Comhshaol, Oidhreacht agus Rialtas Áitiúil
Environment, Heritage and Local Government

For the attention of the County / City Manager

11 March 2010

Circular NPW 1/10 & PSSP 2/10

Appropriate Assessment under Article 6 of the Habitats Directive: guidance for Planning Authorities

I refer to Circular Letter SEA 1/08 & NPWS 1/08 of 15 February, 2008, which addressed the appropriate assessment, under Article 6 of the Habitats Directives, of plans. This Department has now produced more detailed guidance in relation to such assessment, and also the assessment of development applications.

Background

With the introduction of the Birds Directive in 1979 and the Habitats Directive in 1992 came the obligation to establish the Natura 2000 network of sites of highest biodiversity importance for rare and threatened habitats and species across the EU. In Ireland, the Natura 2000 network of European sites comprises Special Areas of Conservation (SACs, including candidate SACs), and Special Protection Areas (SPAs, including proposed SPAs). SACs are selected for the conservation of Annex I habitats (including priority types which are in danger of disappearance) and Annex II species (other than birds). SPAs are selected for the conservation of Annex I birds and other regularly occurring migratory birds and their habitats. The annexed habitats and species for which each site is selected correspond to the qualifying interests of the sites; from these the conservation objectives of the site are derived.

Obligation to consider implications of plans and projects for Natura 2000 sites

The Birds and Habitats Directives set out various procedures and obligations in relation to nature conservation management in Member States in general, and of the Natura 2000 sites and their habitats and species in particular. A key protection mechanism, and the subject of this guidance, is the requirement to consider the possible nature conservation implications of any plan or project on the Natura 2000 site network before any decision is made to allow that plan or project to proceed.

In combination effects

Not only is every new plan or project captured by this requirement but each plan or project, when being considered for approval at any stage, must take into consideration the possible effects it may have in combination with other plans and projects when going through the process known as appropriate assessment (abbreviated in this document to AA). The concept of plan and project is extremely broad and is not limited to development planning and development management, covered by the Planning and Development Acts 2000-2006, and given specific attention in this document.

Steps to be taken

The obligation to undertake appropriate assessment derives from Article 6(3) and 6(4) of the Habitats Directive and both involve a number of steps and tests that need to be applied in sequential order. Article 6(3) is concerned with the strict protection of sites, while Article 6(4) is the procedure for allowing derogation from this strict protection in certain restricted circumstances. Each step in the assessment process precedes and provides a basis for other steps. The results at each step must be documented and recorded carefully so there is full traceability and transparency of the decisions made. They also determine the decisions that ultimately may be made in relation to approval or refusal of a plan or project. AA is not a prohibition on new development or activities but involves a case-by-case examination of the implications for the Natura 2000 site and its conservation objectives. In general terms, implicit in Article 6(3) is an obligation to put concern for potential effects on Natura 2000 sites at the forefront of every decision made in relation to plans and projects at all stages, including decisions to provide funding or other support.

The first test is to establish whether, in relation to a particular plan or project, appropriate assessment is required[1]. This is termed screening for AA. Its purpose is to determine, on the basis of a preliminary assessment and objective criteria, whether a plan or project, alone and in combination with other plans or projects, could have significant effects on a Natura 2000 site in view of the site's conservation objectives. The need to apply the precautionary principle in making any key decisions in relation to the tests of AA has been confirmed by European Court of Justice case law. Therefore, where significant effects are likely, possible or uncertain at screening stage, AA will be required.

[1] Plans or projects that are **directly connected with or necessary to the** nature conservation **management of a Natura 2000** site are essentially exempt from further consideration. Such exceptions will be comparatively rare and it is recommended that the reasons and justifications, and any possible wider effects and mitigation measures, are assessed and recorded in advance of the decision to proceed in each case, together with evidence of consultation with the appropriate National Parks and Wildlife (NPW) officials of the Department.

Best scientific knowledge and professional assessment

AA is a focused and detailed impact assessment of the implications of the plan or project, alone and in combination with other plans and projects, on the integrity of a Natura 2000 site in view of its conservation objectives. There is no prescribed method for undertaking AA, or form or content for reporting. Case law has established that assessments should be undertaken on the basis of the best scientific evidence and methods. Accordingly, data and information on the project and on the site and an analysis of potential effects on the site must be obtained and presented in a Natura Impact Statement (previously known as a Statement for Appropriate Assessment). Ecological specialists will be required to undertake the surveys, research and analysis, with input from other experts (e.g. hydrologists or engineers) as necessary to prepare the Natura Impact Statement. It is the responsibility of the proponent of the plan or project to have the Natura Impact Statement prepared for submission to the competent authority, i.e. the consent authority. Having satisfied itself that the Statement is complete and objective, the competent authority carries out the AA on the basis of the Statement and any other necessary information.

Derogation: imperative reasons of overriding public interest where there are no alternatives

If it can be concluded on the basis of AA that there will be no adverse effects on the integrity of a Natura 2000 site, the plan or project can proceed to authorisation, where the normal planning or other requirements will apply in reaching a decision to approve or refuse. If adverse effects are likely, or cannot be ruled out, the derogation steps of Article 6(4) will apply, but only in a case in which there are imperative reasons of overriding public interest (IROPI) requiring a project to proceed, there are no less damaging alternative solutions, and compensatory measures have been identified that can be put in place. The IROPI test is more rigorous and restrictive in relation to adverse effects on Annex I priority habitats and species. The Habitats Directive requires Member States to inform the Commission of the compensatory measures; this enables the Commission to review whether the compensatory measures are sufficient to ensure that the coherence of the network is maintained. If the Commission is not satisfied it may take steps against the Member State up to and including litigation in the European Court of Justice. Recourse to derogation to allow a plan or project to proceed should be pursued in exceptional circumstances only, and the Minister must be informed at an early stage of any possible IROPI case.

Duty to undertake AA rests with planning authority

The duty to undertake AA, having considered the Natura Impact Statement, and to ensure that the stringent evaluation and decision-making procedure is applied correctly, lies with the competent authority, i.e. the national, regional or local authority charged with decision-making.

This guidance is presented in five chapters followed by various appendices. Chapter 1 is the introduction, and provides background information about the nature conservation directives, the Natura 2000 sites in Ireland and their protection through the application of Articles 6(3) and 6(4) of the Habitats Directive, and the role of the European Commission. Chapter 2 gives the full text of Article 6(3) and 6(4) followed by an explanation of the terminology, concepts and tests that these provisions of the Directive introduce, based on current understanding and case law. Chapters 4 and 5 illustrate how Article 6(3) and 6(4) should be applied by planning authorities in the case of development planning (plans) and development management (projects) covered by the Planning and Development Acts 2000-2006.

This guidance is not a legal interpretation. Experience is defining and clarifying boundaries, procedures and concepts, and consequently law and policy in this area will undoubtedly evolve and change over time. This guidance represents the current situation and understanding, and should be regarded as a work in progress. Comments, feedback, suggestions and relevant case studies are invited from users of this guidance and these may be sent to the address below. Ultimately it is envisaged that this guidance will form the basis for statutory guidelines for planning authorities under the Planning Acts.

In general, to ensure that decisions are compliant with the Habitats Directive, this guidance should be followed. Where there appear to be problems in doing so, it is recommended that the advice of the Department be sought. Such consultation will help ensure that such difficulties are resolved in a compliant manner and will help the Department in the further refinement of this guidance. Any queries should be referred to Joe Mc Mahon on 01 888 3296 or by e-mail at Joe.McMahon@environ.ie

To assist planning authorities in advising the public about the requirements of this guidance, an information sheet is appended to this circular. This can be copied and handed out in response to enquiries.

It is planned to hold a number of workshops in 2010 to assist planning authorities in developing their understanding of the processes relating to appropriate assessment.

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This guidance is available on the Department's website at: www.npws.ie

Appropriate Assessment under Article 6 of the Habitats Directive: An Information Sheet for Applicants for Planning and other Consent

European Protected sites

With the introduction of the Birds Directive in 1979 and the Habitats Directive in 1992, the European Union took steps to address the progressive destruction of habitats and to protect threatened species that were under increasing pressure from modern development and the intensification of land use. Member states took on the responsibility and obligation to establish the Natura 2000 network of sites that were of the highest importance for rare and threatened habitats and species across the EU.

Application in Ireland

In Ireland, the Natura 2000 network of European sites comprises Special Areas of Conservation (SACs, including candidate SACs), and Special Protection Areas (SPAs, including proposed SPAs). SACs are selected for the conservation of vulnerable and threatened habitat types and threatened species (other than birds). SPAs are selected for the conservation of vulnerable and threatened species of birds and other regularly occurring migratory birds, and their habitats. The particular habitats and species for which each site is selected correspond to the qualifying interests of the sites. From these the conservation objectives of the site are derived.

Legal obligations on Ireland

The Birds and Habitats Directives set out various procedures and obligations in relation to nature conservation management which Member States, including Ireland, must undertake for the purpose of ensuring the protection of the Natura 2000 sites and protected species. A key protection mechanism, and the subject of this information sheet, is the requirement to consider the possible nature conservation implications of any plan or project on the Natura 2000 site network before any decision is made to allow that plan or project to proceed.

Appropriate Assessment

Not only is every new plan or project captured by this requirement but in considering whether or not to approve or grant permission for a plan or project, the authorities of the State (referred to in this information sheet as "consent authorities" must take into consideration the possible effects the plan or project may have, in combination with other plans and projects. This is done through the process known as appropriate assessment (abbreviated in this document to AA). The concept of plan and project is extremely broad and is not limited to

development planning and development management, covered by the Planning and Development Acts 2000-2006, which are given specific attention in this information sheet.

The obligation to undertake appropriate assessment derives from Article 6(3) and 6(4) of the Habitats Directive and both involve a number of steps and tests that need to be applied in their proper order, as each step in the assessment process precedes and provides a basis for other steps.

- Article 6(3) is concerned with the strict protection of sites, and
- Article 6(4) is the procedure for allowing derogation from this strict protection in certain restricted circumstances.

The results at each step must be documented by the consent authorities and recorded carefully by them so there is full traceability and transparency of the decisions made. These results determine the decisions that may be made in relation to approval or refusal of a plan or project.

AA is not a prohibition on new development or activities but involves a case-by-case examination of the implications for the Natura 2000 site and its conservation objectives.

Is Appropriate Assessment necessary?

The first test that the consent authority must undertake is to establish whether, in relation to a particular plan or project, appropriate assessment is required. This is termed screening for AA. Its purpose is to determine, on the basis of a preliminary assessment and objective criteria, whether a plan or project, alone and in combination with other plans or projects, could have significant effects on a Natura 2000 site in view of the site's conservation objectives. The European Court of Justice has ruled that the "precautionary principle" applies in making any key decisions in relation to the AA tests. This means that where significant effects cannot be ruled out at screening stage, AA will be required.

Request for additional information

In carrying out the screening, the consent authority may need to seek additional information from the applicant. In doing so, it will specify clearly what is required. The consent authority will inform the applicant if an AA will be necessary.

Ex situ effects

It is important to note here that a plan or project that is not in or even adjoining a Natura 2000 site can still require appropriate assessment, For example, certain types of development in a river catchment could adversely affect a Natura 2000 site located downstream from the development. These are known as ex situ effects.

Finally, it should be borne in mind that the Directive requires AA to address cumulative impacts with other plans and projects, e.g. agricultural pollution combined with the approval of several separate one-off housing developments with septic tanks is likely at some point to impact on the water quality at a riverine Natura 2000 site in the catchment.

Natura Impact Statement

AA is a focused and detailed impact assessment of the implications of the plan or project, alone and in combination with other plans and projects, on the integrity of a Natura 2000 site in view of its conservation objectives. The terms of AA have been worked out in judgments of the European Court of Justice. The case law has established that assessments should be undertaken on the basis of the best scientific evidence and methods. Accordingly, if the consent authority so requires, data and information on the project and on the site and an analysis of potential effects on the site must be obtained and presented in a Natura Impact Statement, (referred to below as the NIS) which must be presented by the applicant.

Role of specialists

Ecological specialists will be required to undertake the surveys, research and analysis, with input from other experts (e.g. hydrologists or engineers) as necessary to prepare the NIS. In general, larger projects will entail a greater amount of scientific scrutiny. It is the responsibility of the applicant to have the NIS prepared for submission to the consent authority. Having satisfied itself that the Statement is complete and objective, the competent authority carries out the AA on the basis of the NIS and any other appropriate sources of information.

If, having examined the NIS and completed its AA, a consent authority determines that there will be no adverse effects on the integrity of a Natura 2000 site, the plan or project can proceed to authorisation, where the normal planning or other requirements will apply in reaching a decision to approve or refuse.

If adverse effects are likely or cannot be ruled out, the derogation steps of Article 6(4) will apply, but only in a case in which there are imperative reasons of overriding public interest (IROPI) requiring a project to proceed, there are no less damaging alternative solutions, and compensatory measures have been identified that can be put in place. The nature of this derogation is that, in general, it applies only to vital projects of compelling public importance. It is not envisaged that it would apply to private projects other than those relating to infrastructural developments of vital public interest.

Implications for applicants for planning approval

The principal implication of this for those seeking the necessary approvals, consents and licences to undertake plans or projects, especially in, or adjoining, or in the catchment of, Natura 2000 sites, is that they may be required to engage scientific experts to prepare material cases this will not necessitate the consent authority having to seek additional information.for screening or to prepare a NIS. While all projects involving land use change are subject to screening, in the majority of cases this will not necessitate the consent authority having to seek additional information.