

## Questions and Answers on Streamlining of Natural England LPA interaction on EPS Mitigation licensing

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### 1. What changes are Natural England making?

Natural England is streamlining the system for processing EPS mitigation licences. The changes are aimed at producing a simplified system that reduces administrative burden (by cutting double handling by Natural England and the local planning authorities (LPA)) and is flexible enough to accommodate the range of development situations which are subject to species licence applications. In summary, the changes involve:

- replacing the requirement for licence applicants to provide information from the LPA with a system where they can provide relevant information themselves, and
- amending the minimum consent requirements, in exceptional cases, to begin processing applications where it is not possible to resolve all consent matters prior to submitting a licence application.

## 2. Why is Natural England removing the LPA consultation from the application process?

To date, applicants have approached their Local Planning Authority to arrange the completion of a questionnaire to provide the evidence presented in support of the Habitat Regulation tests at planning or to confirm that the proposed activity does not require planning consent. Applicants have complained that, in the case of some particularly busy LPAs, this step of the application process causes significant delays and is an administrative burden as extra time is taken to ensure questionnaires are completed. As the licensing authority, Natural England must make an **independent** judgement on whether the proposal meets the 'Purpose' and 'No Satisfactory Alternative' tests. By replacing the questionnaire with a modified Reasoned Statement template this streamlining measure will enable applicants themselves to provide Natural England with the evidence needed to assess the regulation tests (as they do already – see below). This change has the added benefit that it will remove the current double-handling of this area by the LPA during the two stages of the process (i.e. planning and licensing).

## 3. What if my proposed activity doesn't require planning or any other type of consent?

We recognise that, in some instances, no formal planning or other consents (other than a Natural England licence) are needed before you undertake your proposed activity. In such circumstances you will need to provide Natural England with information (in the Reasoned Statement) to establish the legal basis of the activity, the purpose of the proposal and the need that it is addressing. You will also need to demonstrate that no formal consents are required. You may acquire the evidence by approaching the appropriate consenting authorities (or their websites).

## 4. How do applicants know what sort of information is needed?

Applicants are already required to complete a Reasoned Statement as part of their application. In this document, the applicant sets out how their proposal meets the 'Purpose' and 'No Satisfactory Alternative' tests. However, the quality of the statements in some applications suggests that the tests, and the information requirements to support these, are not widely understood, and this often results in applicants submitting applications that are of insufficient quality to secure a licence on the first submission. To help applicants understand the requirements and reduce the risk of a minded-to-refuse response in future, we have produced a new Reasoned Statement template. This is a significant improvement on the current version as it contains (i) prompts through the questions asked and (ii) guidance to help applicants provide the level of detail and supporting evidence Natural England needs to assess these two tests.

## **5. Isn't the revised Reasoned Statement an extra burden on licence applicants?**

Applicants will already have gathered most of the information they need when they applied for other consents (e.g. planning permission), where applicable. The new Reasoned Statement template guides the applicant to provide the information and evidence Natural England needs. Feedback from many applicants has been that they would prefer to provide the information themselves, as the previous reliance on the LPA to complete the questionnaire could cause significant delays in submitting and /or assessing licence applications.

## **6. How can applicants be assured that LPAs will consider EPS issues at the planning stage?**

LPAs are required by Reg 3(4) and PPS9 to take species issues into account in their decision making, and it is for them to defend their decisions. When Natural England regional local/area team advisers, are consulted by LPAs during planning they will continue to comment on the proposals and when necessary request that a LPA include conditions to the planning permission (e.g. survey effort required, mitigation and habitat management strategies, S106 etc requiring a signed-off, detailed mitigation strategy) (see further Q&A on this below).

## **7. When will new style applications be accepted?**

We will begin accepting applications under the new process and on the new forms on 16 March 2009. This is to give applicants and their consultants time to read the new guidance and understand the change. We are releasing the new forms now (February 2009) as we are aware that applications can take some time to prepare, and some applicants will wish to have access to them now. As we do not wish to inconvenience our customers who have already started preparing applications using the current forms, we will continue to accept old-style applications until the end of April 2009.

If you believe that your proposal meets the criteria for 'exceptional cases' (see question 9 below) and you wish to take advantage of our changed consent requirements, we suggest that you consider delaying submitting your application until 16 March 2009, when we will start accepting applications under the new process.

## **8. How will Natural England's new consent requirements differ from what is currently in place?**

To date Natural England has only been able to consider a licence applications that meet our planning consent requirements (i.e. full planning permission or outline planning permission with all associated conditions or reserved matters affecting wildlife fully discharged/resolved) and we have asked for documentary evidence to demonstrate this. In the new process, we recognise that regulation must balance the need to protect species with a need to avoid stifling economic progress and, in certain exceptional cases, we are amending our current requirement to adopt a more flexible approach. In most cases, to provide the level of detail needed to meet the licensing tests, you will need, before applying, a clear plan of the proposed development showing areas to be developed and a timetable for delivery usually illustrated by full planning consents and/or other consents in place. However, in some exceptional circumstances, we will, in the new process, consider applications that do not meet our stringent planning requirement. See question 9 for more on exceptional

circumstances. It should be recognised that there is a risk in applying for a licence on an exceptional basis since it will increase the risk of the application failing to meet the licensing tests.

## **9. What constitutes exceptional circumstances?**

In our new guidance document, '*How to get a licence*', we provide some examples of these exceptional circumstances. In summary, these are cases where there is sufficient certainty that the proposal will go ahead as planned and sufficient evidence is available, at the time of a licence application, for Natural England to be assured that the licensing tests are met, but where it is not possible to secure full consents and discharge all conditions in advance of applying. In practice, these cases will be rare as it is our experience that in the vast majority of cases without full consent, most proposals will not contain sufficient evidence to confirm the tests under the regulation have been met.

## **10. Why is Natural England changing the requirement for all consent matters to be fully resolved before it will accept a licence application?**

Natural England needs to have a standard process that is appropriate for all types of application. In some situations, it is not possible to secure all consents or to discharge all conditions before a licence application is made e.g. pre development site investigation.

In some situations, timetable and funding issues may mean that the activity needs to be carried out as soon as full planning permission is achieved, e.g. the demolition of buildings or site clearance are timetabled (to meet species requirements too) during a period where the details of the development are being considered as part of the full planning application. Note though this example would be classified as an exceptional case and meet the rigours of the licensing tests only if Natural England is convinced by the evidence presented. This might include confirmation of a restrictive timetable, the dependencies of a phased funding regime, mitigation which is not dependent on the new build, development phasing and location of hard development is fixed and land owner permissions are secure/known.

Natural England cannot and will not process licence applications to destroy habitat to make way for possible development 'sometime in the future'. This includes cases where a development 'at some point' in its phasing, is likely to coincide with land occupied by a protected species. Unnecessary applications will waste your time, your clients and Natural England's.

## **11. If Natural England issues a licence before all consent requirements or planning issues (including conditions & reserved matters) are resolved/discharged, isn't there a chance that the mitigation timetable I've committed to in my licence application won't be realistic thus leading to licence amendments?**

Yes. This is why our guidance states very clearly that you must be realistic when deciding when to apply for the licence and setting out your timetable of licensed activities within your application. Natural England can only consider your application once the details are firm and

in most cases, you will need all planning issues (including conditions & reserved matters) resolved/discharged, to be confident that the details in the application meet the requirements of the regulation tests.

**12. Is there a chance that someone who has not met all the consent or planning requirements could go ahead with activities under a licence that Natural England has issued?**

No. Any licence we issue in advance of consents and planning issues being fully resolved and granted will include a licence **condition** stating that the licensed activities cannot go ahead until all consents or planning matters including conditions affecting wildlife are fully resolved and granted. Conditioning licences is an approach that is widely used in all of the other licences we use and it works very well, particularly as the amendments to the Regulations in August 2007 introduced a new offence of ‘failing to comply with a licence condition’. See also question 11.

**13. What’s to stop unscrupulous people ignoring the condition requiring them to secure all consents before beginning licensed activities?**

We compliance check a proportion of licences. This will involve calls/emails (or web site checks) to the relevant consenting authority (LPA in cases that need planning permission) to check the status of consents, coupled with checks with the licensee. This may include visits where necessary. This risk-based move to empowering those regulated to comply with regulations is a fundamental principle of Better Regulation and Hampton Principles; essentially some of Natural England’s resource will be re-targeted at compliance checking and then penalising those who are found not to comply, rather than using our resource over-regulating those who do comply.

**14. Who will carry out these compliance checks?**

Natural England will rely on the Wildlife Licensing Unit to carry out initial planning checks. Where a site visit is needed, the case will be referred to an adviser based in the locality.

**15. If the planning conditions/reserved matters result in minor changes (e.g. to boundaries, access points, design or phasing etc) after the licence has been issued, will such alterations require a licence modification?**

Any change of this nature will require a licence modification if it contradicts the Method Statement which forms part of the licence (thus breaching the licence). This will very much depend on how the statement is worded and the time critical nature of the activities proposed. So for example if the works cannot be completed in the time window specified in the licence then a modification will be necessary but if they slip by two days and this is not material to the overall time frame, a modification to the licence won’t be necessary. Please read our guidance note ‘*How to get a licence*’ for more information on changes that will require a modification and advice on how to seek one.

**16. Won’t the need to define the timescales sufficiently (to make sure MS is SMART) so early in the project lead to lots of time-consuming modification requests?**

Our guidance stresses that applicants should not consider applying until they are confident that the details of their proposal are firm; they should also ensure that their timetable is

realistic, meeting the requirements of the species affected by the licensed activities and takes account of the time needed to resolve planning matters or other consents. We are calling on professional consultants (including ecologists, architects and planning consultants) to stress to their clients the importance of being realistic. Not only will this avoid clogging the licensing system with applications that do not include sufficient evidence to meet the Regulation tests, it will also ensure that applicants avoid unnecessary delays and that their effort and that of the regulator's is expended at the most appropriate time to ensure their licence application is approved promptly.

#### **17. Will this change affect the role of Natural England staff in the regions**

No. In the vast majority of cases, this change will not cause local/Area team staff to do anything differently. Area team staff will continue to be consulted (as a statutory consultee) by Local Planning Authorities on developments <http://www.naturalengland.org.uk/ourwork/planningtransportlocalgov/spatialplanning/default.aspx>. Area teams will continue, as appropriate, to recommend conditions for planning permissions to ensure that any development impacts on EPS are mitigated for. The wildlife licensing staff will continue to liaise closely with area team colleagues in processing licence applications. This will ensure a joined-up integrated approach to managing these cases to ensure that the needs of EPS species are properly accounted for.

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