the quick start guide and the protected species section of the overarching guidance, before applying for a species licence. A more experienced person may not need the explanation of the regime but may benefit from the overarching guidance (e.g. in managing their relationship with consultants or regulators) and may benefit from the signposting to detailed guidance.

Consultation questions – stocktake of existing guidance

1. Do you agree with the principles for undertaking the stocktake?
2. Do you agree with the proposed new structure of guidance?

Draft overarching guidance

20. This consultation is also seeking views on the draft new overarching guidance at Annex 1.

21. The new guidance is aimed at businesses, statutory advisers and regulators. It focuses on requirements of the habitats and wild birds directives as they affect businesses and others. It is split into three modular sections covering:

- The “**appropriate assessment requirements**” which apply to plans or projects which may affect European sites
- The application of “**derogations**” rules, under which some plans of projects might be given consent to proceed (in limited circumstances) even though they

¹ There are currently two exercises looking at legal requirements relating to national (as opposed to EU based) protections for sites and species. The Department for Communities and Local Government is looking at possible revised planning guidance, including guidance on national wildlife protection law, to support the National Planning Policy Framework. The Law Commission is looking at rationalisation and consolidation of national legislation relating to species protection.

might have an adverse effect on a European site. Paragraphs 23 and 24 below give more detail on this aspect of the guidance

- The “**protected species requirements**” relating to animals and plant European protected species (EPS) protected by the Habitats Directive and wild birds protected by the Wild Birds Directive, including the offences which may be committed if such species are harmed, and the process by which licences might be granted in limited circumstances.

22. The main features and intentions of the draft guidance are:

- It seeks to clarify the existing system and does not seek to change the current approach on how the legislation is implemented in England. As mentioned above, the policy is set by the legislation which is not expected to change significantly in the foreseeable future.
- It is intended to be concise and can be supported by more detailed technical guidance as necessary
- It will explain regulatory processes and key legal tests with a view to increasing consistency of understanding and providing a benchmark to which other Government and agency guidance should adhere
- It will establish broad principles to which regulatory decision makers must have regard, particularly in “borderline” cases (see paragraphs 10-12 of the draft guidance). These principles encourage a risk-based approach to implementation that avoids excessive precaution yet is compatible with the Directives
- The guidance will be non-statutory – i.e. it will be a steer from the Government on how the requirements should be applied, rather than legally binding guidance.

Section 2 of the draft overarching guidance

23. We are not seeking views on Section 2 of the draft overarching guidance – entitled “Derogations (European sites)” – in this consultation. This section relates to the derogations tests under article 6(4) of the Habitats Directive setting out the limited circumstances in which plan or projects might be allowed to proceed despite having adverse effects on a European site.

24. The derogations section of the overarching guidance was “fast tracked” to clarify the derogations tests, particularly in relation to infrastructure projects. It was subject to public consultation from July-October 2012, and it will initially be published as a stand-alone document. In March 2013 it will be absorbed into the overarching

guidance when it is published. We have included Section 2 in the consultation draft so that consultees can see how it would fit into the finished overarching guidance.

Consultation questions – draft overarching guidance

3. Is the draft guidance clear? Are there aspects of the guidance which you feel could be clarified?
4. Does the guidance cover everything it needs to cover?

Responding to this consultation

25. The Government is interested in views on the draft guidance, in particular from:

- Developers of nationally significant infrastructure
- Developers of other plans or projects, including small and medium sized enterprises
- Competent authorities
- Other parties with interests in infrastructure and development, and nature conservation

26. Comments are welcomed to explain responses to the specific questions set out in the document or to provide views on other elements of the draft guidance. A response form is included at Annex A. Responses will be made publicly available unless a specific request is received not to publish a response.

27. Responses should be sent to:

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

HDimplementationreview@defra.gsi.gov.uk

Responses should be received by 5 February 2013.

Next steps

28. A summary of responses to this consultation will be made publicly available. Responses to this consultation will inform the stocktake of existing guidance and the production of final overarching guidance to be published in March 2013.

Annex A: response form

Name:

Organisation:

Stocktake of existing guidance

1. Do you agree with the principles for undertaking the stocktake?
2. Do you agree with the proposed new structure of guidance?

Draft overarching guidance

3. Is the draft guidance clear? Are there aspects of the guidance which you feel could be clarified?
4. Does the guidance cover everything it needs to cover?

© Crown copyright 2012

You may re-use this information (not including logos) free of charge in any format or medium, under the terms of the Open Government Licence. To view this licence, visit www.nationalarchives.gov.uk/doc/open-government-licence/ or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or e-mail: psi@nationalarchives.gsi.gov.uk

This document/publication is also available on our website at:

www.defra.gov.uk/consult

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

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

HDimplementationreview@defra.gsi.gov.uk