

OVERVIEW OF PLANNING POLICY AND PROCEDURE RELATING TO BIODIVERSITY IN ENGLAND AND WALES

1.0 GENERAL

- 1.1 Wildlife legislation in the UK is complicated. It has undergone a steady evolution and its amendment process has created numerous different acts, regulations and statutory orders, all of which must be referred to in order to gain the complete picture. In addition, the Environment has become a devolved function for the different country administrations in the UK, resulting in different legislation and policy developing in the different countries of the UK. It is further complicated by the interaction between national, European and international legislation and jurisprudence. Different levels of protection apply to different species.
- 1.2 The following paragraphs will provide an overview to the ecological planning and legislative context generally applying to England Wales. It is not a comprehensive analysis and does not purport to advise in relation to any specific site, species or habitat. It is accurate at the date of writing, but current legislative documentation must be referred to in full to identify specific ecological legislative context for any given situation.
- 1.3 Sites, species or habitats may be protected or highlighted by six broad categories of instrument:
- Statutory Instruments
 - National Planning Policy Guidance
 - County, District and Unitary Development Plans
 - The UK Biodiversity Action Plan
 - Local Biodiversity Action Plans & locally adopted Wildlife Strategies
 - Other lists of species of conservation concern

2.0 STATUTORY INSTRUMENTS

- 2.1 Statutory protection is afforded to wildlife sites and to particular species in England and Wales by EU Directives, various international conventions to which the UK is signatory and various Acts and Regulations of Parliament, principally the **Wildlife and Countryside Act 1981** as amended by various Statutory Instruments relevant to England and/or Wales (**WCA**).
- 2.2 Other relevant legislation includes the Conservation (Habitats &c) Regulations, 1994 and 2007 (usually known as the **Habitats Regulations**). These Regulations translate the EU Habitats Directive into British Law, by requiring particular protection for European species and for European sites of nature conservation value.
- 2.3 The Habitats Regulations 1994 have been recently amended by **Statutory Instrument 2007 No 1843**. The changes introduced include changes to the thresholds above which offences may be committed for the disturbance of a European protected species. The changes have also removed many of the defences. This includes the commonly relied upon 'incidental result defence', which previously covered acts that were the incidental result of an otherwise lawful activity and which could not reasonably have been avoided.

- 2.4 The **Natural Environment and Rural Communities Act 2006 (NERC)** also introduces statutory obligations for public bodies to have regard to biodiversity in the exercise of their functions – in terms of planning, this includes decisions taken by Local Planning Authorities.
- 2.5 ODPM have published a useful circular (ODPM 06/2005) which summarises how these statutory obligations affect the planning system. Although this Circular is only obligatory in England, the vast majority of its guidance applies in Wales. Specific guidance on the consideration that the local planning authorities (LPA) in Wales should give to nature conservation interest is also contained in **Planning Policy Wales (PPW)** on Nature Conservation.

Statutory wildlife sites

- 2.6 In the UK there are many designations for giving protection to sites of national or international importance. The most commonly-encountered designations are summarised below:
- **Special Area of Conservation (SAC)**: An area of land or water of international (European) conservation importance as designated by European Member States under the EU Habitats Directive (Directive 92/43/EC). In the UK, all SACs will also be designated as Sites of Special Scientific Interest (SSSI).
 - **Special Protection Area (SPA)**: A site of international (European) conservation importance for birdlife as designated by European Member States under the Birds Directive (Directive 79/409/EC). In the UK, all SPAs will also be designated as SSSIs.
 - **Ramsar site**: A wetland of recognised international importance designated under the Ramsar Convention 1971. In the UK, all Ramsar sites will also be designated as SSSIs.
 - **National Nature Reserve (NNR)**: A nationally important nature reserve designated by Countryside Council for Wales (CCW) or Natural England (NE) under the WCA and managed by CCW, NE or an approved body. NNRs will usually be designated as SSSIs.
 - **Local Nature Reserve (LNR)**: A nature reserve on public land, established by a Local Authority under Section 21 of the National Parks and Access to the Countryside Act 1949. LNRs may or may not be Sites of Special Scientific Interest.
 - **Site of Special Scientific Interest (SSSI)**: An area of land or water notified by CCW or NE under the WCA or the National Parks and Access to the Countryside Act 1949 as being of special nature conservation interest for its plant or animal communities, geological or landform features.

Statutorily protected species and their habitats

- 2.7 In most cases relevant to planning applications, protected species are those listed in Schedules 2 and 4 of the Habitats Regulations, in Schedule 1, 5 and 8 of the WCA (as amended) and in the **Protection of Badgers Act 1992 (PBA)**. The extent of legal protection varies between species and the protocols for development which affects such species also varies.

- 2.8 It is particularly important to obtain site-specific advice before formulating an action plan when considering development affecting protected species. The following paragraphs are outlines of legal protection afforded to some of the species most frequently encountered.
- 2.9 It must also be remembered that many protected species can range widely, and their presence outside the proposed development must always be considered. Many planning applications have failed because inadequate consideration was given to the terrestrial habitats of amphibians present some distance from the proposed development.
- 2.10 **European protected species** include great crested newts and native species of British bat. The full list of European species is in the Habitats Regulations, 1994 & 2007.
- 2.11 The extent of legal protection covers both the species and its habitat. Any development proposal that would impact on either species or habitat is required to provide for conservation of the species and its habitat under licence from the relevant licensing authority (Natural England or Welsh Assembly).
- 2.12 The licensing authority require the LPA to consider (1) the impact of the proposed development on the European species and their habitat; (2) the need for development; and (3) consideration of possible alternative development proposals, before determining planning applications that could affect European protected species.
- 2.13 The LPA will therefore expect detailed surveys to be carried out prior to them determining a planning consent for a development that may adversely affect a European species or its habitats.
- 2.14 CCW or NE local teams will advise the LPA on their policies for European protected species and also any conservation implications of individual planning decisions which affect European protected species.
- 2.15 The licensing authority will normally expect the planning situation to be fully resolved prior to determining a licence application.
- 2.16 The licensing authority will also expect detailed surveys to have been carried out before granting any licences for handling the species or affecting the habitat when development is proposed.
- 2.17 The conservation scheme necessary to enable any development project will depend on the size of the population of the affected species, the locality and the impact of the proposed development. Usually an extended period of alternative habitat creation, trapping and movement of the animals is required, followed by a period of site management and monitoring.
- 2.18 **Schedule 1** of the WCA lists a number of **birds** for which it is illegal to disturb or destroy the birds or nests. Some Schedule 1 species can be locally common, such as kingfisher or barn owl, but most are rare.
- 2.19 The WCA also makes it illegal to disturb the nests of **most British wild birds** while at the nest. In this sense a wild bird is defined as being any bird, other than a game bird, that is resident in or a visitor to Great Britain in a wild state.

- 2.20 For most UK wild birds there is no provision within the current legislative or licensing system to disturb nesting birds. Certain "pest" species are permissible to disturb under licence from the relevant licensing authority. Legal advice may be needed to determine if a proposed nest disturbance or destruction is lawful. In some cases it will be, in other cases it may not be. Game birds are protected separately by the Game Acts that affords them full protection during the closed season.
- 2.21 **Schedule 5** of the WCA lists animals which are protected. Schedule 5 was most recently amended by Statutory Instrument 2008 No. 431, which increased the level of protection for certain species, including **water voles**, which now receive full protection of both animal and habitat. It is not possible to obtain a licence under the provisions of the WCA for the purposes of development. If it is not possible to avoid possible impacts to water voles or their habitats under the development proposals, it is therefore vital that water vole survey, mitigation design and implementation are considered early in order to avoid significant delays to programmes.
- 2.22 All UK native **amphibians** and **reptiles** are protected to some degree. The rarer species and their habitats (great crested newt, natterjack toad, sand lizard and smooth snake) are protected under the WCA and are also European protected species, for which the licensing implications are discussed above.
- 2.23 The more common amphibian species are only protected against sale, which is not relevant to developments. The more common reptile species (adder, grass snake, slow worm and viviparous lizard) are protected only from killing and injury (and also sale). In practice, this requires a reptile protection scheme before implementing a planning permission, but no specific licence is required.
- 2.24 **Badgers** receive protection under the PBA, 1992. In terms of development, this means that any scheme which involves the destruction of a recently active sett (even if an outlier) requires a licence from the appropriate licensing authority (NE or CCW). The licensing authority will require adequate protection of the animals, which means that alternative provision is needed and disturbance will not be permitted in the hibernation or early spring period when badgers are gestating or have dependent young. The licensing authority will tend to object to loss of a main sett.
- 2.25 **Schedule 8** of the WCA lists **plants** that are statutorily protected. In relation to development, these plants do tend to be very rare and not frequently encountered. The **bluebell** is scheduled, but this prohibits commercial bulb-picking from the wild rather than to prohibit development.
- 2.26 There is also a category of **plants** which it is an offence to introduce to the wild. These include **Japanese knotweed**, which is frequently encountered on brownfield sites. Care is needed to avoid spreading the species around the site during earthworks, and to ensure that any removal of infested soils off-site is to a licensed tip. **Giant hogweed** is also listed in this category of invasive alien plant species.

3.0 NATIONAL PLANNING POLICY GUIDANCE

England

- 3.1 National Planning Guidance is issued in the form of Planning Policy Guidance Notes (PPGs) and Planning Policy Statements (PPSs). These are issued on a topic basis. The most relevant is PPS9 Biodiversity and Geological Conservation (2005), but PPS12 (2004) Local Development Frameworks and PPG13 (2001) Transport also refer to nature conservation interests and consideration for nature conservation and

biodiversity in the planning process. The thrust of guidance in PPS9 is aimed at Regional Planning Bodies and Local Planning Authorities who must consider nature conservation impacts in planning policy and decision.

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

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

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

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

16 Planning authorities should ensure that these species [requiring conservation action as species of principal importance for the conservation of biodiversity in England] are protected from the adverse effects of development, where appropriate, by using planning conditions or obligations. Planning authorities should refuse planning

permission where harm to the species or their habitats would result unless the need for, and benefits or, the development clearly outweigh that harm.

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

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

Wales

- 3.8 Planning Policy Wales (PPW) sets out the land use policy of WAG.

- 3.9 PPW confirms that the natural heritage of Wales is not confined only to statutorily protected sites but across the entire extent of the country. It identifies that attractive and ecologically rich environments are important for their own sake and for the health and social and economic well being of individuals and communities, with the quality of the environment often being a factor in business location decisions. PPW identifies the importance of biodiversity and landscape considerations being taken into account at an early stage in both plan preparation and development control.

- 3.10 PPW states at paragraph 5.2.7:

The planning system has an important part to play in meeting biodiversity objectives by promoting approaches to development which create new opportunities to enhance biodiversity, prevent biodiversity losses, or compensate for losses where damage is unavoidable. Local planning authorities must address biodiversity issues in so far as they relate to land use planning, in both UDPs and development control decisions.

- 3.11 PPW guides LPAs specifically in relation to the protection of trees and woodlands at paragraph 5.2.8:

Trees, woodland and hedgerows are of great importance, both as wildlife habitats and in terms of their contribution to landscape character and beauty. Local planning authorities should seek to protect trees, groups of trees and areas of woodland where they have natural heritage value or contribute to the character or amenity of a particular locality. Ancient and semi-natural woodlands are irreplaceable habitats of high biodiversity value which should be protected from development that would result in significant damage.

- 3.12 Section 5.5 of PPW outlines Development Control and the conservation and improvement of the natural heritage. Relevant statements include:

At 5.5.1 "The effect of a development proposal on the wildlife or landscape of any area can be a material consideration. In such instances and in the interests of achieving sustainable development it is important to balance conservation objectives with the wider economic needs of local business and communities. Where development does occur it is important to ensure that all reasonable steps are taken to safeguard or enhance the environmental quality of the land."

At 5.5.2 "when considering any development proposal (including land allocated for development) local planning authorities should consider environmental impact, so as to

avoid, wherever possible, adverse effects on the environment. Where other material considerations outweigh the potential adverse environmental effects, authorities should seek to minimise those effects and should, where possible, retain and, where practicable, enhance features of conservation importance”.

At 5.5.11 “The presence of a species protected under European or UK legislation is a material consideration when a local planning authority is considering a development proposal which, if carried out, would likely result in disturbance or harm to the species or its habitat. ... An ecological survey to confirm whether a protected species is present and an assessment of the likely impact of the development on a protected species may be required in order to inform the planning decision.”

- 3.13 In relation to European protected species where derogation from the provisions of the Habitats Regulations is required to permit the development, PPW stresses that the *“Local planning authorities are under a duty to have regard to the requirements of the Habitats Directive in exercising its functions. TO avoid developments with planning permission subsequently not being granted a derogation in relation to a European protected species, planning authorities should take the three requirements for a derogation into account when considering development proposals where a European protected species is present.”*
- 3.14 PPW is supplemented by a series of **Technical Advice Notes (TAN)**, which are issued on a topic basis. The most relevant is TAN5 Nature Conservation and Planning (1996), but TAN12 Design (2002) also refers to landscape and biodiversity interests being material in the planning process.
- 3.15 The thrust of guidance in TAN5 is aimed at local planning authorities who must consider nature conservation impacts in planning policy and decision. However, TAN5 is a very useful summary of wildlife policy and practice, providing advice on:
- Development control issues for Special Protection Areas (SPAs), Special Areas of Conservation (SACs) and Sites of Special Scientific Interest (SSSIs);
 - The selection and designation of non-statutory nature conservation sites, such as local nature reserves;
 - The protection of species, commons and greens;
 - Annexes outlining the statutory framework for nature conservation and designated sites and give information about the Countryside Council for Wales.
- 3.16 TAN5 1996 is the version currently available from the Welsh Assembly, but it is expected to be updated shortly.

4.0 COUNTY, DISTRICT AND UNITARY DEVELOPMENT PLANS

- 4.1 Under the Planning and Compulsory Purchase Act 2004, Local, Structure and Unitary Development Plans are to be replaced by Local Development Plans (LDP). The LDP sets out each local planning authority's proposals for future development and use of land in their area. Once the LDP is adopted, it will form the basis of planning decisions that the local planning authority makes.
- 4.2 The degree of protection for sites and species will vary, but policies will always be very heavily weighted against development which might affect **statutory wildlife sites** (see section 2 above).
- 4.3 The development plan will allow for the designation and policy protection of **non-statutory wildlife sites**, (sometimes generically called second-tier sites, to distinguish

them from statutory sites). These sites go under a variety of names such as. Site of Biological Importance (SBI), Site of Importance for Nature Conservation (SINC), Biological Heritage Site (BHS) etc. Often geological sites are grouped with ecological sites, for example Regionally Important Geological/Geomorphological Sites (RIGS), Geological Heritage Sites (GHS).

- 4.4 Non-statutory sites are usually identified by a fairly rigorous system of criteria which are themselves usually adopted as supplementary planning guidance.
- 4.5 Adopted development plans often provide protection for '**Wildlife Corridors**' or '**Greenways**', which are identified on plan.
- 4.6 The extent of protection to non-statutory sites is usually not absolute, but even where the importance of development is considered to outweigh ecological interests, a mitigation strategy is usually required as a condition of a planning consent.
- 4.7 In England, PPG12 (2001) Development Plans has been replaced by PPS12 (2004) Local Development Frameworks. However, PPG12 will remain in operation for development plans still being prepared under the 1999 Development Plan Regulations.
- 4.8 In Wales, procedural advice is given in National Assembly for Wales/Welsh Office circulars. PPW, the TANs and the circulars together comprise national planning policy which to be taken to account by local planning authorities in Wales in the preparation of UDPs.

5.0 THE UK BIODIVERSITY ACTION PLAN

- 5.1 The publication of the **UK Biodiversity Action Plan (UKBAP)** is in response to Article 6 of the Rio Biodiversity Convention, to develop national strategies for the conservation of biological diversity and the sustainable use of biological resources. The UKBAP contains action plans for over 200 **UK priority species** and 30 **UK key habitats**, considered to be of national conservation priority.
- 5.2 UK priority species are defined in the *UK Biodiversity Group Tranche 2 Action Plans* (HMSO, 1998) as either globally threatened or rapidly declining in the UK, i.e. by more than 50% in the last 25 years. Some of the UK Priority species are statutorily protected, while others receive partial or no protection.
- 5.3 Specific to Wales, the list of the principal species of biodiversity importance which should be considered by Local Planning Authorities was published in 2003 in the document "Going Wild in Wales" (GWW).
- 5.4 The listing of a species or habitat in the UKBAP or in GWW, does not *per se* provide it with any statutory or planning policy protection; however, it is likely that many planning authorities will begin to introduce policies that provide protection to UKBAP species and habitats. Many non-statutory wildlife sites are already selected by reference to populations of UKBAP species and habitats.
- 5.5 In September 2007, UK Government endorsed a thorough review of the UK List of priority species and habitats. There are now 1149 priority species and 67 priority habitats. Some of these are frequently encountered on development sites, even in brownfield situations.

6.0 LOCAL BIODIVERSITY ACTION PLANS

- 6.1 Many districts, counties or metropolitan areas have **adopted nature conservation strategies** that tend to set out general principles of attention to nature conservation. Most of these date from the early to mid 1990s.
- 6.2 More recently, counties have prepared **Local Biodiversity Action Plans (LBAP)**, in conjunction with partners such as CCW, EA and the Wildlife Trust. These LBAPs highlight species and habitat types which are either of national concern (UKBAP species and habitats) or are endemic to the county and of local concern. LBAPs will be prepared for these species and habitats. As with the UKBAP, listing of a habitat type, a site or a species in a LBAP does not confer any new statutory or planning policy protection. However, impacts upon sites, habitats or species prioritised in LBAPs may be a material consideration in a planning application.
- 6.3 In Wales, some LBAPs have been adopted as Supplementary Planning Guidance by the local authority as recommended by 'Go Wild in Wales' 2003. In England, many LBAPs are used in the evidence base for emerging LDPs or are used as the basis to create Nature Conservation and biodiversity Supplementary Planning Documents (SPDs). Use of the BAPs in the manner may result in local species or habitats of conservation concern becoming a material consideration in planning.

7.0 OTHER LISTS OF SPECIES OF CONSERVATION CONCERN

- 7.1 In addition to the lists referred to above, there are other lists made of national abundance of groups of fauna, particularly the less well-documented groups. These lists do not themselves confer any statutory protection, but may often be used in Environmental Impact Assessment to establish whether or not a proposed development will have a significant impact.
- 7.2 In the case of **plants and invertebrates**, few species are statutorily protected or listed in the UK Biodiversity Action Plan, but many are thought to be rare or vulnerable. Such species are known as **Red Data Book (RDB)** species and there are various grades of ecological sensitivity, e.g. Nationally Rare/Vulnerable species, Nationally Notable (A), Nationally Notable (B) and Nationally Scarce. These gradings are based on frequency of occurrence of species in 10km² squares across the country e.g. for invertebrates Nationally Notable species occur in less than 300 10km² squares in the UK.
- 7.3 In the case of **birds**, there are various species categorised by a consortium of leading statutory and non-statutory organisations as **Species of Conservation Concern (SPOCC)**, but which may not necessarily be statutorily protected or listed in the UKBAP.
- 7.4 Species such as those discussed above are often listed in LBAPs (see Section 6 above).

