

OVERVIEW OF PLANNING POLICY AND PROCEDURE RELATING TO BIODIVERSITY IN ENGLAND

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A1.0 GENERAL

- A1.1 This is a brief summary of the ecological planning and legislative context generally applying to England.
- A1.2 Sites, species or habitats may be protected or highlighted by six broad categories of instrument:
- Statutory Instruments
 - National Planning Policy Guidance/Statements
 - Development Plans
 - The UK Biodiversity Action Plan
 - Local Biodiversity Action Plans, locally adopted Wildlife Strategies and the Natural Area profile for the area
 - Other lists of species of conservation concern

A2.0 STATUTORY INSTRUMENTS

- A2.1 Statutory protection is afforded to wildlife sites and to particular species by EU Directives, various international conventions to which the UK is signatory and various Acts and Regulations of Parliament, principally the ***Wildlife and Countryside Act, 1981 (as amended) (WCA)***.
- A2.2 Other relevant legislation includes the ***Conservation (Habitats &c) Regulations, 1994, amended in 2007*** (usually known as the **Habitats Regulations**). These Regulations translate the EU Habitats Directive into British Law, by requiring particular protection for 'European' species and for 'European' sites of nature conservation value. The Habitats Regulations 1994 have recently been amended by **Statutory Instrument 2007 No 1843**. The changes introduced include changes to the thresholds above which offences may be committed for the disturbance of a European protected species. The changes have also removed many of the defences. This includes the commonly relied upon 'incidental result defence', which previously covered acts that were the incidental

result of an otherwise lawful activity and which could not reasonably have been avoided.

A2.3 The ***Natural Environment & Rural Communities Act 2006 (NERC)*** introduces statutory obligations for public bodies to have regard to biodiversity in the exercise of their functions – in terms of planning, this includes decisions taken by Local Planning Authorities.

A2.4 ODPM have published a useful circular (ODPM 06/2005) which summarises how these statutory obligations affect the planning system.

Statutory wildlife sites

A2.5 In the UK there are many designations for giving protection to sites of national or international importance. The most commonly-encountered designations are summarised below:

- ***Special Area of Conservation (SAC)***: An area of land or water of international (European) conservation importance as designated by European Member States under the EU Habitats Directive (Directive 92/43/EC). In the UK, all SACs will also be designated as Sites of Special Scientific Interest (SSSI).
- ***Special Protection Area (SPA)***: A site of international (European) conservation importance for birdlife as designated by European Member States under the Birds Directive (Directive 79/409/EC). In the UK, all SPAs will also be designated as SSSIs.
- ***Ramsar site***: A wetland of recognised international importance designated under the Ramsar Convention 1971. In the UK, all Ramsar sites will also be designated as SSSIs.
- ***National Nature Reserve (NNR)***: A nationally important nature reserve designated by English Nature under the WCA and managed by either English Nature or an approved body. NNRs will usually be designated as SSSIs.
- ***Local Nature Reserve (LNR)***: A nature reserve on public land, established by a Local Authority under s21 of the *National Parks and Access to the Countryside Act, 1949*. LNRs may or may not be Sites of Special Scientific Interest.
- ***Site of Special Scientific Interest (SSSI)***: An area of land or water notified by English Nature under the WCA or the *National Parks and Access to the Countryside Act, 1949* as being of special nature conservation interest for its plant or animal communities, geological or landform features.

Statutorily protected species and their habitats

A2.6 In most cases relevant to planning applications, protected species are those listed in Schedule 1, 5 and 8 of the WCA (as amended), in the *Protection of Badgers Act, 1992 (PBA)* and in the *Conservation (Natural Habitats &c) Regulations, 1994, (amended in 2007)*. The extent of legal

protection varies between species, and the protocols for development which affects such species also varies.

- A2.7 It is particularly important to obtain site-specific advice before formulating an action plan when considering development affecting protected species. The following paragraphs are outlines of legal protection afforded to some of the species most frequently encountered.
- A2.8 It must also be remembered that many protected species can range widely, and their presence outside the proposed development must always be considered. Many planning applications have failed because inadequate consideration was given to the terrestrial habitats of amphibians present some distance from the proposed development.
- A2.9 **European protected species** include **great crested newts** and native species of British **bat**. The full list of European species is in the Habitats Regulations, 1994 & 2007. The extent of legal protection covers both the species and its habitat. Any development proposal that would impact on either species or habitat is required to provide for conservation of the species and its habitat under licence from the relevant licensing authority (Natural England or Welsh Assembly).
- A2.10 The licensing authority require Local Planning Authorities to consider the impact of the proposed development on the European species and their habitat, the need for development and consideration of possible alternative development proposals before determining planning applications that could affect European protected species.
- A2.11 The licensing authority will also expect detailed surveys to have been carried out before granting any licences for handling the species or affecting the habitat when development is proposed.
- A2.12 The conservation scheme necessary to enable any development project will depend on the size of the newt population, the locality and the impact of the proposed development. Usually an extended period of alternative habitat creation, trapping and movement of the animals is required, followed by a period of site management and monitoring.
- A2.13 **Schedule 1** of the WCA lists a number of **birds** for which it is illegal to disturb or destroy the birds or nests. Some Schedule 1 species are relatively common (kingfishers); most are rare.
- A2.14 The WCA also makes it illegal to disturb the nests of **most British birds** while at the nest. Only certain "pest" species are permissible to disturb under licence from the relevant licensing authority; for most UK wild birds there is no provision within the current legislative or licensing system to disturb nesting birds.
- A2.15 **Schedule 5** of the WCA lists animals which are protected. Schedule 5 was most recently amended by Statutory Instrument 2008 No. 431, which increased the level of protection for certain species, including **water voles**, which now receive full protection of both animal and

habitat. It is not possible to obtain a licence under the provisions of the WCA for the purposes of development. It is therefore vital that water vole survey, mitigation design and implementation are considered early in order to avoid significant delays to programmes.

- A2.16 **Reptiles** are all protected. The more common and widespread species are protected only from killing/injury; their habitats are not strictly protected. In practice this requires a reptile protection scheme before implementing a planning permission. No specific licence is required. The rarer reptiles require a protection and conservation scheme, and the relevant licensing authority (Natural England or Welsh Assembly) may not grant such licences unless they are assured that protection and conservation is guaranteed.
- A2.17 **Badgers** receive protection under the PBA, 1992. In terms of development, this means that any scheme which involves the destruction of a recently active sett (even if an outlier) requires a licence from the appropriate licensing authority (Natural England or Countryside Council for Wales). The licensing authority will require adequate protection of the animals, which means that alternative provision is needed and disturbance will not be permitted in the hibernation or early spring period when badgers are gestating or have dependent young. The licensing authority will tend to object to loss of a main sett.
- A2.18 **Schedule 8** of the WCA lists **plants** which are statutorily-protected. In relation to development, these plants do tend to be very rare and not frequently encountered. The **bluebell** is scheduled, but this prohibits commercial bulb picking from the wild rather than to prohibit development.
- A2.19 There is also a category of **plants** which it is an offence to introduce to the wild. These include **Japanese knotweed**, which is frequently encountered on brownfield sites. Care is needed to avoid spreading the species around the site during earthworks, and to ensure that any removal of infested soils off-site is to a licensed tip. **Giant hogweed** is also listed in this category of invasive alien plant species.

A3.0 NATIONAL PLANNING POLICY GUIDANCE

- A3.1 National Planning Guidance is issued in the form of Planning Policy Guidance Notes (PPGs) and Planning Policy Statements (PPSs). These are issued on a topic basis. The most relevant is PPS9 Biodiversity and Geological Conservation (2005), but PPS12 (2004) Local Development Frameworks and PPG13 (2001) Transport also refer to nature conservation interests and consideration for nature conservation and biodiversity in the planning process. The thrust of guidance in PPS9 is aimed at Regional Planning Bodies and Local Planning Authorities who must consider nature conservation impacts in planning policy and decision.

- A3.2 PPS9 Biodiversity and Geological Conservation highlights the need to consider biodiversity during all development proposals – by identifying features of local significance for protection and enhancing these during development. PPS9 also stresses that the UK Biodiversity Action Plan and the relevant Local Biodiversity Action Plan should also be considered in planning for biodiversity within the context of development.
- A3.3 The presence of a statutorily protected species or a species of principal importance (i.e. prioritised in the UKBAP) is a material consideration when a planning authority is considering a development proposal that, if carried out, would likely result in the harm to the species of its habitat. PPS9 reiterates the requirement to comply with legislation in respect of such statutorily protected species.
- A3.4 PPS9 introduces an obligation for local authorities to maximise opportunities for building in biodiversity or geological features as part of good design. Where significant harm to biodiversity and geological interests cannot be prevented, local authorities should seek adequate mitigation and/or compensation measures, or else planning permission should be refused.
- A3.5 PPS9 also notes that guidance on the local features of biodiversity interest can be obtained from studying Natural Area profiles which were produced by English Nature (now Natural England).
- A3.6 Relevant statements in PPS9 include:

1(vi) The aim of planning decisions should be to prevent harm to biodiversity or geological conservation interests. Where granting planning permission may result in significant harm to those interests, local planning authorities will need to be satisfied that the development cannot reasonably be located on any alternative sites that would result in less or no harm. In the absence of any such alternative sites, planning authorities should ensure that, before planning permission is granted, adequate mitigation measures are put in place. Where a planning decision would result in significant harm to biodiversity and geological interests which cannot be prevented or adequately mitigated against, appropriate compensation measures should be sought. If that significant harm cannot be prevented, adequately mitigated against or compensated for, then planning permission should be refused.

13 The re-use of previously developed land for new development makes a major contribution to sustainable development by reducing the amount of countryside and undeveloped land that needs to be used. However, where such sites have significant biodiversity or geological interest of recognised local importance, local planning authorities together with developers should aim to retain this interest or incorporate it into any development of the site.

14 *Development proposals provide many opportunities for building in beneficial biodiversity or geological features as part of good design. When considering proposals, local planning authorities should maximise such opportunities in and around developments, using planning obligations where appropriate.*

16 *Planning authorities should ensure that these species [requiring conservation action as species of principal importance for the conservation of biodiversity in England] are protected from the adverse effects of development, where appropriate, by using planning conditions or obligations. Planning authorities should refuse planning permission where harm to the species or their habitats would result unless the need for, and benefits or, the development clearly outweigh that harm.*

A3.7 In addition, Government Circular 06/2005 states at Part IV.A.98:

“The presence of a protected species is a material consideration when a planning authority is considering a development proposal that, if carried out, would likely result in the harm of a protected species or its habitat. Local authorities should consult with English Nature before granting planning permission. They should consider attaching appropriate planning conditions or entering into planning obligations under which the developer would take appropriate steps to ensure the long term protection of the species. They should also advise developers that they must comply with any statutory species’ protection provisions affecting the site concerned...”

A4.0 DEVELOPMENT PLANS

A4.1 PPG12 (2001) Development Plans has been replaced by PPS12 (2004) Local Development Frameworks. However, PPG12 will remain in operation for development plans still being prepared under the 1999 Development Plan Regulations.

A4.2 Local, Structure and Unitary Development Plans (to be replaced by Local Development Plan Documents under the Planning and Compulsory Purchase Act 2004) will provide protection, both to sites and to certain species. The degree of protection varies according to different types of site, or different species. Policies will always be very heavily weighted against development which might affect **statutory wildlife sites** (see section 2 above).

A4.3 The development plan will allow for the designation and policy protection of **non-statutory wildlife sites**, (sometimes generically called second-tier sites, to distinguish them from statutory sites). These sites go under a variety of names such as. Site of Biological Importance (SBI), Site of Importance for Nature Conservation (SINC), Biological Heritage Site (BHS) etc. Often geological sites are grouped with ecological sites, for example Regionally Important Geological/Geomorphological Sites (RIGS), Geological Heritage Sites (GHS).

- A4.4 Non-statutory sites are usually identified by a fairly rigorous system of criteria which are themselves usually adopted as supplementary planning guidance.
- A4.5 Adopted development plans often provide protection for '**Wildlife Corridors**' or '**Greenways**', which are identified on plan.
- A4.6 The extent of protection to non-statutory sites is usually not absolute, but even where the importance of development is considered to outweigh ecological interests, a mitigation strategy is usually required as a condition of a planning consent.

A5.0 THE UK BIODIVERSITY ACTION PLAN

- A5.1 The publication of the **UK Biodiversity Action Plan** (UKBAP) is in response to Article 6 of the Rio Biodiversity Convention, to develop national strategies for the conservation of biological diversity and the sustainable use of biological resources. The UKBAP contains action plans for '**UK Priority**' species and '**UK Priority Habitats**', considered to be of national conservation priority.
- A5.2 'UK Priority Species' are defined in the 'UK Biodiversity Group Tranche 2 Action Plans' (HMSO, 1998) as either globally threatened or rapidly declining in the UK, i.e. by more than 50% in the last 25 years. Some of the UK Priority species are statutorily protected, while others receive partial or no protection.
- A5.3 The listing of a species or habitat in the UKBAP does not *per se* provide it with any statutory protection. However, as discussed in Section 4, above, new planning guidance requires planning authorities to introduce policies that provide protection to UKBAP species and habitats. Priority species may become a material consideration in a planning decision. Many non-statutory wildlife sites are already selected by reference to populations of UKBAP species and habitats.
- A5.4 In September 2007, UK Government endorsed a thorough review of the UK List of priority species and habitats. There are now 1149 priority species and 67 priority habitats. Some of these are frequently encountered on development sites, even in brownfield situations.

A6.0 LOCAL BIODIVERSITY ACTION PLANS AND ECOLOGICAL STRATEGIES

- A6.1 Many districts, counties or metropolitan areas have **adopted nature conservation strategies** that tend to set out general principles of attention to nature conservation. Most of these date from the early to mid 1990s.

- A6.2 More recently, counties have prepared **Local Biodiversity Action Plans (LBAP)**, in conjunction with partners such as the Wildlife Trust. These LBAPs highlight species and habitat types which are either of national concern (UKBAP species and habitats) or are endemic to the county and of local concern. LBAPs will be prepared for these species and habitats. As with the UKBAP, listing of a habitat type, a site or a species in a LBAP does not confer any new statutory or planning policy protection. However, impacts upon sites, habitats or species prioritised in LBAPs may be a material consideration in a planning application.
- A6.3 On a broader level, Natural England has mapped the country into a number of discrete Natural Areas. Each Natural Area has a distinct ecological identity, e.g. the 'Cheshire Meres and Mosses' is characterised by waterbodies in peat or boulder clay. Conservation priorities are set in terms of retaining and enhancing waterbody and field hedgerow connections. By comparison, the 'Sefton Coast' Natural Area highlights the unique sand dune and mudflat systems, with conservation priorities being set accordingly.
- A6.4 Natural Areas have no legislative power, and for many developments, they are described in too broad a scale to have site-specific value. Nevertheless they give an indication of which habitats are particularly valued locally.

A7.0 OTHER LISTS OF SPECIES OF CONSERVATION CONCERN

- A7.1 In addition to the lists referred to above, there are other lists made of national abundance of groups of fauna, particularly the less well-documented groups. These lists do not themselves confer any statutory protection, but may often be used in Environmental Impact Assessment to establish whether or not a proposed development will have a significant impact.
- A7.2 In the case of **invertebrates**, few species are statutorily protected or listed in the UK Biodiversity Action Plan, but many are thought to be rare or vulnerable. Such species are known as **Red Data Book (RDB)** species and there are various grades of ecological sensitivity, e.g. Rare/Vulnerable species, Nationally Notable (A), Nationally Notable (B) and Nationally Scarce. These gradings are based on frequency of occurrence of species in 10km² squares across the country e.g. Nationally Notable species occur in less than 300 10km² squares in the UK.
- A7.3 In the case of **birds**, there are various **species of conservation concern (SPoCC)**, known informally amongst ornithologists, but not protected or listed in the UKBAP e.g. the lapwing has undergone substantial decline in numbers, particularly on farmland.
- A7.4 Such RDB/SPoCC species are often listed in LBAPs (see Section 6 above).