

# Royal Society for the Protection of Birds (RSPB) – EclA Guidelines Comments

The Royal Society for the Protection of Birds (RSPB) is the charity that takes action for wild birds and the environment. We are the largest wildlife conservation organisation in Europe with over one million members.

The RSPB has considerable experience and expertise in environmental assessment both at project and strategic levels of decision-making. We are actively involved in the environmental impact assessment (EIA) at all levels from the national and international debate on legislation and policy down to practical casework in the UK. We believe that EIA and related processes such as Ecological Impact Assessment are vital for integrating environmental considerations into decision-making on land use activities. We aim to stimulate further improvements in the treatment of biodiversity in these processes and to promote best practice<sup>1</sup>.

This response is divided into two parts. The first part presents our views on particular areas of interest or concern in the guidance. The second lists more minor points where we would like to suggest alternative wording or short additions to the text.

## **Part 1: Detailed comments**

### **National Biodiversity Planning Policy**

It is not immediately clear whether these guidelines are intended for an England-only or UK-wide audience. If they are intended for the latter, references to English planning policy and regulations (eg PPG9 – see below) should be made with care. Promoting the guidance to people in the devolved countries will be a more difficult task if references are only appropriate to an English audience. The references that are appropriate to people in the other countries should also be presented.

Following on from the above, now that Planning Policy Statement 9 has been issued, the references to PPG9 need to be updated. In some cases, for example the definition of integrity (para 4.34), the correct reference is now the Office of the Deputy Prime Minister 'Government Circular: Biodiversity and geological conservation – Statutory obligations and their impact within the planning system' (06/2005).

### **Relationship with other guidance**

Paragraph 1.11 states that IEEM intends to produce separate advice where an Appropriate Assessment under the Habitats Directive is required, so the EclA guidance does not cover the requirements on the Habitats Directive. We support this approach, and the proposed production of specific guidance on the Habitats Directive. However, we believe it is important that certain information is provided to prevent confusion between similar but different elements of the EclA process and the Habitats Directive requirements. For example, a short explanation is needed in this introductory section of the differences in 'significant effect' or 'impact' between EIA terminology and Habitats Directive terminology. 'Significant effect' within the Habitats Directive is very precise and relates only to an effect on the integrity of the site (especially in terms of the conservation interest for which the site is designated). 'Significant effect' or 'impact' in EIA / EclA can take account of a greater range of receptors and values and can therefore be more broadly defined.

### **Significant impact as defined by the guidance**

We are aware that debate about the definition of 'significant impact' has taken place during the preparation of this guidance. The definition now given in para 4.23 recommends that an impact is identified as either 'significant', or as 'not significant', based on a discussion of the factors which characterise it - rather than using a major / medium / minor significance approach as in some guidance. It takes account of both site integrity and conservation status of habitats and species. We fully support this definition as given in this section.

However, the section in Appendix 1 (1.4) comparing the TAG guidance and these guidelines seems to be at odds with the definition given in the rest of the text. It states that *'the present guidelines define a significant effect on a site ONLY as one that adversely affects its integrity. Effects only on conservation objectives of a site that would not lead to an effect on site integrity are not considered to be significant in terms of the site in the present guidance'*. There is a risk of confusion here in respect of assessing impact on SPAs/SACs.

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<sup>1</sup>RSPB has published the following good practice guidance on EIA - *Biodiversity Impact - Biodiversity and Environmental Impact Assessment: A New Approach* and *Biodiversity Impact - Biodiversity and Environmental Impact Assessment: A Good Practice Guide for Road Schemes* (2000) and *Wildlife Impact – the treatment of nature conservation in environmental assessment* (1995) RSPB.

Judgements on the effects on site integrity of SPAs/SACs must refer back to the site's conservation objectives. An impact that is significant in terms of the conservation objectives will almost certainly have an adverse effect on integrity. Therefore it is difficult to distinguish between the two. This interdependence needs to be made clear in the context of SPAs/SACs.

Related to this, the guidance should recognise that the Habitats Directive requires high standards of protection for SPAs/SACs. Essentially, there can be no reduction in the conservation status of a site. Therefore, any activity that will result in such a reduction will be an adverse effect. Although the guidance makes clear in the introduction that the requirements of the Habitats Directive will not be detailed, a short section to address any confusion between impact assessment and appropriate assessment issues such as this would be helpful.

### **Consultation**

*Box 3 (Stages in scoping) includes point 9 'agree details of proposed survey/research methodologies'. We feel strongly that these details should be agreed with stakeholders in order to avoid problems/disputes later and that point 9 should be amended accordingly. Failure to agree detailed methodology with stakeholders at this stage often leads to wasted effort and a requirement to repeat surveys later, when the original survey fails to provide robust data.*

***Para 2.18 notes that the timing of consultations with stakeholders will depend on the circumstances, but that in many cases it is helpful to engage in discussions after preliminary investigations have been carried out. This is true, provided discussions do not start after scoping or after certain baseline studies have been undertaken. Consultation may lead to different baseline requirements being recognised, or different methodologies being appropriate, which will be costly and time consuming if a lot of work has already been done. This suggestion should be clarified.***

### **The screening process**

Para 2.31 notes that contextual information is essential to confirm the spatial and temporal scope. We believe reference should also be made in this paragraph to the appropriate use of reference/control areas.

### **Site designation and input of EclA ecologists**

Para 3.14 suggests that if ecologists consider a site they are surveying no longer meets the criteria for designation, this should be reported in the assessment and conclusions discussed with the relevant authority. If a lower classification is agreed with the relevant authority then this adjusted value should be used in the assessment.

We have reservations about this paragraph. In the case of statutorily designated sites, this should not apply as:

- (1) for SPAs/SACs - there is a requirement to maintain or restore the site at favourable conservation status (FCS). This means that if a site has temporarily 'lost' its interest, the Government is under an obligation to restore the site to FCS in accordance with the site's conservation objectives. Ideally, this situation should not occur. Under Article 6(2) of the Habitats Directive the Government is required, in simple terms, to take appropriate steps to avoid habitat deterioration or disturbance to species that would reduce the conservation status of the site.
- (2) for SSSIs, the various country administrations have adopted (or in Wales are about to adopt) PSA targets to ensure a high percentage of the features or the area of SSSIs/ASSIs is in favourable condition. Except in extremis, SSSIs/ASSIs should not reach the position where they no longer meet the designation criteria.

If this situation is reached, it should be a trigger for investigation as to the causes and then remedial work to restore the site. Therefore, we recommend replacing the fourth sentence with the following:

'Where this relates to statutorily designated sites (i.e. SPAs, SACs, SSSIs, ASSIs), it is important to remember that the Government has legal and policy obligations to ensure these sites are in favourable condition. In the case of non-statutory sites, the potential to recreate lost interest must be taken into consideration (paragraph 3.44)'

We also note, where '*the potential to recreate the lost interest must be taken into consideration*', that proposals for mitigation for a development should not be the restoration of a site that should be functioning properly anyway.

### **Paragraph 3.27 - Valuing species**

This section needs an introductory paragraph setting out the statutory provisions, equivalent in content to paragraph 3.22 for habitats. The paragraph should cover the following in respect of species:

- birds (Annex I and regularly occurring migratory species) in respect of SPAs designated under Article 4 of the Birds Directive
- birds re Birds Directive Article 4(4) last sentence - outside of SPAs the UK Government under obligation in respect of Annex I/regularly occurring migratory species to 'strive to avoid the pollution or deterioration' of their habitats. This could go in the 'Valuing habitats' section just as easily.
- species for which SACs are designated (ie those listed on Annex II of the Birds Directive)
- European protected species (ie those listed on Annex IV of the Habs Directive)
- SSSIs - the selection guidelines will set out the criteria for which SSSIs can be selected for species

Paragraph 30 affords a higher priority to a rare and declining species than to a rare and stable species. This seems to ignore the vulnerability issue alluded to elsewhere in the paragraph. A rare but stable species may be present on just one site and therefore highly vulnerable to a single catastrophic event. This sentence should be amended accordingly.

#### **Para 3.44 - Potential value**

We believe that this paragraph is inaccurate in describing the legal obligations in respect of potential value. We believe that this issue only applies to the selection and subsequent management of SACs in order to achieve FCS for the species and habitats for which they have been selected - it does not have the broad application suggested in this paragraph.

The Habitats Directive does indeed require Governments to maintain or restore at favourable conservation status '*natural habitats and species of wild fauna and flora of Community interest*' [Article 2(2)]. The key issue here is that it relates only to habitats and species of *community interest*. It then is more narrowly drawn by Article 3 as *the* delivery mechanism for this in relation to habitats/species on Annexes I and II is *the* SAC network. Therefore, consideration of potential value in respect of habitats/species on Annexes I/II only comes in to play in the selection of SACs in order to achieve FCS for those species or habitats.

*We believe this is the only real application of 'potential value' in the Habitats Directive. It would be prudent for IEEM to consult one of the species specialist groups for an interpretation of the sections in the Habitats Directive on species protection (articles 12-16).*

*A second point that should be added in to this paragraph is that the various PSA targets to achieve favourable condition on SSSIs/ASSIs, means that the 'favourable condition' of a SSSI/ASSI should be the benchmark against which impacts are assessed. This is important because legal mechanisms now exist by which it is possible to deliver the sites to 'favourable condition'. It is no longer a valid defence to suggest that there is no realistic chance of a SSSI/ASSI achieving favourable condition.*

#### **Economic value – para 3.56-57**

We have reservations about the wording used in this section. The examples focus on ecosystem benefits whose value is easily seen in the market (eg shell fish, fish / hunting licenses, tourist revenue). There are many other biodiversity services and benefits that are financially valuable but not reflected in markets, for example climate regulation, water purification, nutrient cycling etc. The reference in para 3.55 to '*financially valuable*' ignores the non-financial values of biodiversity (such as cultural, amenity and intrinsic values). We also warn that the term 'assigning values' should not only mean monetary value, since it is very difficult to monetise the values of many ecosystem services. To clarify this, we suggest the second sentence of 3.56 is re-worded as follows:

*'Ecologists and economists may need to work together to identify economically important resources, but the economist should **decide how to describe their economic value in qualitative and quantitative terms.**'*

*Any economic appraisal should be open to consultation as soon as possible, with the methodology presented transparently so that stakeholders can give a view on the values assigned.*

Characterising ecological impacts - duration

**Para 4.11 on duration of impacts suggests that five years might be seen as short-term in the human context. In our experience of EIAs, five years is often viewed as long term. For some animals, five years is a short time span. There needs to be a distinction between short-term and longer-term impacts that may be of longer duration than suggested in 4.10 and 4.11.**

**Table 1: worked example of effect of road widening on Dartford warblers**

Paragraph 4.44 states that without mitigation, the conservation status of the Dartford warblers in the worked example was at risk due to disturbance from people, cats and dogs. However, disturbance from people, cats and dogs is not considered in the worked example. The example concentrates solely on the effects of noise from the road improvement. This paragraph needs to be re-written to better describe the findings of the worked example.

In the operational impacts section, we believe a caveat is needed in the fourth column in relation to the Reijnen study. For example, *'however, care is needed as the Reijnen et al study did not relate to heathland habitats and therefore presents difficulty in applying its findings to this habitat'*. This is one of a very few studies that has examined the impacts of roads on habitats, but great care must be taken when using it in a heathland context. The application of its thresholds should not be promulgated without a health warning.

**Paragraphs 5.1 and 5.2 on mitigation, compensation and enhancement**

Paragraph 5.1 is somewhat confusing as it states quite clearly that proponents are *required* to recommend mitigation and compensation measures. However, the situation is not so clear in reality. For example, compensation is only required in respect of damage to SPAs/SACs considered to be of overriding public interest. In other situations, it is a matter of good practice (though there are legal implications in respect of SSSIs).

*We are concerned that the third bullet point suggests that compensation is only required in respect of remaining 'significant adverse ecological effects'. This is not the requirement in respect of SPAs/SACs. This section may be improved by incorporating a section in the introduction to the document, as suggested previously, reminding readers that in respect of SPAs/SACs there are some very strict additional requirements that have to be met.*

Para 5.2 recommends that mitigation measures should be incorporated into a scheme as part of the design process. This is good practice but the paragraph should clarify that mitigation measures cannot be taken into account in the screening process. A sentence should be added, for example, *'However, mitigation measures should not be considered in the screening process as to do so would risk undermining the purpose of the impact assessment process'*.

**Compensation and habitat banking**

Paragraph 5.4 refers to the view that there should be more emphasis on the delivery of biodiversity objectives and less on damage limitation. It also mentions habitat banking schemes. In the first sentence we recommend deleting *'and less on damage limitation'*. It cannot be right that there should be less effort put into avoiding / reducing damage. However, it is appropriate that there should be increased attention given to delivering biodiversity objectives. What this sentence means is that more resources are needed overall.

*In the third sentence, we recommend deleting 'or other forms of compensation'. In most cases, if a developer is providing compensation, this is done to ensure that there is no net loss of biodiversity resource – therefore this cannot contribute to biodiversity objectives i.e. biodiversity gain.*

We have serious reservations about habitat banking schemes in general. In particular, experience in the US suggests that the schemes are sometimes limited in success. On the assumption that compensation is applicable only for highly valued features of conservation importance, it should be on a like-for-like basis. Whilst land banking offers the advantage of putting 'compensation' in place prior to damage being incurred, it may not be on a like-for-like basis unless tied closely to specific development proposals. We suggest that the passing reference to land banking, without supporting detail, be deleted. If a reference to land banking has to be maintained in the final version of the guidance, it needs to be placed in context and a caveat regarding its effectiveness should be inserted.

***Para 5.8 notes that there is currently no general legal requirement to implement or monitor the success of mitigation, compensation or enhancement measures. This is true to some extent, however if mitigation / compensation measures are part of planning conditions or obligations, the developer does have a duty to implement them fully and many legal agreements will include the setting up of monitoring and assessment of effectiveness. Additionally the Habitats Directive imposes a duty on the UK Government to ensure that adverse impacts are mitigated properly, and that compensation is secured and effective, in relation to relevant sites.***

**Table 2 – Ecological, legal and policy implications**

*A number of corrections need to be made to this table. In the Adverse Impacts section, there is a cell on the International row describing the implications for development control. The first sentence omits the*

*'alternatives' test of the Habitats Regulations, which must be passed before a project can be consented for reasons of over-riding reasons of public interest (these reasons can only be considered if it has been established that there are no alternatives to the proposal). The test needs to be included in this description. The text also confuses the site protection and species protection provisions/requirements of the Habitats Directive and Habitats Regulations. The licensing requirements in respect of European protected species need to be separated from the site protection requirements under Regulations 48, 49 and 53.*

In the same section, the first sentence of para 2 needs to be re-written as follows:  
*'If consent is granted, compensation for **damage will be required...**'*

Where damaging schemes (as opposed to those that result in 'losses' which is different) are consented, compensatory measures are required - without them, the scheme should be refused.

For the National row, the cell that describes legal implications needs to be re-written as follows:  
***'Likely conflict with the LPA's duty under section 28G of the Wildlife and Countryside Act 1981 (as amended). LPA will be required to consult with statutory conservation agency before authorising a damaging proposal.'***

In the Positive Impacts section of the table, the International row includes Implications for Development Control. In paragraph 2, the word '*may*' needs to be replaced with '*should*'. Good practice for any such scheme must be to set up robust long-term management and monitoring – the current wording implies it would be optional.

## **Part 2: Suggested text additions and amendments**

### **Throughout**

***The references within the text to the 'boxes' of explanatory information should be more clearly highlighted, for example by underlining or bolding the text.***

### **Summary**

In '*assessment of whether these biophysical changes will give rise to a significant ecological impact*', replace underlined text with '*are likely to*'.

After '*provision for monitoring and following up the implementation and success of mitigation measures and ecological outcomes*', insert '*including feedback in relation to predicted outcomes*'.

### **Box 2 (EIA process)**

Scoping: After '*Undertake preliminary assessment of potential ecological receptors and impacts*', insert '*incorporating existing data/information*'

*Evolution of proposal design and mitigation: second bullet point refers to compensation and so should be moved from this section to the next section 'Identify significant residual impacts...'*

***Reporting: After 'Clear explanation of the criteria used to evaluate ecological resources and assess the significance of impacts' insert 'if the proposal does go ahead'***

*Follow-up and monitoring: last bullet point - add reference to compensation measures as there should be provision for remedial measures for these too.*

### **Box 5 – Information about the proposal**

In the last section (To assess the impacts of alternatives etc) add new bullet point:

- *Alternative means of meeting objectives of proposal*

This is necessary because alternative sites or designs may not be the only alternatives to fulfil the need the proposal seeks to meet.

### **Box 6 Activities likely to generate impacts: Construction phase**

After 'Access and travel on- and off-site', add 'presence of personnel on site as well as vehicles. Also add a final bullet point as follows: 'Removal, disruption to soil etc may mobilise contaminants leading to pollution.'

### **Box 6 Activities likely to generate impacts: Occupation/Operational phase**

After 'Presence of people' insert ', vehicles'.

#### **Para 2.18**

At end of the second sentence, insert a new sentence:

'Where there are many possible alternative sites to locate the proposal, it can be very helpful to consult stakeholders before preliminary investigations take place in order to identify those sites likely to cause the least ecological damage.'

#### **Para 2.19**

*In first sentence, either delete 'sometimes' or replace with 'often'. As it stands, this sentence downplays the usefulness of consulting stakeholders as early as possible during the scoping process and continuing that throughout the scoping process.*

#### **Para 3.29**

Third sentence - the 5 years data referred to as being required by EN relates to international sites e.g. SPAs. For SSSIs, only 3 years of data are normally required. This should be acknowledged.

In last sentence insert 'national or' before 'international' to cover SSSIs/ASSIs too.

#### **Para 3.9**

At beginning of second sentence, insert 'It is UK Government policy that...' to reflect UK Government position that pSPAs/cSACs and Ramsar sites should receive the same protection as designated SPAs/SACs.

It should also be noted that ECJ rulings have provided differing interpretations to the Government position in respect of (1) sites that should be SPAs (Basses Corbières ruling) and (2) sites proposed as SACs but not yet accepted by the Commission as SCIs (ECJ case C-117/03).

Box 8 Information required to establish baseline conditions for ecological resources within the zone of influence

In the following question 'Are there any legally protected breeding, [wintering or passage/migration stopover] sites, habitats or resting places for internationally, nationally or other important species?', insert the text provided in square brackets.

Under 'What are the key ecological processes or species activity periods; are there seasonal variations in distribution, abundance and activity?', we think the following factors should also be considered: tidal, diurnal/nocturnal cycles, age-related aspects e.g. recently fledged young of year v adults etc.

#### **Para 2.36 - issues to consider when selecting ecological resources for further investigation.**

Under a – designated value – add 'also, qualifying interest of species on sites that might be designated'.

#### **Para 3.44 - Potential value**

*The title should be in bold, as it presently appears as a subset of 'Injurious and legally controlled weeds'.*

#### **Box 12**

Ecosystem properties - add in 'Source/sink population'.

#### **Para 4.15**

At end of paragraph, add 'and give rise to overcrowding elsewhere.'

#### **Paras 4.16 and 4.29**

These paragraphs refer to 'quality breeding habitat'. We suggest they should refer to 'high quality breeding habitat'.

#### **Box 13**

At end of 3rd bullet point add 'and sea-level rise' to make it as realistic as possible.

**Para 4.29**

The cross-ref to para 4.17 is incorrect.

**Para 4.36**

At end add 'e.g. effect of changes to coastal geomorphological processes on estuarine habitats'

**Para 4.37**

In the first sentence, replace 'may' with 'should'. The test of integrity is against the site's conservation objectives – it is not optional.

In the first sentence, delete 'any' before 'conservation objectives'. All SPAs/SACs should have site conservation objectives.

**Table 2: Ecological, legal and policy implications**

***The word 'affect' is used a number of times when the word 'effect' should be used.***

**Para 5.3**

Make the following changes (underline) to the final sentence: '*However, compensation often carries higher uncertainty and may result in a temporary loss of ecological value due to a time lag between damage occurring and the new habitat becoming fully functional*'.

**Para 5.8**

At end add new sentence '*The legal duties set out under the Habitats Directive in respect of the protection of SPAs and SACs, mean that it will be necessary to monitor the effectiveness of mitigation and compensation measures in respect of SPAs and SACs and, where necessary, provide remedial measures if those measures do not meet the agreed standard.*'

**New para 5.12**

*There needs to be a paragraph on agreeing biological/physical habitat targets in respect of compensation measures and monitoring those measures.*

Habitat compensation should have clear objectives e.g.

- Primary, high level objectives related to reasons for compensation, gross area of compensation and overall quality of compensation; and
- Detailed objectives comprising specific ecological requirements for the habitat compensation scheme in terms of e.g. the number of birds and the habitats they require.

**Para 6.5**

In last sentence after 'appropriate assessment' insert 'by the competent authority'

**Para 6.14**

5th bullet point reword as follows:

- *Availability and security of land to implement successfully the design options*