



CASE LAW AND PRACTICE GUIDE 4

BIODIVERSITY

The Inspectorate is currently reviewing the advice for its Inspectors, as part of this process a new guide on Biodiversity has been produced which supersedes the Inspector Handbook Chapter that was previously published on our website.

What's New since the last version

Changes highlighted in **yellow** made 24 January 2011:

New [paragraphs 21 and 22](#) provide further advice on non-designated sites.

New [paragraphs 86, 87 and 88](#) provide expanded advice on species licensing.

Relevant Legislation, Guidance and Case law

International Legislation

- Council Directive 79/409/EEC on the conservation of wild birds (the 'Birds Directive')
- Council Directive 92/43/EEC on the Conservation of natural habitats and of wild fauna and flora (the 'Habitats Directive')

National Legislation

- Wildlife and Countryside Act 1981
- Natural Environment and Rural Communities Act 2006
- Marine and Coastal Access Act 2009
- The Conservation of Habitats and Species Regulations 2010 - SI 2010 No 490

- The Conservation (Natural Habitats, &c.) (Amendment) (England and Wales) Regulations 2008 - SI 2008 No 2172
- The Offshore Marine Conservation (Natural Habitats, &c.) Regulations 2007 - SI 2007 No 1842
- The Offshore Marine Conservation (Natural Habitats, &c.) (Amendment) (England and Wales) Regulations 2009 - SI 2008 No 7

Guidance

- PPS9 - Biodiversity & Geological Conservation (August 2005)
- Circular 06/05: Biodiversity and Geological Conservation - Statutory Obligations and Their Impact within The Planning System (August 2005)
- Planning for Biodiversity and Geological Conservation: A Guide to Good Practice (March 2006)
- Planning Policy Wales – Chapter 5 (Edition 3, July 2010)
- Technical Advice Note 5: Nature Conservation and Planning (September 2009)
- Valuation of Ecosystem services - link to Defra website
- Ecosystems Approach Action Plan - link to Defra website
- Joint Nature Conservation Committee website - information about protected species
- Defra Website - Biodiversity Information
- Guidance for Public Authorities on Implementing the Biodiversity Duty
- Guidance for Local Authorities on Implementing the Biodiversity Duty
- Wales Biodiversity Partnership Checklists and Guidance
- Local Sites - Guidance on their Identification, Selection and Management (Defra, February 2006)
- Conserving Biodiversity – The UK Approach (Defra, October 2007)
- The Birds and Habitats Directives: Outline Government Position (May 1998)
- The Planning Response to Climate Change: Advice on Better Practice (ODPM) (September 2004) - Biodiversity pages 52-56
- Conserving biodiversity in a changing climate: guidance on building capacity to adapt (Defra, May 2007)
- Ecological Impact Assessment Guidelines (IEEM, July 2006)
- PINS Notes
- LDF Note 3/2006 - PPS9 Biodiversity and Geological Conservation

Case law

- The Basses Corbieres Judgment ECJ [2000] C-374/98
- Buglife (the Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corporation and Rosemound Developments Ltd HC [2008] EWHC 475
- Buglife (the Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corporation and Rosemound Developments Ltd CoA [2009] EWCA Civ 29
- The Bund Naturschutz Judgment ECJ [2006] C-244/05
- The Dragaggi Judgment ECJ [2005] C-117/03
- Hart DC v SSCLG & Others [2008] EWHC 1204
- Humber Sea Terminals Ltd. v SoS for transport [2005] EWHC 1289
- Lewis v Redcar & Cleveland BC [2007] EWHC 3166
- Morge v Hampshire CC CoA [2010] EWCA Civ 608
- Newsum v Welsh Assembly Government [2005] EWHC 538
- The Santana Marshes Judgment ECJ [1993] C-355/90
- The UK transposition Judgment ECJ [2005] C-6/04
- The Waddenzee Judgement ECJ [2004] C-127/02
- Woolley v Cheshire East BC and Millennium Estates Ltd [2009] EWHC 1227 (Admin)

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Checklist

General

- i. Has the decision been based upon up-to-date information about the environmental characteristics of the area?
- ii. Has regard been had to the purpose of conserving biodiversity as required under S40 of the Natural Environment and Rural Communities Act 2006?
- iii. Even if a development site is not statutorily protected, does it nevertheless contribute to a network of natural habitats which, because of their linear and continuous structure, or their functions as stepping stones, are essential for migration, dispersal and genetic exchange?
- iv. Will the proposal maintain, enhance, restore or add to biodiversity and geological interests within the wider community as required by PPS9?
- v. Would the proposal lead to the loss or deterioration of ancient woodland? If so are the benefits of the proposal sufficient to outweigh this loss or deterioration?

Protected sites

- vi. Is the development site subject to an international, national or local designation? Has reference been made to the designation in the decision?
- vii. Does the development site fall within, adjacent to or near a European site (Special Protection Area, Special Area of Conservation, candidate Special Area of Conservation), an international site (Ramsar Site) or a potential Special Protection Area?
- viii. If so, have the following tests been applied, as required under the Habitats Regulations:
 - a. Is the proposal directly connected with or necessary for the management of the protected site?
 - b. If not, can it be objectively determined that it would be unlikely, alone or in combination with other plans and projects, to have a significant effect on the protected site?
 - c. If not, has an appropriate assessment (AA) been undertaken?
 - d. Does the AA establish that the development would not adversely affect the integrity of the protected site?
 - e. If not, can the adverse effects be minimised or avoided by imposing appropriate conditions or through a valid S106 obligation?

- f. If not, are there alternative solutions which would have no or a lesser effect on the integrity of the protected site?
 - g. If not, are there imperative reasons of overriding public interest to justify permitting the development?
 - h. If so, can all necessary compensatory measures to ensure the overall coherence of the network of internationally protected sites (Natura 2000) be put in place?
- ix. If the appeal site could potentially have an impact on a nationally designated site eg Site of Special Scientific Interest (SSSI), is the proposal likely to damage the protected site's special interest features? If so are the benefits of the proposal sufficient to outweigh this harm?
 - x. If the proposal would have an impact on a local site would it significantly undermine the intrinsic scientific interest of the protected site and/or reduce the opportunity it provides for contact with and enjoyment of nature and a resource for learning about the natural world? If so are the benefits of the proposal sufficient to outweigh the harm?

Protected species

- xi. Is there evidence to suggest that there is a reasonable likelihood of protected species (PS) being present on or near the site and is there a risk they may be adversely affected by the proposal?
- xii. If so, has a survey been undertaken (recently)? If not, the appeal should normally be refused as it will not be possible to ascertain the likely impact on the species.
- xiii. If a survey has been undertaken, can it be determined that the proposal would not have an adverse affect on the PS?
- xiv. If it would potentially have an adverse impact could this be overcome by any proposed mitigation measures?
- xv. Can such measures be secured through the imposition of conditions or has a valid section 106 obligation been submitted which would ensure such measures are implemented?
- xvi. If you have concluded that the proposal would result in a breach of the protection afforded to European protected species (EPS), have you had regard to the 3 tests that the licensing authority must consider in deciding a licence application?
- xvii. If you propose to allow the appeal and grant planning permission (PP), are you satisfied that there are sufficient grounds to justify this? Are these grounds clearly expressed in the decision? In particular, if there would be harm to the PS/EPS does the decision identify how this would be mitigated? If it cannot be mitigated have you clearly identified the overriding reasons for granting PP in breach of the Regulations?

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Introduction

1. Biodiversity describes the whole variety of life on Earth, and it has always been a material consideration in planning control. The statutory framework for biodiversity combines 3 approaches: (i) the protection of designated sites; (ii) the protection of particular species irrespective of where they are found; and (iii) the need to have regard to biodiversity generally, irrespective of whether protected sites or species may be affected.
2. There are a number of pieces of international and national legislation that provide for a system of protection in the UK. According to international legislation, sites and species are protected under the Habitats Directive¹ and birds are protected under the Birds Directive². In the UK the Habitats Regulations³ implement the Habitats Directive and the Birds Directive in part. The Wildlife and Countryside Act 1981 ('the W&CA') protects all wild birds and particular animal and plant species. The legislation is supported in England by Planning Policy Statement 9⁴, its accompanying Guide to Good Practice, and Circular 06/2005⁵; and in Wales by Planning Policy Wales and Technical Advice Note 5 (TAN 5).
3. This chapter provides advice on the legislation and guidance, and the statutory procedures that decision-makers must follow. It mainly advises on the implications for planning casework, but it also touches on the implications for development plans (DPs). It does not cover enforcement casework.

National policy and Government objectives

4. Government policy and objectives are set out in:
 - PPS9 (August 2005)
 - Planning for Biodiversity and Geological Conservation: A Guide to Good Practice (March 2006)
 - Circular 06/2005 (August 2005)
 - Planning Policy Wales (July 2010)
 - TAN 5 (September 2009)
5. The main thrust of **PPS9** is that development should have minimal impact on biological and geological diversity and enhance it where possible.
6. The **Guide to Good Practice** is essential reading and *Section 5: Development Control* in particular contains useful advice.

[1] Council Directive on the conservation of natural habitats and of wild fauna and flora (92/43/EEC)

[2] Council Directive on the conservation of wild birds (79/409/EEC)

[3] The Conservation of Habitats and Species Regulations 2010 ('the Habitats Regulations')

[4] Planning Policy Statement 9: Biodiversity and Geological Conservation

[5] Circular 06/2005: Biodiversity and Geological Conservation – Statutory obligations and their impact within the planning system

7. **Circular 06/2005** complements PPS9 and the Good Practice Guide and offers administrative guidance on the application of the law relating to planning and nature conservation. This is also essential reading. Of particular interest are (*unless indicated otherwise numbers refer to paragraphs in the Circular*):
- flow charts on pages 7, 23 and 25 which illustrate the consideration of development proposals or operations affecting internationally and nationally designated sites of nature conservation interest;
 - internationally designated sites (9-33):
 - nationally designated sites – operations likely to damage the special interest feature of Sites of Special Scientific Interest (SSSIs) (56 – 83):
 - habitats and species conservation outside designated sites (84-95):
 - conservation of species protected by law (96-124)

Other relevant national guidance

UK Biodiversity Action Plan

8. The UK Biodiversity Action Plan was published in 1994 as part of the UK response to the United Nations Convention on Biological Diversity (UNCBD). The UKBAP drew together existing instruments and programmes for nature conservation throughout the UK, set out a series of activities for a 20 year period, and recognised the need for specific biological targets and plans for the recovery of certain species and habitats. It includes Action Plans for species and habitats afforded priority conservation action, and is translated into effective action at the local level through Local Biodiversity Action Plans (LBAPs). These cover most of England and all of Wales and set local priorities which contribute to the delivery of priorities and targets contained in the species and habitat Action Plans. The UK List of Priority Species and Habitats was published in 2007, and contains over 1100 species and 65 habitats listed as priorities for conservation action.
9. Section 40 of the Natural Environment and Rural Communities Act 2006 (NERC) requires decision-makers to have regard to the conservation of biodiversity when carrying out their normal functions. Sections 41 and 42 require the Secretary of State (SoS) and WAG to publish lists of habitats and species which are of principal importance for the conservation of biodiversity in England and Wales. These comprise the priority habitats and species identified under UKBAP, the potential effects on which can be an important material consideration.

Working with the Grain of Nature/The Biodiversity Framework

10. The UK Biodiversity Partnership replaced the UK Biodiversity Group in 2002 with the aim of bringing together all the partners involved in the UKBAP. This is the mechanism by which the common vision and approach to conserving UK biodiversity is formulated and promoted within the UK's devolved administrative framework. It is explained in *Conserving Biodiversity - The UK Approach*, (October 2007).
11. Each of the devolved administrations within the UK has now produced biodiversity strategies: 'Working with the Grain of Nature' in England (Defra, 2002); and 'The Biodiversity Framework' in Wales (Wales Biodiversity Partnership, 2008). The former seeks to ensure biodiversity considerations become embedded in all main sectors of public policy and sets out a work programme for the next 5 years to make the changes necessary to conserve and enhance biodiversity. Annual stock take reports provide updates on progress regarding implementation of the strategy and next steps. They also provide useful overviews of different habitats e.g. water and wetlands, as well as topics such as climate change. The UK Clearing House Mechanism for Biodiversity (UK-CHM) was established as a result of the UNCBD and is designed to provide rapid access to relevant technical and scientific information.
12. In summary, the UKBAP and its associated Action Plans provide the identification of issues and analysis of what action is required in relation to habitat and species recovery. 'Working with the Grain of Nature' and 'The Biodiversity Framework' are the strategies through which those issues will be addressed in England and Wales.

Development Plans

Sustainability Appraisal (SA)

13. The SA is a mechanism to better inform the decision making process. It includes appraisal of social and economic factors in addition to environmental factors and is a mechanism by which the full impact of the plan on sustainability is understood. It is an independent, informative process carried out throughout the plan production process.

Strategic Environmental Assessment (SEA)

14. SEA is expected to be carried out as part of a SA. SEA is required by EU Directive 2001/42/EC (frequently referred to as the SEA Directive) and is transposed into UK law by The Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004 No 1633 Environmental Protection). This introduced systematic assessment of the environmental effects of strategic land use related plans and programs. It applies to regional and local DPs, and waste and transport plans, within the EU. SEA should specifically assess policies in relation to their impact on the environment.

Protected Sites

Hierarchy of Protected Sites

15. There is a hierarchy of nature conservation sites, which is set out below. Internationally designated sites, which are both 'European sites' and international sites, have the highest level of protection, although protection of terrestrial sites' interest features from deterioration and disturbance are nearly always underpinned through dual notification as a SSSI, a national designation. JNCC provide a useful description of the various designations on their website (<http://www.jncc.gov.uk/page-1527>).

- **European sites:** Special Protection Areas (SPAs); Special Areas of Conservation (SACs), Sites of Community Importance (SCIs)⁶ and candidate Special Areas of Conservation (cSACs). European site lists for England and Wales can be accessed below:

England:

SPAs (& pSPAs):

<http://www.jncc.gov.uk/page-1401>

SACs, SCIs & cSACs:

http://www.jncc.gov.uk/ProtectedSites/SACselection/SAC_list.asp?Country=E

Wales:

SPAs (& pSPAs):

<http://www.jncc.gov.uk/page-1403>

SACs, SCIs & cSACs:

http://www.jncc.gov.uk/ProtectedSites/SACselection/SAC_list.asp?Country=W

- **International sites:** Wetlands of International Importance (commonly known as 'Ramsar sites') designated under the Ramsar Convention. These sites do not have statutory protection under the Habitats Regulations, but are usually dual designated as European sites and/or SSSIs. In addition, although they are not statutory European sites, the UK Government has decided that the same planning policies and procedures should apply as if they were European sites (see *Circular 06/2005, paragraph 5*). Ramsar site lists for England and Wales can be accessed below:

England:

<http://www.jncc.gov.uk/page-1390>

Wales:

[6] SCIs and cSACs are sites going through the SAC designation process.

- **potential Special Protection Areas (pSPAs).** These are not European or international sites, and they do not have statutory protection under the Habitats Regulations. However, the UK Government has decided that the same planning policies and procedures should apply as if they were European sites.
- **National sites:** Sites of Special Scientific Interest (SSSIs), National Nature Reserves (NNRs), Marine Nature Reserves (MNRs);
- **Regional and local sites:** Regionally Important Geological and Geomorphological Sites (RIGS), Local Nature Reserves (LNRs), other local sites variously titled by LPAs eg Sites of importance for Nature Conservation (SINCs), Sites of Nature Conservation Importance (SNCIs), County Wildlife Sites (CWSs), non-statutory nature reserves;
- **Ancient woodland and other important natural habitats**

SSSIs

16. Whilst nearly all internationally designated sites are dual designated as SSSIs, the interest features of the internationally designated site may be narrower than the special interest features of the SSSI and the boundaries may differ. In such circumstances, Inspectors must consider the effects of a proposed development in relation to each designation.
17. SSSIs are notified by NE or the Countryside Council in Wales (CCW) under S28 of the W&CA. SSSIs may be notified for geological as well as biological interest. Certain permitted development rights do not apply in SSSIs.
18. NE/CCW are the Government's/WAG's statutory advisers in relation to nature conservation in their areas. They have a statutory role not only in notifying SSSIs, but in their management. An LPA proposing to permit development must consult NE/CCW if the proposed development is:
 - in an SSSI; or
 - in any consultation area defined by NE/CCW around an SSSI; or
 - otherwise likely to affect an SSSI.
19. An Inspector dealing with a case involving an SSSI must be aware of the special role of these bodies. If an Inspector is proposing to grant permission for a development that is likely to damage the special interest features of a SSSI, he/she must notify NE/CCW prior to reaching his/her decision. NE must be allowed 28 days in which to comment. If the Inspector decides that he/she will grant permission against NE's/CCW's advice, a condition must be attached that prohibits commencement of development for 21 days from the date of the decision, in order to allow NE/CCW to consider any further action. NE/CCW must be sent a copy of the issued decision.

Non-designated sites

20. The designation of an area for its nature conservation value will normally be a material consideration of some weight at appeal. The precise amount of weight to be attached in each case however should take into account the position of the site in the hierarchy set out above, as well as all the other circumstances of the case. Sites which have not yet been fully designated eg proposed SAC (pSAC), potential Ramsar site, may also merit weight as a material consideration - certainly in the case of pSPAs and cSACs (see paragraph 14 above).
21. Parties to an appeal may sometimes argue that a particular area meets the criteria for a European site, eg a SPA or SAC, and ask the Inspector to conclude on whether such an area should be treated as if it were already a designated/classified site. It may be argued that Articles 6(2) – 6 (4) of the Habitats Directive apply to such sites as they do, according to Government policy, to pSPAs and Ramsar sites, and therefore that proposals that are likely to have a significant effect on the site should be subject to an appropriate assessment under Regulation 61 of the Habitats Regulations (covered under the [Habitats Regulations Assessment section](#) below).
22. It is for Government, not Inspectors, to determine whether a site should be treated as if it were already designated/classified. According to current UK practice, the Government considers that, prior to a site being fully designated/classified, it is subject to the assessment process set out in the Habitats Regulations following a ministerial announcement either of a formal public consultation on the proposed site, or that a site has been accepted as a pSPA, SCI or cSAC following a review exercise. If no such ministerial announcement has been made, regulation 61 of the Habitats Regulations does not apply to the proposal. Inspectors will still need to consider the impact of the proposal according to the protection afforded by other legislation, such as eg the W&CA.
23. The nature conservation value of land outside designated sites may also be a material consideration. PPS9 makes it clear that planning decisions should aim to maintain, and enhance, restore or add to biodiversity and geological interests within the wider community. Article 10 of the Habitats Directive (implemented by Regulation 39 of the Habitats Regulations) requires Member States to endeavour to encourage the management of such features which are of major importance to wild fauna and flora.
24. This is reinforced by Section 40 of NERC, which places a general duty on public authorities, including the SoS and Inspectors⁷, in exercising their functions to have regard, so far as is consistent with the exercise of those functions, to the purpose of conserving biodiversity. It is clear therefore that biodiversity should be considered as an important material consideration at appeal, regardless of whether or not the site has been designated or specifically identified for its nature conservation interest.

[7] This duty also applies to the National Assembly in Wales and as a consequence to Inspectors working in Wales.

25. Inspectors should be aware that Defra guidance on the designation of local sites indicates that local authorities should take into consideration not only their intrinsic scientific interest but the extent to which they provide the opportunity for contact with and enjoyment of nature and a resource for learning about the natural world: 'Local Sites - Guidance on their Identification, Selection and Management' (Defra, February 2006). The Wales Biodiversity Partnership has produced equivalent guidance, 'Wildlife Sites Guidance Wales – A Guide to Develop Local Wildlife Systems in Wales'.
26. PPS9 identifies that ancient woodland is also a valuable biodiversity resource both for its diversity of species and for its longevity as woodland. Such areas may not have statutory protection but are nevertheless an important material consideration as government policy makes clear that PP should not be granted for any development that would lead to the loss or deterioration of such areas unless the need for and benefits of the proposal outweigh the loss. In addition, PPS9 indicates that policies in DPs should aim to conserve other important natural habitat types.
27. PPS9 and Circular 06/2005 also refer to the value of a network of natural habitats, comprising not only statutory and non-statutory sites but features which, because of their linear and continuous structure, or their functions as stepping stones, are essential for migration, dispersal and genetic exchange. Examples of such features are: rivers with their banks; traditional field boundary systems such as hedgerows; ponds; and small woods.
28. In considering biodiversity issues, Inspectors should have regard to the possible implications of climate change. In particular they should seek to ensure that not only are areas of existing conservation interest appropriately protected but that provision is made, where necessary, for the restoration and/or creation of habitats to allow some species to relocate in response to climate change. More detailed guidance on this aspect can be found in 'Conserving biodiversity in a changing climate: guidance on building capacity to adapt':
29. Alongside national policy on biodiversity, Inspectors should be aware of NE's advice on the provision of suitable accessible natural greenspace, 'Nature Nearby'. CCW have produced the equivalent 'Green Space Tool Kit' NE considers that people living in urban areas should have easy access to places of wildlife interest and have suggested a set of benchmarks in order to achieve this. They recommend that people living in towns and cities should have:
 - an accessible natural greenspace⁸, of at least 2ha in size, no more than 300 metres (5 minutes walk) from home;
 - statutory LNRs at a minimum level of one hectare/1000 population;

[8] Inspectors should take care not to confuse this advice with NE's recommendation that suitable accessible natural green space (SANGS) should be provided as mitigation/avoidance measures for developments likely to significantly affect internationally designated sites.

- at least one accessible 20ha site within 2km of home; one accessible 100ha site within 5km of home; and one accessible 500ha site within 10km of home.

Marine Sites

30. In the UK, marine biodiversity is protected under the Habitats Regulations, the Offshore Marine Conservation (Natural Habitats, & c.) Regulations 2007 (OMCR) and the W&CA. A variety of marine areas have been protected under this range of legislation. Marine SACs and SPAs, which form part of the network of Natura 2000 sites, are protected under the Habitats Regulations and OMCR. They are described as 'European marine sites' in the Regulations. Marine Nature Reserves (MNRs), for nationally important habitats and species, are protected under the W&CA. MNRs can extend out to 3 nautical miles. Currently, there are three designated reserves in the UK, Lundy MNR in England; Skomer MNR in Wales; and Strangford Lough in Northern Ireland.
31. The marine SACs, SPAs and MNRs are collectively known as 'marine protected areas' (MPAs). MPAs describe a wide range of marine areas which have some level of restriction to protect living, non-living, and/or natural historic features.
32. Identification of marine SACs within UK territorial waters is the responsibility of the relevant country conservation agencies: NE in England and the CCW in Wales. Identification of marine SPAs within UK territorial limits is undertaken by the JNCC, on behalf of the country conservation agencies
33. The UK's transposition of the Habitats Directive initially only applied to terrestrial areas and inshore waters (within 12 nautical miles [nm] of the UK coast). The OMCR extended the UK's transposition of the Directive to the UK offshore marine area (those waters, beyond 12nm, within British fishery limits and the seabed within the UK Continental Shelf Designated Area). JNCC is responsible for identifying offshore SACs and offshore SPAs (collectively known as European offshore marine sites) in light of the obligation to designate SACs and SPAs in the offshore marine area.
34. In addition to existing MPAs, work is underway to identify and survey further sites in UK waters (English territorial waters and UK offshore waters).
35. It should be clear from the appeal papers whether a MPA could be affected by a proposal. Inspectors must apply the same considerations to these sites according to the Habitats Regulations (and the W&CA where applicable) as to land-based sites designated under that legislation.

Marine management schemes

36. In order to ensure that various marine operational activities undertaken by planning, navigation or harbour authorities comply with the requirements of the Habitats Directive, the 2010 and 2007 Regulations provide for the preparation of management schemes for European marine sites (SACs and SPAs). Such schemes are likely to be required where

there is a mixture of commercial and recreational activities as well as for sites which fall either side of the mean low water mark. Once established, a management scheme governs the exercise of the functions of the relevant authorities and has legal status [Regulation 36(1)]. It may be a material consideration if a proposed development would affect (or be affected by) the management scheme.

Marine and Coastal Access Act 2009

37. The Marine and Coastal Access Act 2009 ('the Marine Act') received Royal Assent on 12 November 2009. The objective of the Act is to implement a new marine planning regime with a strategic approach to managing activities in UK waters and a simplified system of managing marine resources. It aims to secure the maximum sustainable benefits from UK marine resources while ensuring that they are properly protected, and contains a number of measures intended to achieve this.
38. The Act also introduces a new mechanism to designate marine sites to protect marine features of national importance, called Marine Conservation Zones (MCZs). Together with SACs and SPAs, these sites will comprise an ecologically coherent network of MPAs throughout English and Welsh territorial waters and UK offshore waters.

Defra, WAG and JNCC website marine pages

The Defra, WAG and JNCC website marine pages can be accessed via the following links:

<http://ww2.defra.gov.uk/environment/marine/>

<http://new.wales.gov.uk/topics/environmentcountryside/consmanagement/marinefisheries/?lang=en>

<http://www.jncc.gov.uk/page-3>

Marine SACs and SPAs:

SACs: <http://www.jncc.gov.uk/page-1445>

SPAs: <http://www.jncc.gov.uk/page-1414>

Habitats Regulations assessment (HR assessment)

39. The UK is bound by the terms of the Birds and Habitats Directives. These set out specific provisions which must be followed by Inspectors when considering appeals or applications for development or other activities which may impact on protected sites.
40. In particular,
 - *Article 6(2)* of the Habitats Directive requires member states to take appropriate steps to avoid the deterioration of natural habitats and species habitats as well as disturbance of the species for which the

areas have been designated, in so far as such disturbance could be significant in relation to the objectives of the Directive;

- *Article 6(3)* states that any plan or project (or element thereof) not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to an appropriate assessment (**AA**)⁹ of its implications for the site in view of the site's conservation objectives. In light of the conclusions of the **AA**, the relevant competent authority shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site;
 - *Article 6(4)* requires that if, in spite of a negative **AA** of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest (IROPI), the Member State shall take all compensatory measures necessary to ensure the overall coherence of Natura 2000¹⁰ is protected.
 - Article 7 of the Habitats Directive applies the obligations arising under the above Articles to the Birds Directive.
41. These obligations are transposed into UK law through the Habitats Regulations.¹¹
42. In particular, *Regulation 61(1)* makes clear that if a plan or project is likely¹² to have a significant effect on a protected site in Great Britain (either alone or in combination with other plans or projects), and it is not directly connected with or necessary to the management of the site, the competent authority shall undertake an **AA** of the implications for the site in view of its conservation objectives.
43. *Regulation 62* transposes the requirement of Article 6(4) which seeks to allow the approval of plans or projects where there is a negative assessment subject to there being no alternative solutions available, imperative reasons of overriding public interest for agreeing to a plan or project exist¹³ and adequate compensatory measures to maintain the overall ecological coherence of the Natura 2000 network are in place (or at least secured).

[9] Inspectors should take care to ensure that they have understood what is being referred to by the words 'AA' in any written material before them. In the past these words have been used to refer to the overall process required by the Directive, as well as the specific procedure required under Article 6(3) and this is still happening in some circumstances. However, the overall process is more appropriately referred to as Habitats Regulations assessment and the specific step in article 6(3) as 'AA'.

[10] Natura 2000 is comprised of the European network of SPAs, SACs and SCIs.

[11] However, paragraph 5 of Circular 06/2005 makes clear that the Government has chosen to apply the Regulations not only to European sites but also to Ramsar sites and pSPAs.

[12] Or such a risk cannot be excluded *on the basis of objective information* (see paragraph 48).

[13] In the case where the site hosts a priority natural habitat or species, only reasons relating to human health, public safety or beneficial consequences of primary importance to the environment, can be considered, unless the competent authority has sought and had regard to an opinion from the Commission.

44. *Regulation 68* allows for conditions or limitations to be imposed on planning permissions where this is necessary to avoid any adverse effects of the plan or project on the integrity of the protected site.
45. Neither, the Directive nor the Regulations define what is meant by '*the integrity of the site*'. However, paragraph 20 of Circular 06/2005 defines the integrity of the site as '*the coherence of its ecological structure and function, across its whole area, that enables it to sustain the habitat, complex of habitats, and/or the levels of populations of the species for which it was classified*'.
46. The Inspector is the '*competent authority*' for transferred appeals. Consequently before granting permission for any development that may affect a protected site, they will need to undertake a HR assessment of the impact of the development.
47. The SoS is the competent authority for all other cases. However, if an Inspector is not recommending refusal on other grounds they should consider all the information in relation to the HR assessment and conclude on it, but make it clear that the formal AA is for the SoS as the decision-maker¹⁴.
48. So what does a HR assessment involve?

There are basically 7 steps. However, once one of the steps has been met there is no requirement to go on to consider the remaining steps. These are set out in a flow chart in Figure 1 of Circular 06/2005.

Step 1 – Is the proposal directly connected with or necessary to the management of a protected site?

(If the answer is yes then PP can be granted, providing no other harm is identified.)

Step 2 - Is the proposal likely to have a significant effect¹⁵ on the interest features of the site, alone or in combination?

(If the answer is no, PP can be granted subject to the same caveat as above.)

Step 3 – If it is or such a risk can not be excluded *on the basis of objective information*, then an **AA** must be undertaken to determine whether or not the development will have an adverse effect on the integrity of the site¹⁶.

(If the AA result is that there are no risks of adverse effects, PP can be granted as above.)

[14] Example wording: 'I conclude that the possibility that the proposal would have significant adverse effects cannot be ruled out without further consideration. As the competent authority it falls on the SoS to undertake an AA but to assist in that process I have set out below my assessment of the factors that need to be taken into account'.

[15] See paragraphs 13-16 of Circular 05/06.

[16] Based on the judgement in *ADT Auctions Ltd v Secretary of State & Hart DC [2000]* JPL 1155, it is implicit that the adverse effect has to be significant.

Step 4 – If any adverse effects are identified, can they be mitigated or overcome by conditions or other restrictions such as a section 106 agreement or undertaking?

(If adverse effects can be sufficiently reduced or overcome through mitigation measures, such that the integrity of the site is not adversely affected, then PP may be granted subject to the necessary conditions being attached and/or the requisite section 106 being signed and sealed.)

Step 5 - If not, are there alternative solutions that would have a lesser effect on the integrity of the site?

(If the answer is yes than the appeal must be dismissed.)

If there are no alternative solutions which would have no or a lesser effect on the integrity of the site, then the next step is dependent on whether or not a priority habitat or species¹⁷ would be adversely affected.

Step 6a - If a priority habitat or species would not be affected, are there imperative reasons of overriding public interest, which could be **of a social or economic nature**, sufficient to override the harm to the site?

(If the answer is no the appeal must be dismissed.)

Step 6b - If a priority habitat or species would be affected, are there imperative reasons of overriding public interest relating to **human health, public safety or benefits of primary importance to the environment**?

(Again if the answer is no then the appeal must be dismissed.)

Step 7 - If there are imperative reasons of overriding public interest can it be determined that compensatory measures necessary to ensure the overall coherence of the Natura 2000 network have been undertaken or at least secured?

(If appropriate compensatory measures cannot be provided then the appeal should be dismissed.)

49. Looking at the steps in more detail, **Step 1** is fairly straightforward. Proposals which meet this requirement are unlikely to come to appeal very often. Unless it is suggested by the parties that the proposal falls into this category, **Step 2** can normally be proceeded to directly.
50. **Step 2** is more complex. This stage of the HR assessment must be carried out on a precautionary basis. The question is whether there is a probability or a risk that the plan or project will have a significant effect on the site. It is not necessary to identify that it would have at this stage, merely whether there is a risk that it might. In line with the judgement in **Waddenzee**¹⁸ it can only be concluded that a proposal would be

[17] Priority habitats and species are indicated by an asterisk in Annexes I and II of the Habitats Directive. The citation indicating why the site was designated will show whether it hosts a priority habitat or species.

[18] *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlands Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw (ECJ case C-127/02)*

unlikely to have a significant effect if such a risk can be excluded on the basis of objective information. However, on the basis of the judgement in ***Hart District Council v The Secretary of State for Communities and Local Government, Luckmore Limited & Barratt Homes Limited (2008)***, any proposed avoidance or mitigation measures, which form part of the proposal, should normally be taken into account in considering this step (page 33, paragraph 2).

51. At appeal it is for Inspectors to decide what weight to attach to the evidence with which they are presented. However, they should be aware that the SoS/WAG regard NE/CCW as their scientific adviser on this subject. Although its evidence should always be tested, as with evidence presented by any other party, it should only be rejected where there is clear objective scientific evidence which contradicts it.
52. It is important to remember that the determination must be made not only on the basis of the effect of the proposal alone but *in combination* with any *other plans or projects* that have been approved or are likely to take place.
53. What other plans or projects must be taken into account? Clearly any development that has been granted planning permission must be included. Paragraph 16 of Circular 6/2005 also states that it will normally be appropriate to take into account current planning applications as well as consents or applications under other relevant regimes (e.g. discharge consents or abstraction licences). Regard should also be had to proposals in adopted DPs.
54. How far emerging plans and proposals should be taken into account will be a matter of judgement based on the extent to which there is a realistic prospect of their being implemented. However, in coming to a view regard should always be had to the precautionary principle. Unless there is objective evidence to indicate that an emerging plan or project is unlikely to be adopted and/or implemented regard should normally be had to it.
55. In determining what other plans and projects to take into account Inspectors should not limit their assessment to those mentioned by the parties, particularly where they are aware of other plans or projects that may have an impact. However, if consideration of other plans or projects that have not been mentioned by the parties would be likely to be material to the decision it will be necessary to allow the parties an opportunity to comment.
56. In cases where there is an extant PP for a site, developers may suggest that they will implement that PP if the appeal fails and that therefore a fall back position exists. Such arguments are likely to carry much less weight in cases where it is necessary to undertake a HR assessment. The fall back position was raised in a recent case involving the Thames Basin Heaths SPA. The Inspector and SoS concluded that, according to the Habitats Directive and Habitats Regulations, it was not a consideration in

assessing the effect of the proposal on the protected site.¹⁹ However, such arguments must be considered on a case by case basis.

57. Inspectors should be aware that the requirement to undertake a HR assessment may also apply at reserved matters stage [Regulation 68(3)]. This flows directly from Articles 6(3) and 6(4) of the Habitats Directive. It will always be a requirement where no HR assessment was undertaken when the outline application was being considered, even if the protected site had not been designated at that stage. In other cases a HR assessment would only be necessary at reserved matters stage where it would not have been possible to determine the impact of the proposal on the protected site on the basis of the details submitted with the original outline application.
58. If it cannot be excluded on the basis of objective evidence that the proposal will have a significant effect then an **AA** must be undertaken under **Step 3**, unless it is proposed to refuse the proposal on other grounds. Such an assessment should be proportionate. It doesn't need to be unduly elaborate. The level of detail should be consistent with the likely impact. Generally it should be undertaken on the basis of the information that is already available to the Inspector. Only in exceptional circumstances should proceedings need to be adjourned or a decision delayed in order to allow the parties time to produce further evidence. However, unless their views are already very clear, the Inspector must also consult NE/CCW before completing an AA.
59. Sometimes an **AA** will already have been undertaken by the LPA but it will need to be checked to ensure that it fully meets the requirements of the Regulations and any alterations to the proposal have been taken into account, particularly if changes have been made to the scheme since the appeal was submitted.
60. In undertaking an **AA** the impact of the proposal on the site needs to be considered in the light of the site's conservation objectives. Some sites still do not have their own conservation objectives. If there are none, then regard should be had to the reasons for the site's designation and any objectives there may be for constituent parts of the site (ie SSSIs) which are relevant to its international designation. The ultimate test is whether the proposal would *adversely affect the integrity of the site*. In considering this test the protected site should be looked at as a whole and not just the part which is nearest the appeal site.
61. If the appeal is to be allowed and PP granted the Inspector must be certain that there would be no adverse effect ie there must be no remaining reasonable scientific doubt that such effects will occur.
62. If there would be a significant adverse effect, or the effect is uncertain but could be significant, then it is necessary to consider whether it could be overcome through the imposition of conditions or a planning obligation which would achieve effective measures to mitigate the effect (**Step 4**).

[19] APP/R0335/A/08/2084226 – appeal by Taylor Wimpey against refusal of outline PP for 781 dwellings and associated development at the former RAF Staff College in Bracknell. An extant PP existed for 730 dwellings - the appellant claimed that would be implemented if the appeal was dismissed.

In appropriate cases, these could include habitat or access management measures or the provision of alternative land which would reduce the potential pressure on the affected site to a sufficient degree such that there was no longer the risk of an adverse effect.

63. It is important to ensure that any condition meets the tests in Circular 11/95 and that any obligation under section 106 complies with the advice in Circular 05/2005. In particular, the Inspector should not accept the parties' view that the obligation would resolve the problem without first satisfying themselves that it would do so.
64. If the harm cannot be mitigated then consideration needs to be given to whether there are alternative solutions which would have a lesser effect (**Step 5**). These could include locating the development elsewhere. This is a stiff test and there are unlikely to be many proposals where some form of alternative solution would not be available.
65. If there are no alternative proposals then it is necessary to go on to **Step 6**. It is essential at this stage to establish whether or not a priority species or habitat would be affected before undertaking this step as different criteria apply where this would occur.
66. If a priority habitat or species would not be affected, then it is still necessary to conclude whether there are imperative reasons of overriding public interest to justify granting planning permission²⁰. However, the reasons can be fairly broad in this scenario and can include social or economic reasons. Nevertheless, given that the reasons have to be *imperative* and of *overriding public interest*, the barrier to allowing development is still fairly high. It would be normal in such cases to expect some indication from Government policy that the proposal would meet this test before allowing the appeal. However, even where no such indication exists it will still be necessary to consider whether such reasons exist but there would need to be very sound evidence for concluding that they did before allowing the appeal.
67. If a priority habitat or species would be affected, the grounds for allowing the appeal are far more restricted. There must be imperative reasons of overriding public interest either on health or public safety grounds or benefits of primary importance to the environment. Alternatively it must be for other imperative reasons of overriding public interest agreed by the European Commission.
68. As paragraph 28 of Circular 06/2005 points out, there will be few cases where it can be judged that imperative reasons of overriding public interest will allow a development to proceed which will have a potentially negative effect on the integrity of a protected site. This is unlikely to ever be the case in transferred appeals.
69. Finally, if it is concluded that there are imperative reasons then the final stage in the process is to consider whether or not compensatory measures have been secured as required by Regulation 66 (see paragraphs 29-32 of Circular 06/2005).

[20] This is because the proposal would still be having an adverse effect on non-priority habitats or species which would be harmful to the integrity of the site.

Proposals that require dual consents

70. Many proposals eg power stations, waste management facilities, water treatment plants etc, require consents such as environmental permits or abstraction licences in addition to planning approvals. Decisions on such consents are also subject to the assessment provisions of the Habitats Regulations, and Regulation 65(2) provides that a competent authority is not required to assess any implications of a plan or project that would be more appropriately assessed by another competent authority.
71. The fact that a particular impact, eg air quality, on a protected site will be controlled by a separate consent does not negate the requirement for the competent authority for the planning consent to assess whether a proposal is likely to have a significant effect and whether it is necessary to undertake AA. However, if with the benefit of information before them they are satisfied that a particular impact is more appropriately assessed by another competent authority they are not required to consider whether it is necessary to undertake AA in relation to that particular impact.

Habitats Regulations Assessment and Development Plans²¹

72. The decision in *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* (C-6/04:2005 ECJ) made clear that the requirements of the Birds and Habitats Directives apply equally to DPs, and the 2007 amendments to the 1994 Habitats Regulations, now consolidated in the 2010 Regulations, transposed this into UK law. Regulations 102 - 107 provide for AA and subsequent considerations. Consequently, in considering the soundness of a DP it is necessary to carry out a HR assessment. In this case however it is the responsibility of the LPA, who remain the competent authority, and not the Inspector, to undertake such an assessment.
73. Consequently, it will be important to establish at an early stage of the examination process whether an AA is required and, if so, whether it has been undertaken. If the LPA has failed to undertake an AA, where one is required, then the Inspector should ensure that this has been completed by the LPA before the hearing sessions commence. Ideally it should also have been subject to appropriate public consultation.
74. It is important to remember in relation to DPs that HR assessment is an iterative process and will need therefore to be reviewed at each stage where changes are made to the plan. The depth of any HR assessment should be proportionate to the level of the plan i.e. the more strategic the plan, the more strategic the assessment. In many cases, it may be appropriate to leave more detailed matters to a later stage in the decision making process, taking account of the fact that further assessments will be required at each stage in the process, including at the planning application stage, in which case this should be made explicit in the DP.

[21] Further guidance on this topic is included in CLG's 'Planning for the Protection of European Sites: AA - Guidance For Regional Spatial Strategies and Local Development Documents'. Although still in draft it has been through consultation, and is already in use by LPAs and RPBs.

Protected Species

Good Practice

75. All wild birds are protected to varying degrees under the W&CA, and particular species of animals and plants are protected under the W&CA and the HR. The presence of a PS is a material consideration when considering a proposal that would be likely to harm a species or its habitat. It is essential that the presence of PS and the extent to which they may be affected by a proposal is established **before PP is granted**, so that all relevant material considerations have been addressed in making the decision (paragraphs 98 - 99 of Circular 06/2005). Those species protected under the W&CA are listed in Schedules 1, 5 and 8, and those protected under the HR under Schedules 2, 3 and 4. Other species, such as badgers and deer, are protected under their own legislation.
76. Prior surveys form part of the evidence base for any assessment and are essential where there is a **reasonable likelihood** of legally protected species being present and there is a risk that they would be adversely affected by the proposed development. In such circumstances, survey work should normally have accompanied either the application or the appeal. Parties often suggest that a condition requiring a survey can be imposed on a PP. However, other than in exceptional circumstances, it would be contrary to the guidance in Circular 06/2005 to grant permission subject to a condition that the appellant carry out a species or habitat survey prior to commencement of development. This applies to initial or further surveys.
77. Neither the Circular, PPS9 nor the Good Practice Guide provides examples of what constitutes 'exceptional circumstances'. Where an appellant claims that such circumstances exist, an Inspector will need to exercise his/her judgment on a case by case basis. He/she can only grant permission and impose a condition requiring a survey if satisfied that the circumstances are exceptional.
78. In the absence of an appropriate survey, the Inspector will need to consider the reasonable likelihood of a PS being present on a site. The Inspector should weigh up the representations made by statutory consultees such as the local wildlife trust, NE, CCW, and/or interested parties, and what he/she sees during their site inspection²². The weight the Inspector attaches to such representations is a matter of judgement. Representations which have a factual or empirical basis are likely to be more convincing in this respect than claims and assertions which are not supported by such evidence.
79. Where an Inspector considers that there is credible evidence to suggest that there is a reasonable likelihood of protected species being affected, and the matter has been aired but survey information is either missing or inadequate, or suggested mitigation measures are unlikely to be effective, the appeal can generally only be dismissed. However, as

[22] Care should be taken in according weight to the Inspector's own observations given that the visit may well take place at a time of year when the species may either not be present and/or signs of its presence are not readily visible.

always, Inspectors will need to have regard to the usual advice that nothing in the decision should come as a surprise to the parties.

80. Accordingly, if there has not been prior airing of the issue it may be necessary to allow the main parties an opportunity to comment prior to reaching a decision. This would apply, for example, where an assertion has been made that there are protected species on a development site, the main parties made little or no reference to it at application stage and no party has commented at appeal stage but the Inspector nonetheless has concerns that there may be a reasonable likelihood of protected species being present and affected. If an appeal is being dismissed on other grounds it would not usually be necessary to go back to the parties, reference could simply be made in the decision to the potential need for further investigation in the event of another application being submitted.
81. Where satisfactory surveys have been undertaken and found no evidence of protected species, and the Inspector's observations at the site additionally lead him/her to conclude that protected species are unlikely to be present and affected, there is no need to take the matter any further. Where there is dispute on the issue the Inspector should make specific reference in his/her decision to the observations he/she made at the site visit.

Conditions and Section 106 planning obligations

82. Where surveys have been conducted and the presence of protected species has been confirmed it is the responsibility of the developer to include proposals for appropriate mitigation measures in their evidence. Where mitigation has been proposed and there is clear evidence that it can be achieved, it may be necessary to impose a condition to ensure that it is implemented e.g. preventing construction at certain times of the year to avoid the breeding season; referencing a bat mitigation strategy, which may include type, location and phasing of installation of bat roosting boxes. However, any condition should be precise, specific and enforceable, often in the form of a Method Statement (see the Good Practice Guide paragraph 5.23).
83. Developers must provide sufficient description of mitigation measures that an Inspector can be satisfied that they will achieve the intended result. The wording of any condition will depend on the level of detail provided by the developer. A condition may need to specify that development shall not commence until details have been submitted to and approved in writing by the LPA and the mitigation implemented in accordance with those approved details, after which the mitigation shall be retained as approved. Alternatively, the level of detail may be so complete that there is no need for any further approval and the condition could specify that the mitigation is implemented, and subsequently retained, according to the already submitted details.
84. In some cases, where there are extensive requirements for enhancement or mitigation measures (and their long term monitoring), particularly where these would be located outside the application site, a S106 planning obligation may be the most suitable means of control (see the Good Practice Guide paragraph 5.24).

Licensing

85. Where an Inspector intends to grant PP for a development on a site on which PS are present, and the development could cause harm to the species or its habitat, the developer should be informed in the decision of the need to conform with any statutory species protection provisions affecting the site.
86. Further strict provisions apply to European protected species (EPS). Regulation 41 of the HR transposes Article 12 of the Habitats Directive and sets out the offences that may be committed in relation to EPS. A 2010 judgement, *Morge v Hampshire CC* (2010), provided some clarification on the meaning of Article 12, particularly 12 1 b and d.
87. In relation to 12 1 b (disturbance), it was concluded that whether a disturbance is likely to have a detrimental impact must be judged in the light of and having regard to the effect of the disturbance on the conservation status of the species at population level, i.e. the long-term distribution and abundance of the population. The court determined that disturbing one, or even two or three specimens, may not amount to the disturbance of the species in the long term, and it would be a matter of fact and degree in each case.
88. Article 12 1 d prohibits the deterioration or destruction of breeding sites or resting places. However, the court noted that, unlike Articles 12 1 a – c, Article 12 1 d does not specify that the act of deterioration or destruction needs to be deliberate. This stricter provision recognises that breeding sites and resting places are crucial to animals' life cycles and that their protection is directly connected with the conservation status of a species. It was noted that Article 12 1 d therefore aims to safeguard the ecological functionality of breeding sites and resting places. The court concluded that proposed developments must be judged in the light of whether they will directly or indirectly result in deterioration or destruction of breeding sites and resting places.
89. Where a development will result in a breach of the protection afforded to EPS a decision to grant PP should draw the appellant's attention to the need to apply for a licence, granted by NE/WAG under Regulation 53 of the Habitats Regulations (which transposes Article 16 of the Habitats Directive). Where a licence is required, a PP cannot be implemented until the licence is granted. Paragraphs 112 to 117 of Circular 06/2005 provide advice on licensing.
90. As a Regulation 53 licence is a derogation from the protection regime, the licensing authority may only grant a licence if they are satisfied that the purpose of the proposed development accords with one of the purposes set out in Regulation 53(2). The most relevant of these to planning is 53(2)(e) which refers to imperative reasons of overriding public interest. The licensing authority must then satisfy itself that the two further tests set out in Regulation 53(9)(a) and (b) are met. These are that:
- (a) there is no satisfactory alternative; and

(b) the action authorised by the licence will not be detrimental to maintaining the population of the species concerned at a favourable conservation status in its natural range.

91. It is not for an Inspector to consider the likelihood of the authority granting a licence. However, Regulation 9(5) places a statutory duty on Inspectors, as the competent authority, to have regard to the requirements of the Habitats Directive in the exercise of their functions. Where an Inspector considers that a proposal could cause harm to EPS he/she will need to apply those same 3 tests, taking into account the effect of any mitigation measures, such as relocation. The Inspector will need to make it clear that he/she had regard to any consultation comments made by NE/CCW, and set out his/her conclusions on those tests in the decision. This is in line with the judgement in *Woolley v Cheshire East BC and Millennium Estates Ltd* [2009] (paragraphs 19 – 35).

Example decisions

Summaries of relevant appeal decisions involving PS are set out in Annex D.

Annex A

Principal wildlife legislation

Legislation	Details
Wildlife and Countryside Act 1981 (as amended)	This is the principal wildlife-protection legislation in Great Britain. It includes provisions for important habitats to be designated and protected as SSSIs, and protects individual species and the places they use for shelter and protection. All birds, their nests and eggs, are also protected.
The Conservation of Habitats and Species Regulations 2010 (SI 2010 No 490)	These implement the EU Habitats Directive in Great Britain. The Regulations provide for the designation and protection of 'European sites' and the protection of 'European Protected Species' (EPS). The provisions also include a statutory requirement for competent authorities to undertake an AA of the potential impacts of projects likely to have a significant effect on European sites.
The Countryside and Rights of Way Act 2000	The Act increased protection for SSSIs and strengthened wildlife enforcement legislation. With regard to SSSIs, it includes provisions to extend powers for Statutory Nature Conservation Organisations (SNCOs) to enter into management agreements with landowners, and it extends the range of offences and increases the penalties for breaches of legislation. In particular, it provided for a new offence of reckless disturbance.
The Natural Environment and Rural Communities Act 2006	This places a statutory duty on all public bodies and statutory undertakers in England and Wales to have due regard to the conservation of biodiversity in all their functions. It also requires publication of a list of habitats and species of primary importance for the conservation of each country's biodiversity.
The Protection of Badgers Act 1992	This protects badgers and their setts. The Act currently precludes the use of heavy machinery within 30m of a sett.
The Hedgerow Regulations 1997	These make provision for the protection of hedgerows in England and Wales, making it an offence in certain circumstances to remove a hedgerow without notifying the local planning authority ^[26] .

[26] For appeals under The Hedgerow Regulations see IH Chapter PT10

Site Designations

Designation	Legislation under which classification/designation made	Implications for development
European and international		
Special Protection Area (SPA)	Classified under EC Directive on Conservation of Wild Birds 79/409/EEC. Protected in the UK under the Habitats Regulations.	European site. Terrestrial sites also notified as SSSI. Form part of a network of European sites termed Natura 2000. Development must be considered according to the requirements of the Habitats Regulations.
Potential Special Protection Area (pSPA)	A stage in the formal SPA designation process.	Not European or international site and not covered by the Habitats Regulations. But as a matter of policy the Government has chosen to afford pSPAs the same level of protection as classified SPAs therefore the implications for development are the same.
Special Area of Conservation (SAC)	Designated under EC Directive on Conservation of Natural Habitats and of Wild Flora and Fauna 92/43/EEC. Protected in the UK under the Habitats Regulations.	European site. Terrestrial sites also notified as SSSI. Form part of Natura 2000. Development must be considered according to the requirements of the Habitats Regulations.
Site of Community Importance (SCI)	Protected in the UK under the Habitats Regulations.	European site. Last stage before formal designation as SAC. Terrestrial sites also notified as SSSI. Form part of Natura 2000. Development must be considered according to the requirements of the Habitats Regulations.
Candidate Special Area of Conservation (cSAC)	Protected in the UK under the Habitats Regulations.	European site. In the UK cSACs are given the same statutory protection as SACs under the Habitats Regulations and therefore the implications for development are the same.
Proposed Special Areas of	A stage in the formal SAC designation process.	Not European or international sites and not covered by the

Conservation (pSAC)		Habitats Regulations. Should be taken into account as a material consideration when determining an appeal (Circular 05/2006).
Ramsar sites	Convention on Wetlands of International Importance Especially as Waterfowl Habitat 1971 ('Ramsar Convention')	International sites. Not European/Natura 2000 sites. Sites usually also notified as SSSI. As a matter of policy the Government has chosen to afford Ramsar sites the same level of protection as SPAs and SACs therefore the implications for development are the same.
National statutory designations		
Sites of Special Scientific Interest (SSSIs)	The Wildlife and Countryside Act 1981 Countryside and Rights of Way Act 2000 Natural Environment and Rural Communities Act 2006	Protected by law and planning guidance. LPAs must consult SNCOs on planning applications that might affect SSSIs. Operations that could damage special interests require consent of SNCOs.
National Nature Reserve (NNR)	The Wildlife and Countryside Act 1981 Countryside and Rights of Way Act 2000	Sites notified as SSSIs – land managed by SNCOs.
Marine Nature Reserve (MNR)	The Wildlife and Countryside Act 1981	As SSSI.
Local statutory designations		
Local Nature Reserve (LNR)	National Parks and Access to the Countryside Act 1949	LPAs are required to consult SNCOs about all new proposals.
Local non-statutory designations		
Local sites, eg Sites of Importance for Nature Conservation (SINCs) – or County Wildlife Sites (CWSs)	n/a	LPAs take account of local sites when formulating local plans and when considering planning applications. Government guidance requires LPAs to have regard to the extent to which local sites contribute to the public enjoyment of nature conservation.

		Defra's publication 'Local Sites' provides additional guidance.
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Housing Delivery in the South East and the Thames Basin Heaths Special Protection Area

- B1. This Annex provides advice on casework which involves the Thames Basin Heaths Special Protection Area (TBH SPA).

Background

- B2. A major issue arose in 2005 in relation to proposals for new housing developments in the South East which are located near the Thames Basin Heaths Special Protection Area. Currently, 15 LPAs are affected across Berkshire, Hampshire and Surrey:

Basingstoke and Deane
Bracknell Forest
Elmbridge
Guildford
Hart
Mole Valley
Runnymede
Rushmoor
Surrey Heath
Waverley
Windsor and Maidenhead
Woking
Wokingham
East Hampshire
West Berkshire

- B3. The TBH SPA was fully designated in March 2005, covers over 8,000ha of land and is divided into 13 main parts, each of which is a Site of Special Scientific Interest (SSSI). The draft conservation objective for the SPA is under review but is currently to maintain, in favourable condition, the habitats for the populations of Annex 1 bird species of European importance, with particular reference to lowland heathland and rotational forestry.
- B4. SPAs (in addition to Special Areas of Conservation [SACs] and candidate SACs [cSACs]) are heavily protected by the EC Birds and Habitats Directives, specific provisions of which are applied in the UK by The Conservation of Habitats and Species Regulations 2010. They place particular responsibilities on a decision maker in relation to such sites. Inspectors must have regard to these requirements, as advised in Circular 06/2005 'Biodiversity and Geological Conservation'. This Circular sets out the procedure a competent authority should follow in deciding whether to approve a proposal that will potentially affect a European site ie cSACs, SACs and SPAs (paragraphs 3 – 33 and Figure 1 on page 7). The UK Government has chosen to additionally apply these procedures to

Ramsar sites and potential SPAs (pSPAs) although they are not European sites as a matter of law.

- B5. As the TBH SPA comprises several SSSIs, provisions in Part II of the Wildlife and Countryside Act 1981, as amended, also apply. This Act places a general duty on any authority specified in section 28G, which includes an Inspector, to take reasonable steps, in the exercise of their functions, to conserve and enhance the special interest features of SSSIs. Such authorities must also ensure particular requirements have been and are followed where they are authorising or consenting to any activity likely to damage the special interest features of a SSSI. Paragraphs 56-67, 74 and Figure 4 of Circular 06/2005 refer.
- B6. A large number of houses have been proposed via allocations in local development frameworks, structure plans, and the Regional Spatial Strategy i.e. the South East Plan. Many planning applications have been made for infill development and redevelopment of existing residential areas close to the SPA. The Planning Inspectorate has received a large number of appeals, some of which relate to small scale housing proposals, because LPAs have refused planning permission partly due to representations from Natural England (NE) following statutory consultation.
- B7. In some instances NE has objected to any proposal which would result in an increase in the housing stock within an area up to 5km from the SPA boundary. NE believes research has shown this to be the distance that many people will travel to visit the heaths for leisure and recreation, especially for dog-walking, thus potentially increasing the disturbance of the birds and pressure on their habitats. For developments closer to the SPA, NE's concerns also relate to increases in the number of cats that may hunt on the SPA.
- B8. Initially, NE considered that the distance from a proposed development to the nearest boundary of the SPA should only be measured as a linear distance. Following the close of the SEP Examination in Public (EiP) and the submission of the Assessor's Report (see below), they changed their approach and considered that it was acceptable to apply linear or travel distance. However they have since reverted to their original stance and consider that it is only appropriate to apply linear distance. As a result the type of measurement applied by NE and LPAs will vary depending on when an application was made. Appellants will often rely on travel distance in their evidence. Inspectors must clearly set out their reasoning in their decision for whichever approach they consider appropriate.

Natural England's Draft Delivery Plan

- B9. Natural England, in order to seek a consistent approach to housing delivery in the areas potentially affecting the TBH SPA, prepared a draft strategy known as the 'Draft Delivery Plan' (DDP) (latest version dated 26 May 2006). The aim was to provide a template which, taking into account local circumstances, would be used by LPAs as a basis for preparing their own Supplementary Planning Document (SPD).
- B10. The DDP suggested that the impact of new residential development on the SPA could be avoided or mitigated by the provision or enhancement of accessible green space that provides similar recreational opportunities to the SPA. NE referred to this space as 'Suitable Accessible Natural

Green Space' (SANGS)^[28]. The DDP contained a formula for calculating the amount of SANGS required to mitigate a proposal's effects. Where a developer is unable to provide sufficient SANGS as part of their proposal, the DDP suggested that they could make financial contributions through a S106 planning obligation towards the provision of new or enhancement of existing SANGS by the LPA.

B11. The DDP made reference to zones, which suggested tiered levels of mitigation according to proximity to the TBH SPA, although NE considers that it is extremely unlikely that the impact of new development in Zone A could be effectively avoided or mitigated. The zones are defined as follows:

- Zone A: 0-400m
- Zone B: 400m-2km
- Zone C: 2-5km

B12. The DDP was not Government-endorsed. It had a varied reception from the affected LPAs, and some planning consultants were not satisfied that it would be workable. It was superseded in February 2009 by the TBH SPA Delivery Framework, (TBHSPA DF) produced by the Joint Strategic Partnership Board [details below].

South East Plan - Regional Spatial Strategy for the South East

B13. Peter Burley was appointed as an Assessor for the South East Plan EiP specifically to consider TBH SPA and NE's DDP. His Report to the Panel was published on 19th February 2007, followed by an Addendum Report in April, and the Panel Report was submitted to CLG on 6 August 2007. The Secretary of State (SoS) considered the Panel Report, and consulted between July and October 2008 on the Proposed Changes, which included a revised TBH SPA policy. The final version of the Plan was published on 6 May 2009. Following the recent Cala Homes judgement it continues for the present to form part of the statutory development plan, although the SoS has indicated his continuing intention to abolish Regional Strategies. The Plan includes policy NRM6 which related to TBH SPA. This is included at Appendix A.

B14. The final version of the policy was similar to the version in the last draft of the Plan subject to a few amendments, and expanded on and clarified some points. Additionally there was a reference to the strategic provision of access management measures, and to the need for LPAs to incorporate into LDFs the principles of the TBHSPA DF. 'SANGS' was replaced by 'SANG'.

B15. The policy referred to a single zone of influence set at 5km linear distance from the SPA. Within that zone is a 400m exclusion zone. The indicative plan at Appendix B below shows the LPA boundaries and the 2 zones. The policy stated that mitigation measures were unlikely to be capable of protecting the integrity of the exclusion zone except in exceptional circumstances.

B16. The key differences between the SEP policy and the NE DDP were:

- a single 'zone of influence' rather than Zones B and C;
- SANG provision at 8ha per 1000 rather than 16ha;

- a more flexible approach for developments of less than 10 dwellings, whereby they did not have to be strictly 'tied' to a SANG catchment area;
- a requirement that local authorities around the SPA to collect developer contributions to fund a strategic access management and monitoring project (currently being set up by NE).

The TBH SPA Delivery Framework

- B17. Following a recommendation in the Assessor's report, in order to coordinate a cross-boundary approach the affected LPAs, the former South East England Regional Assembly (SEERA) and other key organisations formed a Joint Strategic Partnership Board (JSPB). The JSPB published a draft 'Interim Strategic Delivery Plan' (ISDP), consultation on which closed in February 2008. It is understood that those LPAs preparing 'miniplans' (details below) used the draft ISDP, prior to publication of the final version, as the basis for their miniplans rather than the DDP.
- B18. The final version of the ISDP was published on 12 February 2009 and renamed as the 'TBH SPA Delivery Framework.' Although it is purely advisory, LPAs are expected to incorporate the principles into their LDFs. The DF may be raised by parties in casework and may be a material consideration. As the DF has replaced the DDP, if raised in representations the DDP should only be accorded limited weight.

Interim strategies/miniplans

- B19. Pending the SoS's decision on the SE Plan, several LPAs, in liaison with NE, implemented interim strategies based on the DDP, generally referred to as 'miniplans'. Those LPAs are:

Bracknell Forest
 Elmbridge
 Guildford
 Hart
 Runnymede
 Surrey Heath
 Waverley * (see paragraph 22 below)
 Woking

- B20. Essentially, the miniplans aim to secure contributions towards the LPA's provision of new or enhanced green space that can function as SANG via a Section 106 planning obligation. Where an LPA considers that an application accords with a miniplan, NE has agreed with the LPAs that they do not have to be consulted and that they will not object, and the SPA will not usually be a reason for refusal. Inspectors must be satisfied that such arrangements are in line with Circulars 11/95 and 5/05 on the basis of the evidence before them, including on the availability of such land. In some cases developers are understood to have offered, and LPAs are understood to have accepted, cheque payments rather than contributions made via a S106 obligation towards the provision of green space. However, this does not appear to accord with the advice in Circular 5/05 on properly securing a means of payment

B21. As at March 2009, Waverley Borough Council announced that capacity to contribute towards the enhancement of Farnham Park, identified in its adopted Interim Miniplan as SANG, had almost been exhausted and that they may have to withhold planning permission for new residential development within the Farnham area. Consequently, they reviewed the miniplan and agreed with NE that there was scope to further increase the SANG capacity of Farnham Park. On that basis, they issued a consultation draft of the updated miniplan, renamed as the 'Avoidance Strategy for TBH SPA', in May 2009 for comments by 20 July. It was adopted on 15 December 2009 and replaced the Interim Miniplan. The SANG it released became available when the Farnham Design Statement was adopted as a material consideration on 20 July 2010. Prior to adoption, other than in certain limited circumstances, Waverley were refusing permission for new residential development on the basis that there was not yet sufficient SANG available to avoid/mitigate an effect on the SPA. We understand that many developers delaying submitting applications until the new SANG became available.

LPAs without implemented interim strategies/miniplans

- B22. In the absence of an implemented miniplan, developers may suggest that they can mitigate the effects of a development through a planning obligation or by the imposition of a Grampian condition which prevents the occupation of permitted new dwellings until the developers have made and agreed arrangements for the provision of new or enhanced greenspace with the LPA. Inspectors must be satisfied that such arrangements are in line with Circular 11/95 or 5/05 on the basis of the evidence before them, including the availability of such land. Where an LPA has not published a draft SPD for public consultation, Inspectors must carefully consider whether such a planning obligation or condition can be regarded as acceptable. In addition, some developers have suggested that they could mitigate the effect of a proposal by entering into a planning obligation with a neighbouring Council that has an implemented miniplan. However, a developer can only enter into a valid obligation with the Council in whose area an appeal site is situated, so such an obligation would be invalid and could not be enforced.
- B23. Developers may highlight alternative areas of greenspace which have not formally been identified as SANG and suggest that they will avoid a significant effect on the SPA as they will draw future residents away from the SPA. Inspectors will need to consider the effectiveness of this alternative land in avoiding a significant effect. Among other factors, Inspectors will need to take into account the proximity of the alternative greenspace as compared with the SPA to the proposed development, ease of access to it, and the nature of the greenspace. It does not need to replicate the heathland, but must be capable of meeting the recreational needs of the residents by providing recreational opportunities similar to those provided by the SPA in order to deflect visitors from the SPA.
- B24. In SPA cases involving LPAs who have not implemented miniplans, the main parties should have submitted evidence on the issue, and the LPA should have consulted NE at application stage. However, the approach LPAs take will vary depending on their view of NE's position. One LPA, for instance, has approved some applications that result in a net increase in dwellings in the absence of mitigation measures and despite an objection

from NE. Where the LPA was minded to approve an application on SPA grounds but refused permission on other grounds or failed to determine the application there is often limited evidence on the issue at appeal stage. In such cases, the Planning Inspectorate has written to the main parties at an early stage, asking if they wish to make any further comments.

'Pet covenants'

B25. In relation to the effect of dog-walking on the SPA, developers often submit a planning obligation which contains clauses aimed at precluding residents from keeping cats and dogs and suggest that this will mitigate the effects of pet predation. Alternatively, or additionally, they may suggest that a condition requiring mechanisms to be put in place preventing residents from keeping cats and dogs could be imposed on any PP. The effect of such clauses and/or the enforceability of such a condition may vary depending on the type of development and the degree of subsequent supervision that will be available on the site (eg warden or concierge). Inspectors must consider any obligations according to the advice in Circular 05/2005, and any conditions according to the usual Circular 11/95 tests.

Information packs

B26. Developers also often suggest that they can mitigate the effect of a development by providing information packs for residents, which identify alternative green spaces in the area and set out the sensitivities of the SPA. Inspectors must satisfy themselves about the effectiveness of such a measure taking into account the individual circumstances of each case. However, it is unlikely that on its own it would warrant significant weight.

Access Management agreements

B27. Some developers have entered or suggest that they can enter into Access Management agreements with local landowners, such as the local wildlife trust, to improve or enhance local green spaces, in order to mitigate the impact on the SPA. Inspectors will need to judge the effectiveness of such measures according to the individual circumstances of the case.

Action

- B28. Essentially, permission can only be granted where there is no significant adverse effect on a European site or where, in the absence of alternatives, there are imperative reasons of overriding public interest (subject to necessary compensatory measures being secured).
- B29. Where it is clear from the evidence that the effect of a proposal on the TBH SPA is an issue, Inspectors must follow the approach set out in this guidance before granting permission.
- B30. However, if the effect of a proposal on the TBH SPA has not been raised as an issue but an Inspector considers that the proposal could have a possible impact on the SPA he/she must canvas it with the main parties and NE.
- B31. The Planning Inspectorate has written to the affected LPAs asking them to consider notifying NE about any appeals for new housing within 5km of the SPA if they did not do so at application stage. This was in an effort to avoid the inevitable delay that would occur whilst NE were consulted about an appeal in the event that an Inspector was minded to grant/recommend granting planning permission for a development.
- B32. In written representations cases, where it is clear from the evidence that the effect of a proposal on the TBH SPA is an issue but, exceptionally, NE do not appear to have been consulted by the LPA or PINS at an earlier stage (and there is no indication that they did not require consultation, such as where a miniplan is in place), NE should be given an opportunity to comment if an Inspector is minded to grant permission (paragraph 7 and footnote 12, Circular 06/2005). If an Inspector intends to refuse permission for reasons other than the TBH SPA, referral to NE will not be necessary. However an Inspector may wish to indicate in his/her decision that the matter has been raised, adding that if the proposal had been acceptable in other respects, this is a matter on which he/she would have required further clarification.
- B33. In hearing/inquiry cases, where the effect of a proposal on the TBH SPA is raised at a late stage the Inspector must allow the parties and NE a chance to comment. If he/she is not satisfied that it would be reasonable to expect the parties to address and make representations on the issue during the programmed days of the inquiry, he/she should adjourn to a later date, but ask NE and the parties to submit their representations in writing by an agreed date prior to the reopening of the event. If NE was not present at the event (which is usual) the office should be asked to request its comments. The main parties must be given the opportunity to comment on any representations from NE.
- B34. As with any emerging policy/advice/guidance, Inspectors must carefully consider the weight to be attached to any reference to any SPD, having regard to the process that it has undergone and the stage that it has reached.

[27] As advised in PINS Note 1165 (update 3)

[28] (This should not be confused with 'Accessible Natural Greenspace', which NE use to describe land, such as woods, meadows and downs, which is publicly accessible and within easy walking distance of where people live.) SANGS are sometimes also described as 'suitable alternative natural green space'.

Appendix A

POLICY NRM6: THAMES BASIN HEATHS SPECIAL PROTECTION AREA

New residential development which is likely to have a significant effect on the ecological integrity of Thames Basin Heath Special Protection Area (SPA) will be required to demonstrate that adequate measures are put in place to avoid or mitigate any potential adverse effects. Such measures must be agreed with Natural England.

Priority should be given to directing development to those areas where potential adverse effects can be avoided without the need for mitigation measures. Where mitigation measures are required, local planning authorities, as Competent Authorities, should work in partnership to set out clearly and deliver a consistent approach to mitigation, based on the following principles:

i. a zone of influence set at 5km linear distance from the SPA boundary will be established where measures must be taken to ensure that the integrity of the SPA is protected

ii. within this zone of influence, there will be a 400m "exclusion zone" where mitigation measures are unlikely to be capable of protecting the integrity of the SPA. In exceptional circumstances, this may vary with the provision of evidence that demonstrates the extent of the area within which it is considered that mitigation measures will be capable of protecting the integrity of the SPA. These small locally determined zones will be set out in local development frameworks (LDFs) and SPA avoidance strategies and agreed with Natural England

iii. where development is proposed outside the exclusion zone but within the zone of influence, mitigation measures will be delivered prior to occupation and in perpetuity. Measures will be based on a combination of access management, and the provision of Suitable Accessible Natural Greenspace (SANG).

Where mitigation takes the form of provision of SANG the following standards and arrangements will apply:

iv. a minimum of 8 hectares of SANG land (after discounting to account for current access and capacity) should be provided per 1,000 new occupants

v. developments of fewer than 10 dwellings should not be required to be within a specified distance of SANG land provided it is ensured that a sufficient quantity of SANG land is in place to cater for the consequent increase in residents prior to occupation of the dwellings

vi. access management measures will be provided strategically to ensure that adverse impacts on the SPA are avoided and that SANG functions effectively

vii. authorities should co-operate and work jointly to implement mitigation measures. These may include, inter alia, assistance to those authorities with insufficient SANG land within their own boundaries, co-operation on access management and joint development plan documents

viii. relevant parties will co-operate with Natural England and landowners and stakeholders in monitoring the effectiveness of avoidance and mitigation measures and monitoring visitor pressure on the SPA and review/amend the approach set out in this policy, as necessary

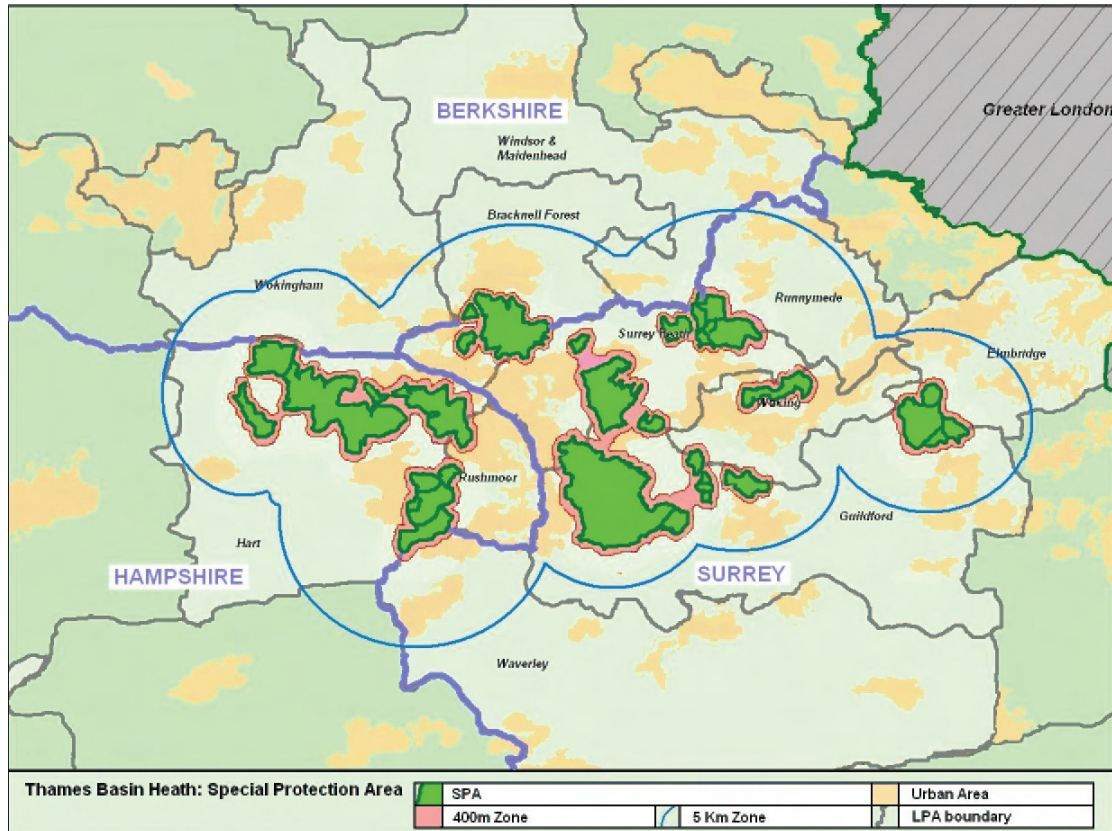
ix. local authorities will collect developer contributions towards mitigation measures, including the provision of SANG land and joint contributions to the funding of access management and monitoring the effects of mitigation measures across the SPA

x. large developments may be expected to provide bespoke mitigation that provides a combination of benefits including SANG, biodiversity enhancement, green infrastructure and, potentially, new recreational facilities.

Where further evidence demonstrates that the integrity of the SPA can be protected using different linear thresholds or with alternative mitigation measures (including standards of SANG provision different to those set out in this policy) these must be agreed with Natural England.

The mechanism for this policy is set out in the TBH Delivery Framework by the TBH Joint Strategic Partnership and partners and stakeholders, the principles of which should be incorporated into local authorities' LDFs.

Zones and LPA boundaries



Dorset Heathlands Special Protection Area

- C1. A similar issue has arisen in relation to planning proposals near the Dorset Heathlands (DH) SPA/SAC as TBH SPA. In dealing with DH SPA casework Inspectors must similarly have regard to the Habitats Regulations, the Wildlife and Countryside Act, and Circular 06/2005.
- C2. The affected (South East Dorset) LPAs are:
- Poole
 - Bournemouth
 - Christchurch
 - East Dorset
 - Purbeck
- C3. The DH SPA is more fragmented than the TBH SPA, but NE's concerns about the potential impact of new residential development within 5km of the SPA are essentially the same. However, the approach of the LPAs is a little different in that **all** of the affected LPAs jointly implemented an 'Interim Planning Framework' (IPF) from 1 January 2007. This details a 3 year interim strategy, prior to the implementation of a longer term solution, for protection of the Heathlands
- C4. A revised version of the IPF was the subject of an 8-week public consultation from December 2009. This version https://www.bournemouth.gov.uk/Library/PDF/Living/Planning/Planning_Policy/Consultations/10_03_23_IPF_amended_FINAL.pdf has now been agreed and extended by a further 2 years to the end of 2011. It is not proposed to make the IPF formal Supplementary Planning Guidance; it will be replaced in 2012 by the Dorset Heathland Joint Development Plan Document.
- C5. Similarly to the TBH SPA miniplans, the IPF makes provision for financial contributions to be made to LPAs through a S106 obligation towards mitigating any likely significant effects of a proposal on the SPA before any planning permission is granted. The LPAs will use the contributions to fund mitigation measures such as the provision of alternative or enhancement of existing green space. It should be noted that the approach in Dorset relies less heavily on the provision of SANG.
- C6. NE has agreed with the LPAs that they do not need to be consulted where proposals are made in accordance with the terms of the IPF. The LPA should provide a copy of the IPF with the appeal papers for every proposal to which it applies. In such cases, the Planning Inspectorate will not require the LPA to consult NE at appeal stage. A note to this effect will be attached to every appeal file.
- C7. It is for the Inspector to be satisfied that an appropriate contribution will be made in accordance with the IPF, and that the mitigation is appropriate, in the event that the appeal is to be allowed.

- C8. Where an application was not made in accordance with the IPF, the LPA should have consulted NE. If NE were not consulted at application stage, it will need to be consulted at appeal stage and the main parties allowed an opportunity to comment on its evidence.

DO NOT COPY

Guide to protected species survey work

D1. This guide is not exhaustive but provides Inspectors with a brief indication of what to look for when assessing survey work, as well as some information about enhancement, mitigation, compensation and management. It only covers surveys for the PS that arise in casework most frequently. However, NE's Publications Catalogue includes guidance on a wide range of species and habitats. Links to the most relevant publications are included in the text but these are not exhaustive.

Ecological Surveys should include an assessment of:

- the number or extent of the species affected;
- the extent of the foraging area likely to be affected by the proposal where applicable;
- the impact the proposal is likely to have on the species;
- mitigation and where necessary compensation measures.

Other points to consider include:

- how recent was the survey?
- was it carried out at the most appropriate time of the year?
- was it conducted by a qualified person?

Bats (*Chiroptera*)

D2. Bats are a PS under Schedule 5 of the W&CA and the EC Habitats Directive 1992, implemented in Great Britain by the Habitats Regulations. This makes it an offence to intentionally kill or injure bats, or to damage, destroy or obstruct access to their roosts. The W&CA has been amended by the Countryside and Rights of Way Act 2000 to make it an offence to recklessly disturb bats or recklessly damage or obstruct access to any structure or place that bats use for shelter or protection.

Evidence submitted on bat habitat

D3. The roof space (or cellars) of buildings and/or hollows in trees can provide bats with a suitable habitat. Where buildings are to be demolished or roofs altered or trees felled as part of a development there is a possibility of disturbing bats. It will **not** usually be necessary to consider the issue in the following circumstances:

- if there is no bat evidence whatsoever;
- if there is evidence or reports of bat sightings no closer than about 500m;
- if there is evidence or reports of bat sightings within 50m - 500m, but no other convincing evidence beyond isolated or infrequent sightings, although it will depend on the nature of that evidence,

If there is evidence of recent bat activity within about 50m an Inspector will normally need to consider the impact the proposal may have on the bats.

If there are substantive reports of bats entering a building or tree a survey should have already been provided.

Survey

- D4. There are a number of survey methods which can be employed depending on the type of roost and the time of year. Bats often return to familiar roosting sites. The most common methods are inspection for bats or signs of their presence such as droppings. Careful inspection of buildings and/or trees is probably the most common method and is applicable throughout the year, although the optimum time for active bats is summer and autumn. However, the presence of bats can often be detected with a single visit at any time of the year. Bat detectors and emergence counts are also used to survey for active bats but are mostly suitable only during the summer (June-August). During the winter, bats tend to be in subterranean areas but can still be surveyed (see reference below). Inspection for signs such as droppings can be carried out throughout the year.

Enhancement, Mitigation, Compensation and Management

- D5. NE's 'Bat Mitigation Guidelines' are comprehensive and cover legislation and licensing, ecology and habitat requirements, surveys, mitigation and compensation. Case studies are also included. 'Bats and Buildings', also by Natural England may be useful.
- D6. The Eurobats website also includes useful publications such as Protecting and Managing Underground Sites for Bats.

Great Crested Newts (*Triturus cristatus*)

Survey

- D7. Surveys for great crested newts should include recording live newts, larvae and eggs. These are searched for at different times of the year and using different methods. March to May is the optimum time for newts, April to June for eggs and August-September for larvae.

Enhancement, Mitigation, Compensation and Management

- D8. NE's 'Great Crested Newt Mitigation Guidelines' are comprehensive covering legislation and licensing, ecology and habitat requirements, surveys, mitigation, compensation, restoration and enhancement.

Barn Owl (*Tyto alba*)

Survey

- D9. Surveys for barn owls can be carried out at any time of the year but the distinctive features sought eg droppings, pellets, feathers and nest debris will display different characteristics throughout the year (see link below). Barn owl feathers are very distinctive and can render reliable information on site occupancy. If the survey is carried out during the main nesting season (March to August) nesting places should not be searched.

Enhancement, Mitigation, Compensation and Management

- D10. There are a wide range of measures which can be incorporated into planning consents to make provision for barn owls. These are detailed in NE's 'Barn Owls on Site'. This also includes detailed information on protection of barn owls prior to and during construction. Building works should avoid the main nesting season.

Badger (*Alces alces*)

Survey

- D11. The optimum time for undertaking badger surveys is February to April to coincide with greatest territorial activity when vegetation cover is minimal. A secondary but less pronounced peak occurs in October. Surveys can be undertaken outside these periods but field signs will be less abundant and obvious.
- D12. The survey should provide information about the number and status of badger setts and foraging areas that are affected by the development proposal. The home range, which consists of feeding grounds and one or more setts, can be extensive. The survey area should therefore extend up to 1km beyond the periphery of the proposed development area. It may take many weeks or months to obtain adequate information about how badgers are using a site since not all the setts are used all the time. Bait marking to determine the home range and other survey techniques are usually effective only at certain times of the year, as although badgers do not hibernate, they are less active in the winter months.

Enhancement, Mitigation, Compensation and Management

- D13. NE has produced several guides including:

- Badgers and Development

Water Vole (*Arvicola terrestris*) (also known as 'water rat')

Legal Protection

- D14. Water Voles are now fully protected under Section 9 of the W&CA (as amended) in response to the recent rapid decline in their numbers.

Survey

D15. The water vole is rarely seen and therefore surveys are often based on the presence of characteristic signs which should be recorded on a detailed map. These should include faeces, latrines, feeding stations, burrows and footprints. The link below provides more details. Typically the survey would involve close examination of all waterway and pond banks up to 2 metres from the water's edge. They are best carried out between April and October as the water vole is not active above ground during the winter.

Enhancement, Mitigation, Compensation and Management

D16. Ecological appraisal should identify opportunities for restoration of vegetated bank side corridors as these can perform an important function by linking fragmented populations.

D17. Where possible areas around ponds or wildlife corridors along ditches or streams should be left undeveloped. The link below also provides additional advice about how to exclude water voles from development areas.

D18. NE's publications include: Water Vole - Guidance for Planners and Developers; Water Vole Mitigation Techniques and Halting the decline; Refuges and National Key Sites for Water Voles.

Example decisions

Allowed Appeals – surveys submitted

- Appeal Ref: APP/C0820/A/07/2047583 (paragraphs 14-18)

Appeal made against the refusal of PP for a wind farm development for 3 turbine generators and associated works. One issue concerned the likely effect of wind turbines on the behaviour of bats. Evidence submitted with the appeal included substantial bat activity survey work. The appeal site is located between two wooded areas (coombes) inhabited by 9 species of bats. Bats seeking to travel between the two coombes would need to cross the appeal site. Whilst the Inspector accepted that turbines can be a danger to bats, on the basis of the evidence submitted, he concluded that bat foraging habits suggest they were more likely to follow the hedgerows whilst travelling between the two coombes. Also few of the recorded species would be likely to fly at turbine blade altitude. The Inspector concluded that, although there was some risk to bats from the potential for collisions, this was unlikely to result in a significant threat to the local population and was outweighed in any event by reasons of overriding public interest.

- Appeal Ref: APP/K0615/V/03/1134255 (paras 4, 31, 62, 70 and Appendix 1 paragraph 5)

Appeal made against the refusal of PP for an extension of an existing site to incorporate further warehousing, associated roads, car and lorry parks and office accommodation. Ponds within the appeal site were known to support a colony of great crested newts. An ecological study recommended mitigation measures which formed part of a S106 agreement. These included measures to avoid losses during construction and thereafter which the Inspector considered were adequate to ensure the protection of the colony.

Dismissed Appeals - no survey submitted

- Appeal Ref: APP/J2210/A/07/2054075 (paragraphs 3 and 14)

This appeal was made against refusal of PP for erection of 6 bed care home, 34 close care dwellings and associated works. The appellant acknowledged there was a reasonable likelihood that great crested newts, slow worms and bats were present on the site but had not done a survey and suggested that any impact might be mitigated through conditions. The Inspector did not consider this appropriate in the light of guidance in Circular 06/2005.

Dismissed Appeals - survey submitted

- Appeal Ref: APP/J3910/A/08/2061220 (paragraphs 2, 6 and 8)

Appeal made against refusal of PP for demolition of existing decanted care home and erection of 14 flats. A survey confirming the presence of bats was submitted with the application and recommended at least one more summer evening emergence/sunrise survey be carried out to confirm the level of use and species involved. This had not been carried out. The appellants contended that further survey and mitigation measures could be required by condition. The Inspector disagreed and decided that in the absence of a survey PP should not be granted.

DO NOT COPY

The Habitats Regulations 1994 (as amended) and The Habitats Regulations 2010 - corresponding regulations

	1994 (as amended) Regulation Number	2010 Regulation Number
Part 1: General Provisions		
Exercise of functions c/f the Habitats Directive	3(4)	9(5)
Nature Conservation Policy in Planning	37	39
Part 3: Protection of Species		
European protected species of animals	38	40
Protection of certain wild animals: offences	39	41
Protection of certain wild animals: defences	40	42
Prohibition of certain methods of capturing or killing wild animals	41	43
European protected species of plants	42	44
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Acronyms

AA	AA
CBD	UN Convention on Biological Diversity
CCW	Countryside Council for Wales
CLG	Department for Communities and Local Government
cSAC	candidate Special Area of Conservation
CWS	County Wildlife Site
DDP	Draft Delivery Plan
Defra	Department for Environment, Food and Rural Affairs
DETR	Department for Environment, Transport and the Regions
DH	Dorset Heathlands
DP	Development Plan
EA	Environment Agency
EiP	Examination in Public
EPS	European Protected Species
IPF	Interim Planning Framework
IROPI	Imperative reasons of overriding public interest
ISDP	Interim Strategic Delivery Plan
JNCC	Joint Nature Conservation Committee
JSPB	Joint Strategic Partnership Board
LBAP	Local Biodiversity Action Plan
LNR	Local Nature Reserve
LPA	Local Planning Authority

MNR	Marine Nature Reserve
MPA	Marine Protected Area
NAW	National Assembly for Wales
NE	Natural England
NNR	National Nature Reserve
NsNR	Non-statutory Nature Reserve
OMCR	Offshore Marine Conservation Regulations
PP	Planning Permission
PPS9	Planning Policy Statement 9: Planning for Biodiversity and Geological Conservation
PS	Protected Species
pSPA	potential Special Protection Area
RIGS	Regionally Important Geological Site
RSS	Regional Spatial Strategy
RTPI	Royal Town Planning Institute
SA	Sustainability Appraisal
SAC	Special Area of Conservation
SANGS	Suitable Accessible Natural Green Space
SCI	Site of Community Importance
SEA	Strategic Environmental Assessment
SEERA	South East England Regional Assembly
SEP	South East Plan
SINC	Site of Importance for Nature Conservation
SNCI	Site of Nature Conservation Importance
SNCO	Statutory Nature Conservation Organisation
SoS	Secretary of State
SPA	Special Protection Area

SPD	Supplementary Planning Document
SSSI	Site of Special Scientific Interest
TBH	Thames Basin Heaths
UKBAP	UK Biodiversity Action Plan
UK-CHM	UK Clearing House Mechanism for Biodiversity
WAG	Welsh Assembly Government
W&CA	Wildlife and Countryside Act 1981

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