

WILDFOWLING WORKSHOP – 26th April 2018

Chair: Rob Cooke (NE)

Attendees: Paul Williamson (BASC), Dennise Shepherd (BASC), Matt Ellis (BASC), John Dryden (BASC – WLC), Simon Breasley (AUKWC), Mike Swan (GWCT), Ian Coghill (GWCT), Richard Broadbent (NE), Francis Parfremment (Chichester), Colin Leppard (NE), Matt Holloway (Severn Estuary), Adrian Jowitt (NE), Sue Beale (NE), Sarah Anthony (NE), Ken Arkley (AUKWC), Helen Rowell (NE), Pete Catling (AUKWC), Robert Hall (NE), John Nottage (Kent) and John Torlesse (NE).

The following is a note of the workshop held between Natural England, Wildfowling Clubs and their representative bodies on 26th April 2018; it is not a verbatim record of the meeting but sets out the main points raised.

The first section deals with the legal operating framework. The subsequent sections deal in turn with main issues which were raised during the recent wildfowling public consultation; an overview from the consultation is provided in each case and then a summary of the main points of discussion.

During the meeting and in subsequent correspondence a number of points were raised which required additional information to be provided, this is set out in Appendix 1.

Legal Operating Framework

Set out the following;

- Natural England's (NE) statutory duty in relation to the step-wise process set out in the Conservation of Habitats and Species Regulations 2017 ("Habitat Regulations") with regard to potentially damaging activities which takes place on a European site.
- Consideration of wildfowling as a plan or project under the Habitat Regulations.
- Differentiation between activities undertaken by owner/occupiers on a designated site and those undertaken by 3rd parties under the Wildlife & Countryside Act (1981).
- Natural Environment and Rural Communities Act 2006

Discussion

Q. Why does NE consider the activity of wildfowling to be a plan or project?

A The term plan or project is not defined within the Habitats Directive or the Habitat Regulations but it has been considered in case law. It was confirmed in *Akester*¹ that the terms should be given a wide interpretation [para 72]. *Akester* also drew attention to the importance of considering whether an action could potentially have an impact on the environment or on a European site when considering whether it could be a plan or project [para 76].

The introduction of, and changes to wildfowling practices is listed on the Operations Likely to Damage (OLDs) for the majority of sites, meaning that consent needs to be applied for under Section 28 (E) of Wildlife & Countryside Act 1981. If a SSSI is also a European site then the activity of wildfowling will be considered a plan or project for the reasons stated above.

Q. Why does NE not consider traditional wildfowling and the associated club activities not directly connected with or necessary to the management of the site?

¹ *Akester & Anor (On Behalf of the Lymington River Association), R (on the application of) v Department for Environment, Food and Rural Affairs* [2010] EWHC 232 (Admin) (16 February 2010) 2010 EWHC 232 CO/1834/2009

- A. The consideration of whether an activity is necessary or directly connected with the management of the site is focused on the primary purpose of that activity. The form of management which is being described within the Habitats Directive, where this consideration is set out, is explained in Paragraph. 4.3.3 of “*Managing Natura 2000*”² which states;

“From the context and purpose of Article 6 (of the Habitats Directive), it is apparent that the term ‘management’ is to be treated as referring to the ‘conservation’ management of a site.”

It is not disputed that many wildfowling clubs undertake beneficial work on designated sites across the country but it would not be accurate to state that the primary purpose of the wildfowling activity was aimed at conservation management.

- Q. **Why is a NE consent needed if a Crown Estate (CE) lease had already been provided as CE is also a 28G body under the Wildlife & Countryside Act and a competent authority in accordance with the Habitats Regulations.**

- A. Sites of Special Scientific Interest (SSSIs) are notified by Natural England by reason of their flora, fauna or geological or physiographical features. The notification papers for each site include a list of operations that require the written consent of Natural England before they can be carried out. Before carrying out such an operation, the owner or occupier of a SSSI must give notice to Natural England of their intention to do so, as set out in Section 28E of the Wildlife & Countryside Act 1981. The Habitat Regulations require that prior to giving consent to an operation that is, or forms part of a plan or project that is not directly connected with or necessary to the management of the European site and is likely to have a significant effect on it, either alone or in combination with other plans or projects, the competent authority must make an appropriate assessment of the implications for the site in view of the site’s conservation objectives. When dealing with wildfowling activities on a SSSI in England, Natural England is the competent authority in terms of determining any notices and may only give consent for the operation after having ascertained that it will not adversely affect the integrity of the site.

Wildfowling Consultation

Long Term Plans

In the consultation, respondents were asked whether they supported the approach of bringing all activities undertaken by a wildfowling club on a site together into one overarching plan. Of the 612 responses to this question, 38% supported the approach, 31% did not and 31% were unsure.

The Long Term Plans would be agreed under Section 7 of the [Natural Environment and Rural Communities Act 2006](#) (NERC) and would encompass all activities undertaken by a wildfowling club on a site including wildfowling, pest control, conservation management, etc. within one plan. NE can only enter into a Section 7 Agreement with people who have “an interest in the land” for the duration of the agreement. The plans would be voluntary, based on agreement between Natural England and the wildfowling club/s and they would not be mandatory or imposed in any way. If agreement was reached on the joint outcomes, delivery of the outcomes and the terms and conditions within the plan, no additional consent would be required.

The plans would, in particular, allow a greater recognition of the positive conservation activities and monitoring undertaken by a large number of wildfowling clubs. By bringing all the information together, the aim would be to secure better environmental benefits for the site, ensure the sustainable use of the wildfowl resource and make the best use of the input and knowledge of the wildfowling club representatives and Natural England resources.

The main points from the Long Term Plan discussion were as follows;

² ISBN 92-828-9048-1. 2000.

- General support for voluntary plans provided they were drafted together, commenced with a joint positive statement/vision and clearly reflected local conditions.
- Discussion on what the term 'long' means in relation to the plans. Participants argued that to be meaningful the plans needed to be longer than the current maximum consent length of 10 years.
- Limit to the predictive quality of historic data leads to issues with extrapolating trends more than 10 years in the future which is why the current 10 year restrictions are in place. Annual/bi-annual reviews would need to be included in the plans and the mechanisms for those would need to be agreed and set out clearly in the terms and conditions of any agreement.
- Rolling plans could be used – need to clarify difference between rolling plans and break clauses.

Sharing of Information

A list of information was provided in the consultation and respondents were asked whether they would agree to share all the information included to enable Natural England to be less precautionary within the Habitat Regulations Assessment process. Of the 621 responses to the consultation, 25% supported the sharing of all the information listed, 31% did not support the sharing of information and 44% were unsure. The most common reason for not wanting to or uncertainty about sharing information was lack of trust. Many respondents questioned what NE would use the information for and whether it would be treated in confidence.

The main points from the Sharing of Information discussion were as follows;

- Strong support for working with Natural England was voiced by all the wildfowling representatives provided it was on a voluntary basis and that the information provided was not looked at in isolation but was set in the wider context ie natural and other non-site based factors.
- Support for the potential of assessments based on a wider range of up-to-date information provided by the clubs to reach less precautionary but more robust conclusions.
- All emphasised the need to build up trust so clubs are happy to share the information that they collect.
- Confirmation that Access to Information legislation gives any person the right to request information held by NE, or other public bodies. The information can be requested for any purpose therefore, this would apply to any information supplied to NE by the clubs.
- [WeBs alerts](#), all present supported these as a base for the assessment process as they were available to all and looked at changes in waterbird numbers at variety of spatial and temporal scales. However, due to funding issues this information was last published in 2013 based on data up to winter 2009/10 and is therefore, now quite out-of-date.

Visit Numbers

In the consultation, BASC strongly opposed any form of restriction associated with visit numbers and this stance was supported by the majority of respondents.

The main points from the discussion relating to visit numbers were as follows;

- The majority of the wildfowling representatives supported the use of historical usage data to measure levels of activity but did not support the data being used to set an annual maximum figure for activity. Many commented that an annual maximum was impossible to police, acted as a target and encouraged submission of inaccurate data.
- Any form of measurement had to be based on trust as there is no ability to check activity.
- There was some support for visit numbers if sufficient flexibility was built into the figure ie 25% increase in the maximum figure would cause a review.
- Other ways of measuring intensity were discussed, in particular bag limits and monitoring. Some attendees commented that this was likely to act in the same way as visit numbers in that it would be impossible to police and encourage false submissions. Many stated that bag returns and bag limits were already in place and therefore, it was a case of building trust to share that data to help safeguard the future of wildfowling
- General comment that wildfowling activity was declining due to age of participants and lack of new people coming into the sport.

Direct Mortality

Current NE guidance states;

“Direct mortality due to wildfowling is not an issue of nature conservation concern if carried out at a sustainable level.”

A number of respondents to the consultation noted that;

“There is no established evidence that links bag returns and negative population trends”

But conversely, there is no established evidence to confirm that wildfowling isn't having an impact.

The main points from the discussion relating to direct mortality were as follows;

- The submission of detailed bag data would be a way of providing evidence to confirm that wildfowling is a sustainable activity and one that does not have an impact on bird populations.
- Strong opposition to any suggestion that direct mortality caused by wildfowling would have an impact on a bird population, basic premise being that wildfowling is a self-regulating activity but acceptance that by providing bag data that a body of evidence could be built up which might support their argument.

Other items

- A number of instances were raised where un-consented shooting activity was taking place on designated sites and NE did not take any action despite being provided with information – this will be followed up with local teams.
- NE is running a public consultation in May on the better use of byelaws particularly in relation to 3rd party activities. All respondents to the wildfowling consultation who agreed to their contact details being used for future communication relating to wildfowling will be contacted and asked to comment.
- It was alleged that some local NE advisors are difficult to work with due to personal views on wildfowling activity – where there is evidence of this it should be raised through the BASC/NE meetings.
- Agreed that a note of the meeting and next steps would be circulated to the attendees.

Next Steps

The proposed next steps are as follows;

- All respondents to the public consultation updated on meeting notes and next steps by the beginning of June.
- Principles of long term plans set out and circulated by the end of June.
- Draft revised guidance available by the end of July.
- One draft long term plan available by the end of July.

Appendix 1

1. Boyer Advice

During the Workshop reference was made to the “Boyer Advice”, this was legal advice provided to Natural England in 2007, in relation to its legal obligations under the Habitats Directive when considering notices of proposals submitted wildfowling clubs on Natura 2000 sites. It was characterised by some attendees as stating that wildfowling was not permissible in accordance with the Habitats Directive. NE stated that if the advice said that then we disagreed with it – not least because in the years since 2007 wildfowling consents have been given, in accordance with the requirements of the Habitats Directive.

NE can confirm that, although there have been developments in the case law since 2007 when the advice was provided, the essential legal analysis of the application of the tests under the Habitats Directive is accurate. For example, the advice given as to whether wildfowling is a plan or project (it can be) and how to approach the appropriate assessment of wildfowling is in accord with the discussion of the law that we had during the Workshop and the approach we have taken towards wildfowling consents to date. The references to the case law and the essential principles of the advice are sensibly approached and discussed.

The advice does talk about the metrics that could be used for carrying out an appropriate assessment. This is the conversation that we started to have during the Workshop (for example over bag returns and shooting days). As was said at the Workshop, there is a very valid conversation to be had here as to what metrics can be relied upon in an appropriate assessment in accordance with the Habitats Directive/Regulations.

2. Statutory Compensation

One element which was debated during the long term plans discussion at the Workshop was statutory compensation for the withdrawal/modification of Section 28E consents in accordance with section 28M of the Wildlife and Countryside Act 1981. For clarification, statutory compensation is only relevant if a section 28E consent is withdrawn or modified. Therefore if a section 28E consent was drawn up alongside but separate to the section 7 NERC Act agreement (or successive section 28E consents were given which are referred to in the agreement, but which are separate to it) then statutory compensation is relevant if those consents are modified or withdrawn.

However, if all activities and future management are agreed between Natural England and the relevant wildfowling club, with an interest in land, including wildfowling, then section 28M is not relevant. In that case the agreement itself would deal with termination and variation in its relevant clauses. In these circumstances, where wildfowling is dealt with as part of a wider management agreement for the site separate section 28E consent is not needed as the agreement itself would be sufficient authority to carry out all the agreed activities.. This makes it particularly important for agreement to be reached on the termination provisions and for clear guidance to be in place if a breach of any such management agreement took place.

3. The Regulator’s Code and Growth Duty

Since the Workshop, some correspondence has been received in relation to the Regulator’s Code and the Growth Duty, these were not covered during the Workshop but Natural England is fully aware of the obligations and duties imposed on it (and other regulators) under section 108 of the Deregulation Act 2015.

Relevant considerations

The section 108 duty is a relevant consideration in regulatory decision-making for SSSIs. Please note that there are various relevant considerations that Natural England must take into consideration in its regulatory decision-making. These include (in cases where they are relevant):

- Natural England’s duty under regulation 9(1) of the Conservation of Habitats and Species Regulations 2017 to exercise its functions which are relevant to nature conservation so as to secure compliance with the requirements of the Habitats and Wild Birds Directives.

- Natural England’s duty under regulation 10(1) of the Conservation of Habitats and Species Regulations 2017 to take such steps in the exercise of their functions as it considers appropriate to secure the objective in (3), so far as lies within its powers. The objective in paragraph (3) is the preservation, maintenance and re-establishment of a sufficient diversity and area of habitat for wild birds in the United Kingdom, including by means of the upkeep, management and creation of such habitat, as appropriate, having regard to the requirements of Article 2 of the new Wild Birds Directive (measures to maintain the population of bird species).
- Natural England’s duty as a section 28G authority under the Wildlife and Countryside Act 1981 to take reasonable steps, consistent with the proper exercise of its functions, to further the conservation and enhancement of the flora, fauna or geological or physiographical features by reason of which the site is of special scientific interest.
- The general duty under section 40 of the Natural Environment and Rural Communities Act 2006 under which we must, in exercising our functions, have regard, so far as is consistent with the proper exercise of those functions, to the purpose of conserving biodiversity.
- To take into account the impacts of regulatory decisions on the Human Rights of individuals in order to strike a fair balance between the public interest in conserving and enhancing SSSIs and private interests in carrying out an operation likely to damage a SSSI
- In cases where it applies, the duty under section 37 of the Countryside Act 1968 to have “regard to the needs of agriculture and forestry and to the economic and social interests of rural areas” when exercising our functions.

Application of the Code and statutory guidance

In particular reference has been made to the Regulators Code and accompanying statutory guidance. It is important to note that the introduction of the duty under section 108 of the Deregulation Act 2015 does not mean that the necessary protections required for protected sites are outweighed. The Code does not detract from other legal obligations that apply in a given case. Rather it is a relevant consideration that must be weighed and taken account of when deciding how to act in a particular case, along with the other legal duties listed above. The weight given to it will depend upon the circumstances of a case, including the applicability of other relevant duties to those circumstances.

The duty of a regulator is stated in the [Growth Duty Statutory Guidance](#):

The primary role of regulators, in delivering regulation, is to achieve the regulatory outcomes for which they are responsible. (Growth Duty: Statutory Guidance 1.3, p.4)

Furthermore, it is also stated that “the growth duty does not legitimise non-compliance and its purpose is not to achieve or pursue economic growth at the expense of necessary protections. The purpose is to ensure that specified regulators give appropriate consideration to the potential impact of their activities and their decisions on economic growth...” (Growth Duty: Statutory Guidance 1.5, p.4)

In order to understand what impact the exercise of a regulatory function will have on economic growth evidence is required. That evidence of an impact on economic growth is then considered against other duties intended to protect sites from harm. The guidance deals with this at 1.12 (p.5) in saying that “regulators must consider the provisions of the guidance and give them due weight in determining how they will exercise their regulatory functions. They are not bound to follow a provision of the guidance in a particular case if they properly conclude that the provision is either not relevant or is outweighed by other considerations...”

The application of the Code in the context of European sites

Where consenting decisions are being made in the context of sites which are SSSIs as well as European sites under the Habitats Directive and Wild Birds Directive, the position is as follows. First, it is essential, as a matter of law, that the sequence of steps under Article 6 of the Habitats Directive are followed (as discussed in the Workshop). This means that where SSSI consent is sought under section 28E of the Wildlife and Countryside Act 1981 for wildfowling then that “plan or project” must, in accordance with Article 6(3) of the Habitats Directive, be screened for likely significant effects and then (if it is likely to have a significant effect) appropriately assessed against the conservation objectives for the European site. If that assessment leads to a conclusion of adverse effect on integrity then Natural England **must**, in accordance with regulation 24 of the Conservation of Habitats and Species Regulations 2017, not give consent for the operation. That decision not to give consent under section 28E of the Wildlife and Countryside Act 1981 can then be appealed to the Secretary of State in accordance with section 28F of the Wildlife and Countryside Act 1981. The Secretary of

State may give consent to the operation if he or she concludes, in accordance with Article 6(4) of the Habitats Directive, that there are no alternative solutions to the operation and that it must be carried out for imperative reasons of overriding public interest. In doing that the Secretary of State may consider evidence of impacts on economic growth.