



SCOTTISH EXECUTIVE
Development Department

PLANNING

Assessing Development Plans in Terms of the Need for Appropriate Assessment

May 2006

Interim Guidance



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Introduction

1. The purpose of this interim guidance is to give planning authorities information on why consideration of the need for appropriate assessment of development plans is necessary, what steps are required to be undertaken and how the Scottish Executive (SE) and SNH can assist local authorities comply with the requirements of Article 6 of the Habitats Directive. This guidance supplements the requirements set out in the Chief Planner's letter of 7 April 2006 (see Annex 2). It is intended to provide planning authorities with a pragmatic approach and some practical assistance in the intervening period in advance of amendments being made to The Conservation (Natural Habitats, &c.) Regulations 1994 ("Habitats Regs") to specifically require development plans to be considered under domestic legislation. The SE will consult shortly on these amendments and consider the need for further guidance in consultation with stakeholders.

2. Responsibility for carrying out appropriate assessments of development plans rests with planning authorities. SNH can assist planning authorities with advice on carrying out an appropriate assessment and the relevant procedural steps.

Background

3. Planning authorities will be aware that the European Court of Justice (ECJ) has ruled (see extract Annex 3) that the UK is not compliant with the Habitats Directive because the transposition of the Directive to the UK Habitats Regs does not specifically require land use plans to be considered under Articles 6(3) and 6(4) of the Directive. The ruling holds that the Habitats Directive applies, not only to projects, but also to the process for the production of development plans within the planning system. As a result of this judgement, it is our understanding that structure plans cannot therefore be approved by Scottish Ministers or, in the case of local plans, be adopted by planning authorities unless:

- there has been a determination by the planning authority based on objective information that the provisions of the plan are **not** likely to have a significant effect on any European site; or
- an **appropriate assessment** has been carried out in respect of the provisions of the plan in line with the requirements of Article 6.3 and 6.4 of the Habitats Directive.

4. This has implications for development plans in preparation, plans before Scottish Ministers and for future plans under both the current and reformed planning system. This guidance deals with plans under the current planning system.

Transitional arrangements

5. Planning authorities must consider whether any structure plan or local plan in preparation or for future preparation is likely to have a significant effect on a European site, and, if necessary, for such plans to undergo an appropriate assessment prior to being submitted to Scottish Ministers for approval or, in the case of local plans, prior to Scottish Ministers giving approval to proceed to adopt. Where the plan is judged not likely to have a significant effect on a European site, planning authorities are asked to provide a reasoned determination in support of that decision. The reasoned determination should be robust, based on sound judgement and an audit of the consideration given to the likelihood of the plan having a significant effect. While some of the procedural steps set out in the 1994 Regulations will be useful to follow, particularly Regulations 48, 49, 52 and 53, the requirements under Article 6 (3) and 6 (4) of the Habitats Directive are those that have to be met. The European Commission's guidance on *Managing Natura Sites: The Provisions of Article 6 of the Habitats Directive 92/43/EEC* will be helpful.

http://ec.europa.eu/comm/environment/nature/nature_conservation/eu_nature_legislation/specific_articles/art6/pdf/art6_en.pdf

6. While planning authorities are the responsible authority for undertaking appropriate assessments, SNH will be able to provide advice and assistance. Planning authorities are encouraged to involve SNH at the outset of plan preparation and take account of their advice on the need and form of any appropriate assessment and whether, once the assessment has been completed where necessary, in their view, it can be ascertained that the integrity of one or more European sites will not be adversely affected. Plans will be at various stages of the process and SNH's view should be sought at the earliest opportunity to get advice on what needs to be done at that particular stage. SNH have been given a note of each plan under preparation and the stage it has reached.

Consultation and Submitting Plans to Ministers

7. Consideration of whether a plan is likely to have a significant effect should be made before the plan is issued for each consultative stage. If necessary an appropriate assessment should also be undertaken prior to consultation. This will enable any alternative solutions to have been considered and any necessary adjustments made in advance of consultation. As a matter of transparency, a short paper should be published at each consultative stage of the plan. This should set out how the authority has determined that there is not likely to be a significant effect and, where an appropriate assessment has been undertaken, the conclusions reached and what action is proposed or has been taken to comply with the Habitats Directive. This will also be appropriate when submitting a structure plan to Scottish Ministers for approval or, in the case of local plans, as part of the notice of intention to adopt. In preparing any reports, or seeking any comments, planning authorities may find it useful to use the terminology

referred to in the Habitats Directive. For example, if you are considering whether the plan is “likely to have a significant effect on a European site”, then if you use this wording and base any determination and conclusions on it, it will avoid any ambiguity about what is being assessed.

8. In commenting on a plan, SNH will state clearly whether they agree with the planning authority as to whether there is likely to be no significant effect or whether they are content with the conclusions of the appropriate assessment. The Scottish Ministers will be sent a copy of SNH’s response.

When is an appropriate assessment of a plan required?

9. Every plan should, initially, be considered by planning authorities as a candidate for appropriate assessment. Planning authorities which have European sites within their territory will be familiar (mainly through planning applications) with the process of consideration of projects. SE Circular 6/95 (as amended in 2000) - the title is in the glossary - sets out both policy and procedural guidance on this and this remains a relevant reference source. The tests relating to plans are the same as for projects although their application to plans may raise more complex issues and judgements.

10. Having regard to the ECJ ruling, tests can be applied as to whether an appropriate assessment of a plan by the planning authority is required, namely:

- Are any of the proposals in the plan so unlikely to pass the tests of Articles 6.3 or 6.4 of the Habitats Directive that it is not in the public interest to include them in the plan?
- Even with the removal of the above elements would the implementation of the plan, alone or in combination with other plans, be likely to have a significant effect on any interest / feature of any European site?

11. If any significant effect is likely, then an appropriate assessment is required. These key steps are covered in more detail in the following sections and in table 1 and Annex 1.

What is a significant effect?

12. The initial task for planning authorities is to establish whether a plan will have a significant effect on a European site or sites. Determining what is a significant effect should not be a lengthy process. As a guide, any element of a plan which has the potential to affect the interests of the site should initially be considered significant and an appropriate assessment undertaken. This position is based on a ECJ case in 2004 (C-127/02, Waddenzee, Netherlands). See footnote.

<http://europa.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&docj=docj&numaff=C-127%2F02&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100>

13. Where there is a possible link to a European site but no significant effect is considered likely and an appropriate assessment is judged not to be required, it is recommended that a record of this decision and the reasoning behind it is made, in case of challenge. It is useful to use the terminology of the first part of Article 6(3) of the Habitats Directive to show the correct test has been applied.

What is an appropriate assessment (AA)?

14. There is no set format for an appropriate assessment, which should be of a scale, and level of detail sufficient to be able answer the test posed in Article 6.3 that it can be ascertained that the plan will not adversely affect the integrity of any site and sufficiently rigorous to justify the conclusions. While in some cases this may require a high level of detail, in others this may not be required. In all cases, however, a full record of the information used and appraisal within the assessment should be kept to justify the conclusions.

15. AA is applicable to structure plans and local plans, and should be carried out from the earliest possible stage. It is for planning authorities to consider what level of assessment is “appropriate” for each plan and to consider what action needs to be undertaken and when, including the need for consultation. This should be proportionate to the scope and level of detail of the plan under consideration. The effects of a development plan on European site interests must be assessed at each relevant stage of plan preparation and the assessment refined and developed as the plan progresses through its preparation. The assessment should be re-visited with increasing specificity at subsequent stages of plan preparation.

16. It is recognised that an assessment of a plan is likely by its nature to be less specific and detailed than the assessment of an individual project would be. Where a firm proposal with an identified scale or locational components forms part of a plan (eg provision for x houses in a specified area), this is capable of more detailed assessment. However, in many cases, the outcomes of policy proposals, (e.g, encouragement of affordable rural housing), may not be readily apparent until a later stage and may not be able to be assessed in detail until that stage. This variable, and usually broader, level of assessment for development plans as a whole is acknowledged by the EC in their Article 6 guidance (see earlier link).

17. Planning authorities will have to consider what level of assessment is appropriate for the contents of respective plans to allow them to determine the likely impact of the plan’s provisions. It should be proportionate, fit for purpose and pragmatic. What is expected is that planning authorities should nevertheless fulfill their commitments under the Habitats Directive in as rigorous an assessment as is practicable in the context of the individual plan, to answer the tests in the Directive.

18. There will be circumstances where it is clear that, even subject to appropriate safeguards, an element of the plan will not be able to progress as

it will adversely affect the integrity of a European site. In such circumstances the element should either be removed or an alternative adopted which avoids the problem identified.

19. Where it is clear that elements of the plan are capable of being implemented without adversely affecting a European site, these can be approved for inclusion in the plan. This approval may be subject to caveats by way of safeguarding wording, particularly where the implementation will require a further level of assessment at a more detailed stage. It is important, in approving such elements of a plan, that it is made clear that this does not exempt further assessment as these are progressed.

20. Note that it is not sufficient to argue safeguards through wording alone or in terms of a generic policy protecting European sites; this can only be done as part of an appropriate assessment. However, as part of such an assessment, it is legitimate to cross-reference between policies which affect sites and overarching protection policies.

21. In cases where an appropriate assessment indicates that there will be a negative impact that has an adverse effect on the integrity of a European site, and removal of the specific adverse element from the plan is not an option, it is for the planning authority to consider alternative solutions. In the absence of such solutions, they should consider whether they wish the plan to be adopted or approved in its current form on the exceptional grounds of imperative reasons of over-riding public interest. Such an option could only take place with approval of the Scottish Ministers and it is essential that the discussion of any such proposals takes place at the earliest possible opportunity.

Examples of Emerging Approaches

22. It is very early stages and so useful examples of how planning authorities might approach consideration of whether policies in a plan are likely to have significant effect are thin on the ground. However, a few planning authorities have adopted interesting approaches and here are two that you may wish to contact: The Glasgow and Clyde Valley Structure Plan Team and The Joint Ayrshire Structure Plan Team.

23. Unfortunately the plans were not on their website at the time of finalising this Guidance but they will be happy to discuss their process with you or, if available when you contact them, provide you with a copy of their approach. The same principles also apply to local plans and your local SNH office will be able to point you in the direction of local plans currently in preparation where interesting approaches have been undertaken.

24. The Joint Ayrshire Structure Plan includes an addition to a general condition on the protection of European sites which you may wish to consider. It ensures that no application will be approved that does not comply with the plan. **Please note that the Executive is not endorsing the content of these plans as they have still to be approved by The Scottish Ministers. We are simply drawing attention to the methods used to enable a conclusion to be reached by authorities on whether policies are likely to have a significant effect.**

Table 1 gives an indication of the steps which the above process involves and which planning authorities may find helpful to adopt

Links between Appropriate Assessment and Strategic Environmental Assessment

25. Plans and programmes that require assessment as a result of the *Habitats Directive* are also subject to the assessment procedure under the SEA Directive (Article 3(2)(b)). The SEA Directive promotes the opportunity for a combined procedure, which may avoid possible duplication, providing it fulfils the requirements of the SEA Directive and the *Habitats Directive*. In such an event, the procedure has to include the procedural steps required by the SEA Directive, and the substantive test regarding the effect on European sites required by the *Habitats Directive*.

26. Planning authorities are encouraged to undertake a combined SEA/AA approach. Consideration should be given to opportunities for sharing aspects of the SEA process with the AA process, though it is recognised that each assessment has a different focus and requirements and therefore cannot be fully integrated. One option is to run the two assessments in parallel utilising common stages such as environmental information gathering; prediction of plan effects; consideration of alternatives; and consultation and publicity stages. The early stage of SEA may be particularly helpful in gathering information prior to policies or proposals being considered. The benefit of a parallel approach is that it can be quite clearly shown in a report how there has been compliance with the *Habitats Directive*. This approach can achieve appropriate savings in resources.

Steps 1 –7 in Table 1 indicate areas for combined AA/SEA procedures akin to a screening stage. Steps 8 – 12 relate specifically to AA

27. If the Appropriate Assessment is undertaken as part of a SEA, it is important that it is clearly documented and that the elements relating to the AA use the proper terms (i.e. the wording of the *Habitats Directive*). It should be made clear in the SEA Environmental Report as to which parts of the Report and the process are intended to form the AA. In particular, it will need to be clearly stated where the plan would and would not be likely to have significant effects on any European site, and in the case of the latter, whether it has been ascertained that the plan will not adversely affect the integrity of any European site.

Sources of information

28. Planning Authorities should already have information on the location of all European sites. Further information on qualifying interests and conservation objectives for the sites, along with other supporting information, will be available on the SNH website, (this information will be augmented shortly) or from local SNH offices. More detailed information may be also available from SNH and other statutory bodies such as SEPA, SE, and FC. In circumstances where the relevant information necessary for assessment does not exist, the planning authority may need to commission work to obtain the information.

29. Planning authorities are advised not to use *Assessment of Plans and Projects Significantly Affecting Natura 2000 Sites: Methodological Guidance on the Provisions of Articles 6(3) and 6(4) of the Habitats Directive 92/43/EEC*. In light of the Waddenzee ruling, this guidance needs updating.

30. If you have any enquiries about the contents of this guidance, contact John O'Brien at: john.o'brien@scotland.gsi.gov.uk or by telephoning 0131 244 7061.

TABLE 1: CHECKLIST: ASSESSING DEVELOPMENT PLANS FOR APPROPRIATE ASSESSMENT

Screening Phase (combined with SEA)

- Step 1 Identify the geographical scope of the plan.
- Step 2 Identify all European sites that may be affected. This may require consideration of sites outside the boundaries of the plan area and should include both maritime and terrestrial sites. If there is any doubt as to whether any European site may be affected, a precautionary approach should be adopted and the site should be included in the assessment. SNH can advise.
- Step 3 Consider the qualifying interests and conservation objectives of each European site which may be affected, in the context of the plan's aims and objectives. Remember that the area affected may extend beyond the boundaries of the plan area. SNH can advise.
- Step 4 Consider the intentions of the aims, objectives, proposals and policies within the plan, and the anticipated changes to the interests of any of the sites that its implementation may cause or contribute to. Estimate the likely magnitude, duration, location and extent of the effects of these changes as far as they may reasonably be predicted at this stage. Remember that the area affected may extend beyond the boundaries of the plan area.
- Step 5 Determine which, if any, elements of the plan would be likely to have a significant effect on any interest/feature of any European site, alone or in combination with other projects and plans, directly or indirectly. The European site or sites that could be affected, should be explicitly cited in the tests. This appraisal can be applied as a signposted or ring-fenced part of the normal SEA process or in a separate procedure.
- Step 6 If the planning authority determines that the plan will not be likely to have a significant effect on any European site it may proceed to adoption or, in the case of structure plans, to submission for Scottish Ministers' approval without requirement for appropriate assessment. A record should be kept of the appraisal and the reasoning behind this conclusion, ensuring that the terminology of the Habitats Directive is used.
- Step 7 For each likely significant effect, consider (in consultation with SNH and any other relevant body as appropriate) whether any option or alternative approach in the plan, including those that

may have previously been rejected, could avoid such an effect on the international site, and still achieve the plan's aims and objectives. If such modifications remove the likelihood of a significant effect on any European site, the plan may proceed to adoption or submission for Scottish Ministers' approval. A record should be kept of the modifications made, their appraisal and the reasoning behind such a conclusion.

Appropriate Assessment Phase (specific to AA)

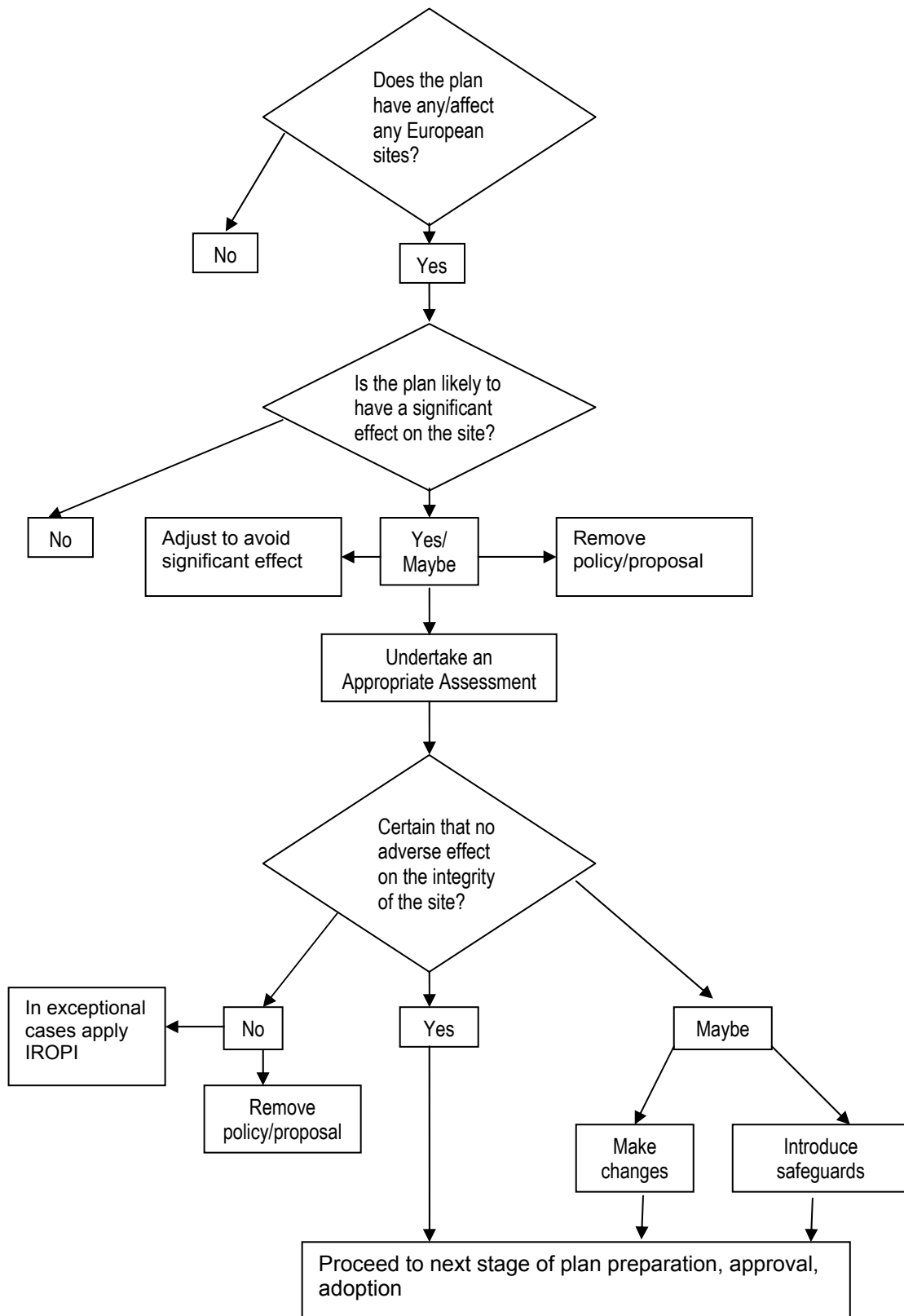
- Step 8 Where a significant effect on a European site remains likely, an appropriate assessment is required. Agree the methods and scope of the appropriate assessment with SNH and other relevant stakeholders (eg SEPA; FCS).
- Step 9 For each likely significant effect, alone or in combination, undertake an appropriate assessment of the implications for the site in light of its conservation objectives, using the best information, science and technical know-how available (regulation 48(1)). The Planning authority should acquire any further information, reasonably obtainable at this stage, to inform the assessment (regulation 48(2)). The assessment should be as full as practicable, being proportional to the level in the hierarchy and detail of the plan.
- Step 10 Having formally consulted SNH (regulation 48(3)) and other stakeholders that may have information or expertise to assist the appropriate assessment (regulation 48(4)), the Planning Authority should identify any impacts on European sites, actions which might avoid or mitigate these, or restrictions which would allow them to be undertaken. The Planning Authority should ascertain that the plan would not adversely affect the integrity of any international site (regulation 48(5)). In doing so it should have regard to the manner in which it is proposed it will be carried out, and consider any restrictions or modifications to which the plan may be subjected, in order to achieve this (regulation 48(6)).
- Step 11 If it *can* be ascertained that the plan will not adversely affect the integrity of any European site either with or without any restrictions or modifications which address any of the potential effects identified, it may proceed to adoption. In approving a higher level plan which will be subject to further elaboration at a more detailed level, it is important that conditions or restrictions on approval of the higher level plan ensure that further assessment will be required to ascertain that the integrity of any European site will not be adversely affected. It should be made explicit in the plan that any subsequent plan or project will only be compliant with the earlier plan in such circumstances.

Step 12 If it *cannot* be ascertained that a plan will *not* adversely affect the integrity of a European site, the planning authority can only proceed with it if it is agreed that it meets the necessary tests for imperative reasons of overriding public interest, there being no alternatives and subject to appropriate compensatory measures (regulation 49). This has to be agreed by Scottish Ministers. It may also require consultation with the European Commission.

Appropriate Assessment – Flowchart

Annex 1

Table 1 gives the details of the procedural steps and this is a summary of the main steps in assessing plans



Ensure that a record is kept of appraisals and decisions at each stage so that a clear audit trail is provided.



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7 April 2006

STRUCTURE PLANS AND LOCAL PLANS CURRENTLY BEING PREPARED: THE IMPLICATIONS OF THE ECJ RULING ON THE HABITATS DIRECTIVE

In his letter of 6 December 2005 John O'Brien informed you of the ECJ Ruling relating to the appropriate assessment of development plans and the possibility of changes to the Conservation (Natural Habitats, &c.) Regulations 1994.

In light of John's letter I expect planning authorities will have been seeking their own legal advice on the implications of this ruling for their development plans. While it is a matter for planning authorities to consider what steps they should take, I am writing concerning plans which are currently in preparation and what Scottish Ministers will be expecting to happen for plans that will be submitted to them under the provisions of the Town and Country Planning (Scotland) Act 1997. I am also writing to let you know what action the Scottish Executive is taking to see what practical assistance it can give to planning authorities in implementing this ruling.

As regards structure and local plans currently in preparation, the Scottish Ministers will not be able to approve structure plans (including alterations) or allow planning authorities to adopt local plans (including alterations) unless:

- 1) there has been a determination by the planning authority based on objective information that there is no potential or risk that the provisions of the plan would impact on a European Site: or
- 2) an appropriate assessment has been carried out in respect of the provisions of the plan in line with the requirements of Article 6 of the Habitats Directive.

The responsibility for carrying out these assessments rests with planning authorities. In undertaking assessments, you will wish to consider what level of assessment is “appropriate” for your structure or local plan. Planning authorities will need to consider what action they need to take and when, including the need for further consultation. The advice below should be helpful in this regard. Any plans submitted to the Scottish Ministers where it is not clear that step one and, if necessary, step two have been undertaken will normally be sent back to the planning authority. However, where a plan is submitted to Scottish Ministers after authorities receive this letter and no such assessment has been undertaken, the Scottish Ministers will not make a decision on the plan until the planning authority provides a view that a plan is not likely to have a significant effect on Natura Sites in the plan area or provides them with an appropriate assessment.

Action

It is therefore advisable for you to consider every plan as a candidate for appropriate assessment, determine whether one is required and if so carry it out either before it is submitted to the Executive or provide a written view after it has been submitted. For plans which are currently before the Executive we are also advising each authority separately, based on the level of consideration already given to natural heritage interests. If you have or will be undertaking a Strategic Environmental Assessment it should provide a good source of information and evaluation for the appropriate assessment but the separate statutory requirements for each assessment have to be satisfied. We are working with Scottish Natural Heritage on this matter and planning authorities should seek their advice as appropriate.

Sources of Advice

There is some useful advice and guidance available to understand the issues and the requirements of Article 6 of the Habitats Directive. This advice, which has been published by the European Commission, is entitled *Managing Natura 2000 Sites: The Provisions of Article 6 of the Habitats Directive 92/43/EEC*. It can be found at: http://ec.europa.eu/comm/environment/nature/nature_conservation/eu_nature_legislation/specific_articles/art6/pdf/art6_en.pdf. The Scottish Executive is preparing interim guidance and this will be issued shortly.

Workshop

In order to understand better the main issues and the implications for practice and advice to planning authorities, we intend to arrange a workshop as soon as possible. As well as representatives from planning departments we also think it would be useful to involve local authority legal advisers, SNH and SEPA.

I hope this is helpful in demonstrating how we are taking forward what is a complex issue.

I am copying this letter to SNH for information.

Yours sincerely

JAMES G MACKINNON
Chief Planner

EXTRACT FROM ECJ RULING

Land use plans

- 51 The Commission submits that United Kingdom legislation does not clearly require land use plans to be subject to appropriate assessment of their implications for SACs in accordance with Article 6(3) and (4) of the Habitats Directive.
- 52 According to the Commission, although land use plans do not as such authorise development and planning permission must be obtained for development projects in the normal manner, they have great influence on development decisions. Therefore land use plans must also be subject to appropriate assessment of their implications for the site concerned.
- 53 The United Kingdom accepts that land use plans can be considered to be 'plans and projects' for the purposes of Article 6(3) of the Habitats Directive, but it disputes that they can have a significant effect on sites protected pursuant to the directive. It submits that they do not in themselves authorise a particular programme to be carried out and that, consequently, only a subsequent consent can adversely affect such sites. It is therefore sufficient to make just that consent subject to the procedure governing plans and projects.
- 54 As to those submissions, the Court has already held that Article 6(3) of the Habitats Directive makes the requirement for an appropriate assessment of the implications of a plan or project conditional on there being a probability or a risk that it will have a significant effect on the site concerned. In the light, in particular, of the precautionary principle, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have a significant effect on the site concerned (see, to this effect, Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405, paragraphs 43 and 44).
- 55 As the Commission has rightly pointed out, section 54A of the Town and Country Planning Act 1990, which requires applications for planning permission to be determined in the light of the relevant land use plans, necessarily means that those plans may have considerable influence on development decisions and, as a result, on the sites concerned.
- 56 It thus follows from the foregoing that, as a result of the failure to make land use plans subject to appropriate assessment of their implications for SACs, Article 6(3) and (4) of the Habitats Directive has not been transposed sufficiently clearly and precisely into United Kingdom law and, therefore, the action brought by the Commission must be held well founded in this regard.

Glossary & other Information

European site/Natura Site

Sites selected by the European Commission for designation as Special Areas of Conservation (SACs) under the Habitats Directive or classified as Special Protection Areas (SPAs) under the Wild Birds Directive are referred to collectively in the 1994 Regulations as European sites. The network of sites across the European Community is known as Natura 2000.

Circular 6/1995 (updated in 2000)

Nature Conservation: Implementation in Scotland EC Directives on the Conservation of Natural Habitats and of Wild Flora and Fauna and the Conservation of Wild Birds (“The Habitats and Birds Directive”).

<http://www.scotland.gov.uk/library3/nature/habd-00.asp>

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