

Natural England Board



Meeting: 28
Date: 30 November 2011

Paper No: NEB PU28 04

Title: Regulatory Reform for Protected Species

Sponsor: Andrew Wood – Executive Director, Science & Evidence

1. Purpose

- 1.1. The purpose of this paper is to seek the Board's endorsement of our proposed approach to implementing the Government's Better Regulation agenda in the context of our work on protected species. This strategy reflects the Board's discussion at the workshop on 27 September.

2. Recommendations

- 2.1. It is recommended that the Board endorse our proposed approach.

3. Background

3.1 Government's Regulatory Reform agenda

- 3.1.1 The Government has set a clear aim: '*to leave office, having reduced the overall burden of regulation*'¹. In pursuit of this aim, it has established an ambitious range of regulatory reform initiatives with a particular focus on reducing impacts on business and with a challenging timetable. It has also made commitments to reduce the amount of state intervention and to encourage and support those we regulate in taking more responsibility for achieving compliance.
- 3.1.2 Better Regulation principles are not new; over the past six years they have shaped the way all regulators behave². Scrutiny of performance against this agenda is now, however, much more intense. More ambitious reform at a faster pace is demanded, due in part to the focus on supporting the growth agenda. This has intensified since June 2011 and will continue in the run up to the autumn announcement on growth and whilst the *Red Tape Challenge* process is ongoing. Set against this is the cross-Government bid to provide a more integrated customer experience, which for us means working in a more joined-up way across the Defra family.

3.2 Our engagement on Regulatory Reform

¹ Red Tape Challenge website: <http://www.redtapechallenge.cabinetoffice.gov.uk/about/>

² e.g. Regulator's Compliance Code (2007), Code of Practice on Guidance on Regulation (2009)

- 3.2.1 Natural England has a range of regulatory responsibilities including its role as the statutory nature conservation adviser and as a competent authority for determining licence applications for activities affecting protected species. There is a significant interface with land use development and with the activities of other regulatory bodies within the Defra family (e.g. Environment Agency, Forestry Commission); there is considerable scrutiny of how we exercise those functions in the current climate.
- 3.2.2 Since vesting in 2006 Natural England has demonstrated firm commitment to embedding Better Regulation principles into its regulatory approach³. We delivered £3.9 million in 'red tape' reductions as part of the Defra's Simplification Plan through our Regulatory Development & Improvement Project from 2007 to 2010, and we achieved a positive outcome in the Business Innovation and Skills (BIS) Hampton Implementation Review in March 2009.
- 3.2.3 We now need to build on that strong track record, both to meet the current challenges set by Government and address Natural England's commitments to offer customer service that is recognised for its excellence and increasingly integrated across Government in meeting customer needs. The solutions we generate must take account of the following drivers and constraints:
- The drive to deliver 'lighter touch' regulation needs to be set alongside the need to protect our natural environment, at a time when it is being further challenged by biodiversity loss, climate change and our growing requirements for space to live and grow food.
 - We must ensure that the legal tests for licensing are met under existing environmental laws and conventions (several of which derive from European Directives). Failure to operate strictly within the legal framework could result in our being exposed to the risk of infraction by the European Commission, and/or challenged in the courts by third parties.
 - We must avoid further unsustainable increases in applications (many of which are precautionary or for low risk, routine situations) to meet the business imperative to streamline in the face of shrinking public sector spending.
 - We must protect resources for ensuring compliance and to monitor environmental outcomes of licensing, which in turn feed into continuous improvement.

4. Our response

- 4.1 We propose to progress a two-pronged strategy as outlined in September (NEB W27 01). Further detail is provided below, but in short, there will be a:
- 4.1.1 Regulatory Improvement Programme: we will continue to drive forward with our ambitious programme of improvements, focused on driving down the costs of operating within *existing* regulations and improving customer service

³ <http://www.naturalengland.org.uk/ourwork/regulation/betterregulation/nestategy/default.aspx>

while maintaining environmental outcomes. We will continue to articulate the benefits of this programme in responding to Better Regulation initiatives, particularly the Red Tape Challenge process and the Penfold Review of Non-planning Consents.

4.1.2 Legislative reform of wildlife laws: reflecting the important opportunity presented by the Law Commission project to review wildlife laws and replace them with a modernised and simplified legislative framework, we will continue to work closely with Defra and the Law Commission in exploring options for primary legislation reform.

4.2 Our Regulatory Improvements Programme

4.2.1 Annex 1 provides an outline of the main themes of our improvements programme, taking into account our reflections on the Board workshop and other stakeholder feedback (e.g. Customer Panel). We have concluded that:

4.2.2 There is support for our proposal to adopt further **risk-based approaches** to licensing and acknowledgement that it takes us in the correct direction. We will proceed as quickly as possible with rolling out additional class and organisational licences, having regard for the risks of challenge.

4.2.3 We should not underestimate the importance and urgency of changes to make **the licensing process** simpler and quicker for customers and ourselves. Our revised programme therefore includes measures to simplify and improve our processes for individual/bespoke licensing.

4.2.4 There is acknowledged value but also risk in pursuing our proposal to offer **chargeable discretionary services** (for which the development sector will be the most important market). These are further explored under Issues below.

4.2.5 There is potential for **earned recognition schemes** to reduce costs (for both those regulated and the regulator), improve outcomes and chime with Government aspirations to make regulated communities more responsible for complying. This principle will be adopted in our plans for Class and organisational licences, but this theme needs further work with Standards Function, partner organisations and customers to assess benefits and risks, define the form this will take and Natural England's role.

4.3 Legislative Reform

4.3.1 The Law Commission's programme to carry out a fundamental review of protected species legislation, which began in July 2011 (www.justice.gov.uk/lawcommission/) represents the best opportunity to shape the legal framework for wildlife protection since the introduction of the Wildlife and Countryside Act thirty years ago and any reforms that follow from this exercise are expected to set the legal framework for a similar period into the future.

4.3.2 Natural England will work in close collaboration with Defra to support the Law Commission programme by providing advice and evidence drawn from our experience as a regulator and advisor on wildlife. There will be a specific focus on making sure proposals for legal reform deliver the Government's better regulation agenda. We will also support Defra's engagement in upstream influencing with the European Commission. We will also encourage

partner organisations to engage with the Law Commission programme to ensure the programme benefits from the widest possible breadth of experience and evidence.

- 4.3.3 The challenge, and our ultimate goal, is to have a legislative framework for protected species that is fit for purpose and equipped to meet the challenges of the 21st century. Annex 2 sets out our aspirations for such a legal framework and a series of recommendations for reform developed following the Board workshop on the 27th September, attended by the Law Commission, Defra and a number of partner organisations.
- 4.3.4 It is important to recognise that laws do not deliver biodiversity gain, nor do they, in themselves, resolve conflicts between people and species. As a regulator Natural England will therefore, have an ongoing role to ensure the reformed legal framework is understood and applied proportionately.

4. Opportunities

- 4.1 The Government focus on how regulation operates presents significant opportunities for us to secure desirable regulatory reform, improving outcomes for the environment and delivering better standards of customer service. Our work will however need to be adequately resourced if we are to capitalise fully on the following opportunities:
- 4.1.2 Engaging with and advising Defra and the Law Commission can help us secure a much improved legislative framework for protected species that makes implementation and compliance with the regulations easier for us and our customers.
- 4.1.3 We can secure reputational enhancement, flowing from:
- moving to a licensing service that properly reflects risk and customer compliance history, and that is more responsive to customer needs (reflecting commitments made through the Customer Service Excellence programme)
 - taking a lead in embedding the BIS-favoured principle of Earned Recognition
- 4.1.4 We can reduce unnecessary costs for customers, particularly developers, playing our role in supporting economic progress, and reducing bad press for biodiversity.
- 4.1.5 We can redirect resource from up front individual licensing (where risk is low) to focus on meeting our statutory obligations to monitor compliance and assess the impacts and successes in delivery of regulatory outcomes within the current constraints on public sector spending. Note, a robust compliance and enforcement regime is a vital enabler for the risk-based approach we propose.
- 4.1.6 We can secure more and improved environmental outcomes as part of sustainable development, by advising earlier in the development process.

4.1.7 We can deliver enhanced/premium services that we will otherwise be unable to provide (including site visits and early access to specialist licensing staff) by charging to cover the costs involved.

5. Risks

5.1 The tables below set out the **risks** associated with pursuing this strategy and how we propose to mitigate them.

Risks	Mitigation
We are unable to devote sufficient resource to progress either elements of this strategy with the urgency required due to the demands of other Government priorities (e.g. bTB licensing, supporting Nationally Significant Infrastructure Projects).	Work closely with Defra to ensure other policies do not adversely impact our progress on delivering regulatory improvements and feeding into reform discussions.
Our pace is insufficiently brisk to reflect the Government's demand for fast change that delivers savings and increased certainty for business.	<p>Maintain contact with Defra's Better Regulation team and BIS, advocating the improvements programme we are pursuing and articulating/reporting the benefits.</p> <p>Consider options for seeking short term resource to maintain the necessary pace.</p>
Delivery of our planned initiatives is hampered by requests from central Government to consider alternative propositions	<p>Be clear internally about our priorities for improvement and reform and focus on advocating their benefits to influence the agenda and create space for us to deliver them.</p> <p>We cannot mitigate this risk fully, but we will continue to invest resource in engaging with and supporting policy colleagues in responding to these requests, providing clear advice on potential benefits/risks of measures, and highlighting impacts of diverting resource.</p>
Our new light-touch approaches get challenged (by third parties or the EC), resulting in changes that reduce scale of benefits	Secure legal services approval of each stage and liaise and test with stakeholders including policy colleagues and NGOs as we go, thus honouring Customer Service commitments to design services around customer needs
Offering chargeable pre-application advice on licensing requirements blurs the separation (the 'Chinese wall')	Our Land Use and Regulation projects on chargeable services have now been joined-up to help maintain clarity and aim

<p>between our nature conservation advisory role and our licensing role, damaging confidence.</p> <p>Advice provided at the early stages, if incompatible with licensing requirements, will result in criticism, reputational damage and potentially in legal action.</p> <p><i>Concern is that customers will over-interpret Land Use pre-app advice as representing Regulation advice also, concluding that a complete Natural England view has been expressed on a development.</i></p>	<p>to present Natural England's chargeable services as 'one shop front with a range of products', each provided by appropriate Functions.</p> <p>Develop robust communications and processes to make clear in writing the nature of advice being provided at each stage of the process i.e. what the advice is and what it is not, what does it mean, and what is next.</p> <p>We will bring two delivery options to the Exec Board for consideration: Either invest in training Land Use staff to deliver a high standard of consistent basic licensing advice, or increase the size of Regulation to deliver more pre-application advice</p>
<p>The costs associated with offering chargeable services may not be offset by the income received.</p>	<p>Address this concern in the business case for Discretionary Chargeable Services</p>
<p>Continued frustration with the individual/bespoke licensing process (specifically from developer customers' perspective) could detract from the reputational benefits accrued from the regulatory improvements proposed</p>	<p>Take forward a range of ideas to simplify the licensing process. A key proposal is to offer Conditioned Licences, which will reduce delays and costs associated with minor errors in applications.</p>
<p>The proposals for legal reform are less ambitious than hoped due to opposition to reform from certain stakeholders / interest groups</p>	<p>Working with Defra and the Law Commission ensure stakeholders understand the benefits of regulatory reform and the safe-guards (i.e. programme is aiming to reform the framework, not change the protected status of individual species.</p>

6. Next Steps

- 6.1 Assuming the Board agrees with our recommendation, we will press ahead with delivery of the Regulatory Improvements Programme. The table at Annex 3 details the main initiatives outlines the benefits that will flow and provides an indication of the priority/timeframe and progress to date.
- 6.2 A Programme Board to oversee prioritisation, delivery planning and communications will be established in Q3. Timings for key deliverables will be kept under review to ensure prioritisation of improvements that will deliver most benefit.
- 6.3 We are investing in consulting customers to inform our priorities for improvements and ensure that the products we develop chime with their

business models and ways of working. This is also expected to facilitate more effective communications with more customers, raising awareness for customers of the benefits of planning early for protected species needs. Initiatives to date include establishing a Licensing Customer Panel and commissioning a telephone survey of a sample of licensing customers (including developers and consultants) to run in Q3 as part of the Customer Services Excellence work.

- 6.4 Aligning with the Law Commission's timetable, we anticipate offering support and advice to the regulatory reform project. The Law Commission's consultation is planned to take place in the spring.

Annex 1: Main themes of the Regulatory Improvement Programme

Central to our plans is a shift away from individual assessment of low (and possibly medium) risk and temporary impact activities, building on the principle of ‘earned recognition’, and investing freed resources on compliance and outcome monitoring and the provision of a better, more differentiated style of customer service.

Our strategy consists of the following themes:

Adopting a more sophisticated approach to risk assessment across all wildlife licensing –. Natural England already has solid experience of risk-based approaches, having deployed conditioned General Licences for low risk situations for a number of years. We have continued to use individual/bespoke assessments for some activities with relatively minor, sometime temporary, impacts on species conservation status that must still be licensed to meet legal requirements, but we have now identified innovative ways of expanding the use of risk-based approaches. We intend to use the full range of regulatory strategies and interventions available, reducing costs for those we regulate by avoiding the need for individual licences in a wider range of scenarios.

More extensive use will be made of innovative Class and Organisational licences associated with Codes of Conduct, which represent a ‘middle way’ between individual, bespoke licensing and our very light-touch General Licences, which are suited to the lowest risk situations. This is about reducing the level of scrutiny applied on a case by case basis, where it is safe to do so, with the regulator focusing more on encouraging and supporting compliance, acting firmly but fairly to address failure to comply, and on ensuring regulatory outcomes are being met.

Licensing Process Improvements – For customers and situations that will still require individual, bespoke licensing, a simple, efficient process is important. Building on an existing licensing improvement programme, we have embarked on staff and customer engagement to review development licensing processes for EPS Mitigation Licensing to identify and test a series of further improvements. We will seek to prioritise delivery of those that will make the biggest difference to our staff and customers.

Offering discretionary chargeable advice services aimed at improving certainty and reducing delays, particularly for developers where there is demonstrable demand for earlier and closer engagement with the regulator. By charging for enhanced premium services, we will ensure it is properly resourced and avoid unfairly disadvantaging customers of the standard service. This will be linked to a ‘Penfold’ commitment to trial an alternative to the current sequencing of planning and licensing, based on a Swedish approach. (At present, we do not normally consider applications for licensing until after planning consent is in place, which can result in delays in certain circumstances). Strong join-up between our licensing and statutory consultee functions will be needed, but in a way that satisfies the need for separation to avoid compromising the independence of the competent licensing authority. A draft description of the proposed Pre-submission Screening Service is provided at Annex 4.

Building on the principle of earned recognition and trust - The ecological consultant community holds significant expertise and could potentially be cultivated as ‘trusted’ customers (with a Better Regulation-compliant risk score/profile). We aim to empower them to carry out certain otherwise unlawful activities under Class licences (i.e. they would have a licence to operate in certain low or medium risk situations,

without needing to seek case-by-case approval). Entitlement to operate under these could be linked to completion of training courses, some of which Natural England plans to offer to improve the standards in licensing applications. There is currently no recognised accreditation scheme in this sector/profession that we can use to underpin such an approach. We will work with Standards colleagues, partner organisations and customers to determine the role that Natural England will play in this field.

Annex 2: The reform of species protection laws: aspirations and recommendations

Aspirations

To meet current and future challenges wildlife laws need to deliver the following six aspirations:

- (i) **Simpler, more consistent and readily understood** (Fairer)
 - Issue: there are more than 50 extant statutes relating directly to species dating from the Game Act of 1831 to the recently revised Habitats Regulations. Such a plethora of laws, many of which have been amended repeatedly but not consolidated, and which are often drafted in unintelligible English, make the law inaccessible to the public and those managing protected species.
- (ii) **More flexibility to tune regulation to the diversity of wildlife species and regulatory challenges** (Flexible and fit for purpose)
 - Issue: most protection is lodged in primary legislation which is either too general or, where detail is provided, is too inflexible. The result is limited scope for regulations to be fine-tuned to the needs of individual species, to keep pace with changes in populations or improvements in best practice. Also absent, is a clear opportunity for stakeholders and practitioners to contribute, in a formal way, to the way the law is applied (e.g. through development of codes of practice).
- (iii) **More options to deal with conflicts** (Functional / user-Friendly)
 - Issue: options to resolve conflicts very widely between species with significant omissions. You cannot, for example, issue a licence for spatial development for any wild bird and airports cannot legally manage game birds in the close season, even if they threaten the safety of passenger planes. Furthermore, laws are focused on species and individuals and are ill-suited to solutions that work at a landscape or ecosystem scale (e.g. biodiversity off-setting).
- (iv) **Improved compliance and enforcement** (Firmer)
 - Issue: enforcement provisions are inconsistent and incomplete, for example, about half of all licences issued at present are not legally enforceable, including most general licences (used by about 100,000 people a year). Some provisions are so out-dated that they are widely ignored (e.g. Game Act 1831).
- (v) **Regularly reviewed and easy to revise** (Future-proofed)
 - Issue: there is no clear process or programme for review and as a result regulations are infrequently reviewed and typically changes are reactive (e.g. in response to EU infraction), leading to reforms that are hurried and piecemeal. This has contributed to inconsistencies and complexity of current laws.
- (vi) **Full compliance with European and international obligations** (Fine-free)
 - Issue: wildlife laws have been the subject of a series of European Commission infractions over the last decade in respect to both the Birds and Habitats Directives.

Recommendations

Realising these aspirations is a realistic goal of the Law Commission's programme of legal reform and the recommended actions set out below should enable most to be delivered.

Topic		Recommended actions
1	Consolidate laws	Consolidate current wildlife laws, and amendments, into a single primary statute (or at most a small number of statutes).
2	Getting the right balance between primary and secondary legislation and guidance	Shift the balance away from relying on provisions in primary legislation and make greater use of secondary legislation (including statutory codes of practice) and non-statutory guidance. This will allow for more flexible and finely tuned species protection. It will also provide the opportunity for industry and stakeholders to contribute in an ongoing way to the application of the regulatory regime. The Animal Welfare Act 2006 is a good example of regulations framed according to this approach.
3	Standardise provisions for different species and situations	Adopt a standardised, consistent approach for legal provisions wherever possible, for example: <ol style="list-style-type: none"> a. Use a common 'currency' or single approach to categorizing the level of protection given to different species that applies to all taxa in a readily understood way. We could, for example, adopt a single series of schedules for listing strictly-protected, protected, huntable/quarry species, and unprotected species, under which being classed as 'protected' means the same for a bird as it does for a mammal. b. Use common provisions for offences, licensing, exceptions and enforcement. These should be based on what is 'best' in current laws, for example, it should be as standard for all species and situations that: <ul style="list-style-type: none"> ○ general and class licences can be issued, and ○ it should be an offence to breach licences
4	Frame provisions in positive terms where possible	A greater emphasis on use of positive provisions, so it is clear what is permitted, rather simply listing what is not permissible. For example

		<p>a. The law (or accompanying guidance) should set-out the protected status of each species or taxa so it is clear at a glance how a species is protected and what actions are permissible. All species, including those without specific protection should be included.</p> <p>b. Using positive lists which specify which species may be imported or released into the wild is a better way to tackle the threats posed by invasive non-native species or native species that can cause conflicts with people or can harm the environment. The onus should be on the person taking the action to show it is not harmful.</p>
5	Broaden derogation provisions (licences and exceptions)	<p>Derogation options should provide scope to cater for all eventualities. Where provisions transpose EU directives or international law we should include the full scope of derogation provisions permitted.</p> <p>Consideration should also be given to the inclusion of a formal appeals process in respect to licensing decisions.</p>
6	Scope for rapid/emergency provisions	<p>Include scope to impose immediate statutory restrictions based on advice from a statutory advisor, for example on the release of species or the hunting of a species in response to a potential threat. This would be on a temporary basis (with an appropriate 'sunset' clause) to allow time for full consultation and decision-making without a risk to the species.</p>
7	Integrate laws with other laws and policy topics	<p>Proposals should be screened to ensure:</p> <p>a. The law fully and accurately transposes European Union and international obligations, and</p> <p>b. Species protection regulations are compatible with and, where appropriate, integrated with regulations for other areas of Government policy (e.g. spatial planning, animal welfare, trade, etc)</p>
8	Improve clarity of language and understanding of law	<p>Use concise, plain English and provide comprehensive, official guidance to accompany the legislation that explains the intention and interpretation of key legal provisions.</p> <p>Include scope for the publication of statutory guidance relating to the interpretation of offences and terms used in the legislation which</p>

		the courts should have regard to (along similar lines to the provision added to the Habitats Regulations in 2009)
9	Funding options	Most wildlife laws currently provide scope for charging for licences on a cost recovery basis. The option of extending this to include scope to introduce (at a later date) a revenue generating licensing regime should be explored as a future-proofing measure. This could generate revenue for species protection and management in a similar way that fishing permits do for angling.
10	Commit to regular review and straightforward revision	The law, particularly any schedules or statutory codes of practice, should be subject to regular review to specified deadlines.

Further ideas to explore

Not all of the aspirations can be fully realised without new policy or changes at a European level. While more ambitious and less easily delivered as part of the current reform programme there may be scope to explore some of these ideas in parallel.

- Shift the focus of legal protection from its current relatively narrow focus on species and individuals to place greater emphasis on protecting ecosystems and landscapes. This will require changes at a European level.
- Extend derogation purposes for wild birds to include spatial development. The EC Habitats Directive and Bern Convention both include an 'overriding public interest' purpose, but the Birds Directive does not. This will require a change at European level.
- The UK currently extends the protection provided to some species and taxa beyond the minimum protection required by international EU and international obligations (e.g. this applies to non-native bird species). This is permissible under the relevant directives and conventions and, in many cases, reflects UK cultural attitudes to wildlife. Whether this is still appropriate should be reviewed on a species by species basis.

Annex 3 – Natural England’s Regulatory Improvements Programme for protected species

Initiative	Benefits	Progress and Delivery timeframe
Risk-based Licensing and Earned Recognition		
<p>Class Licences allow registered persons to undertake activities currently subject to individual consents. Starts with low risk <u>survey</u> activities but reap more benefit by expanding into riskier areas as follows: Streamline licensing of certain medium risk activities by relying on expertise of professional ecological consultants e.g. enable suitably qualified consultants (e.g. those already licensed) to undertake minor developments (e.g. loft conversions or roof repairs with low number of common species of bat) using an agreed Code of Practice.</p> <p>Organisational licences - Offer to major infrastructure organisations, utilities, and other public bodies); linked to Codes of Conduct for routine activities (e.g. site maintenance and repairs), low and temporary impact activities e.g. installation of pipelines and overhead cabling, and responding to emergencies for all relevant protected species (e.g. newts, bats, badgers, water voles etc).</p> <p>Earned Recognition Explore how we incorporate earned recognition principles into our risk-based licensing approach. Could work towards developing a proper (chartered) Ecological Consultant profession which can be trusted to work as our partners. Offer training courses on the licensing process on a cost-recovery basis for practitioners (particularly</p>	<p>Provides greater flexibility to recognise and reward compliance with lighter touch regulation, chiming with a favoured principle in Government’s approach to regulation.</p> <p>Reducing/removing application costs for developers for small-scale development, taking advantage of professional ecological consultant expertise to give the regulator confidence that biodiversity outcomes will not be harmed. <i>Note, stringency of protection for the species means there is <u>no possibility</u> of operating deemed consent.</i></p> <p>Time-savings and significant cost reductions for organisations and Natural England by reducing the need for licensed organisations to apply through individual licensing process for most routine activities and many temporary impact activities.</p> <p>Improved consistency, providing a level playing field for recipients of advice (including developers), reducing costs and challenges</p> <p>Improving quality of advice and licence applications will reduce costs for developer</p>	<p>Class Licensing for surveys activities - phased introduction, newts licences launched 3 Oct 2011, other species launches planned over late 2011/early 2012. Scoping in Q3 and 4, with launch expected in Summer 2012 before next peak in bat applications. Proposal likely to evolve pending legal advice on satisfying strict legal tests for licensing.</p> <p>Organisational licences: piloted for MoD, and similar licences being drafted for fellow Arms Length Bodies (EA & FC) Further scoping (18 July) with utilities and transport sector companies to explore benefits. Now beginning process of understanding impacts assessment to inform drafting of suitable licences. Launch expected mid 2012/13.</p> <p>Strategy at very early stages - discussions started with Standards Function, customer panel, partner organisations and British Standards Institute. Will explore further into 12/13.</p> <p>Training products being developed but</p>

consultants) to improve standards.	and the regulator by reducing volume of poor quality applications.	final content not yet confirmed pending some anticipated simplifications of processes (see below)
Chargeable services, and improvements to interaction between planning and licensing		
<p>Offer a Pre-submission Application Screening Service by licensing advisers. Aims to meet customer (especially developer) thirst for improved certainty, speed and earlier access to technical advisers. Will be discretionary, with developers able to choose to access to avoid delays if their project is subject to demanding timeframes.</p> <p>Will link with Natural England’s Land Use pre-planning application advice services, but will keep sufficient separation to maintain confidence in integrity of separate statutory roles.</p> <p>Sequencing of Planning and Licensing Natural England cannot make final licensing decisions in advance of a planning consent for several reasons. Penfold work on Duplication explains why changing responsibilities for licensing tests is ill-advised. A new procedure for NSIPs provides an opportunity to trial an innovative alternative. This enables early assessment of mitigation proposals <u>before</u> planning (subject to sufficient info being provided by applicant), resulting in issue of ‘letter of comfort’ for developer where proposal meeting ecological requirements, in line with process designed for NSIPs. A similar approach is being piloted in Sweden. Due to resource implications, it is likely that offers of pre-planning engagement could only be offered on a chargeable basis.</p>	<p>Gives developer greater confidence that their mitigation proposal will meet licensing requirements, reducing risk. Provides opportunity to encourage more proportionate approaches and novel solutions and prevent developers making mistakes that result in costly delays or proposal re-design. Maximum benefit will be reaped where mitigation proposals are sufficiently detailed to allow assessment against legal tests.</p> <p>Potential to save time and provide greater certainty for developers, planning authorities and Natural England by ensuring only licensable projects are given planning permission (e.g. avoids often extensive post-Planning consent discussions to resolve licensing hurdles). Opportunity to build better environmental outcomes through s106 Agreements as LPA will be aware of mitigation requirements prior to its assessment.</p>	<p>Secretary of State consent secured for Natural England to charge for discretionary advice services in June 11,</p> <p>Pilot currently underway of Pre-submission Application Screening Service to validate resourcing assumptions for full business (due in Jan 12) and refine the proposed offer in response to customer feedback to ensure it meets business needs Feedback from Customer panel very positive; Launch expected Sep 12.</p> <p>Process being trialled with NSIPs (IPC cases).</p>

Licensing Processes Review		
<p>Building on an existing regulatory improvement programme, we have undertaken further staff and customer engagement to review development/mitigation licensing processes, identify a series of further improvements.</p> <p>Main proposal aims to put in place Conditioned Licences, in which the enforceable elements are limited to essentials (maps, timetable, set of conditions) presented in a simplified pack.</p>	<p>Will reduce complexity, and drive down volume of ‘further information requests’ for critical mistakes/omissions, some of which can be small but cause delays. Will reduce customer frustration, and save time and money.</p> <p>Enhance reputation of public services by being responsive to customer needs but in ways that do not compromise environmental outcomes.</p>	<p>Review and prioritisation workshops hosted 25 Aug and 15 Sep.</p> <p>Detailed scoping of Conditioned Licences underway, launch anticipated Q1 2012/13. Prioritisation exercise for other ideas being undertaken; delivery will be phased, prioritising those that will do most to save customer and staff time and resources, reflecting importance of delivering Government’s growth agenda and Natural England Customer Service Excellence agenda.</p>
Additional Measures led by Defra but which will dovetail with our Regulatory Improvements Programme		
<p>Statutory Guidance on interpretation of offences</p> <p>In 2009, Defra introduced – on Natural England’s advice - a provision in the Habitats Regulations requiring the courts to have regard to statutory guidance on interpreting disturbance and damage/destruction offences. When published (expected this year) this is expected to reduce risks of prosecution for trivial offences, encouraging developers and consultants to embrace risk, reducing burden for us and them and reducing bad press for biodiversity.</p> <p>Amendments to Planning Circular 06/2005 were drafted by Natural England/Defra in 2007/08 to improve planning authority confidence in judging small scale developments (e.g. loft conversions) against the OPI test in a proportionate way. This guidance, which is expected to encourage proportionality of approach to enabling proposals for small scale developments that may affect protected species, has not been released by DCLG. We continue to support Defra policy colleagues as they press for the updated Circular to be released as part of the NPPF.</p>		
<p>Advocacy and support for research into novel methods</p> <p>We will continue to advocate and support a Defra-funded (c. £500,000 over 4 years) programme of research to improve the evidence base for licensing, addressing a lack of knowledge of the success (or otherwise) of mitigation strategies. This research will provide a robust evidence base, thus reducing our exposure to challenge, facilitating a less precautionary approach and enhancing our capacity to be more radical.</p>		

Annex 4 – Draft - NATURAL ENGLAND’S PRE-SUBMISSION SCREENING SERVICE FOR SPECIES LICENSING

Natural England is developing a premium service allowing developers to obtain a much earlier view (on any proposals they may wish to put forward to obtain a licence in respect of European Protected Species (EPS)). This earlier view could be provided prior to planning consent being secured, where the developer is prepared to invest in providing the necessary detail at that stage.

Before issuing a licence, Natural England must be satisfied that the proposals being put forward to mitigate and/or compensate for the effect of the development on EPS meet strict tests set out in the Habitats Regulations 2010. An application for a licence cannot normally be submitted until after planning consent has been obtained. This is for a number of reasons:

- The ‘No Satisfactory Alternative’ legal test requires that Natural England does not license works that do not have the necessary consents to proceed, and
- Development proposals often change as the scheme moves through the planning system, and the limited resources available for assessing licence applications are therefore ordinarily targeted at assessing applications once other consents are in place. Service standards ensure that the licence requests are, wherever possible, turned around within 30 working days.

PURPOSE OF SERVICE

The new premium service that Natural England is developing will, in return for a fee (charged at cost recovery rates), offer developers the opportunity to obtain an upfront ‘in principle’ view on the mitigation proposals that are being put forward for a site. The service aims to reduce the risk to applicants that their EPS mitigation licence application will not succeed at first submission. Increasing this certainty of success will reduce delays and costs for the applicant.

Our proposal takes account of feedback from developers that they want to retain flexibility in sequencing of planning and licensing. (Some planning applications are speculative and developers may not wish to invest in detailed mitigation proposals up front in all cases.) Developers will need to weigh up the clear advantages of obtaining an earlier view from Natural England against any disadvantages that the mitigation proposals may subsequently need to be amended as a result of the planning process. However, early feedback Natural England has obtained from developers through a pilot of the service and discussions with a Customer Panel indicates that they wholeheartedly welcome the proposed service.

PRE-SUBMISSION APPLICATION SCREENING SERVICE: PRODUCT DESCRIPTION

In order to ensure applicants get real value out of pre-submission screening, applications should be in as complete a state as possible. Ideally the applicant should have or be about to request planning permission (and/or other consents) and have the following application elements in draft:

- Application form
- A method statement
- A reasoned statement

Most benefit is likely to be gained from this service if the application is substantially complete when screened as the assessors will be able to either provide assurances

that the application is likely to meet licensing requirements or very specific guidance on how to address any inadequacies in the draft application.

Within a target date, of between 20 to 30 working days (customer feedback will inform the standard that is adopted), Natural England will provide the applicant and their ecologist with an 'in principle' decision/opinion on the draft application. Natural England will also provide a detailed note setting out any shortfalls in the application, method statement and/or reasoned statement.

The 'in principle' decision will relate to the detail in the set of proposals presented; major changes to proposals as a result of the planning process may require a full reassessment. However, the service does aim to significantly reduce the level of uncertainty an applicant may face, and it should reduce the risks of the delay that can occur when a formal submission fails to meet requirements and results in a Further Information Request.

Natural England will offer:

- A Completeness check of the draft licence application pack to ensure that everything that needs to be is included.
- Peer review of draft application documents by desk assessment, to help prevent a Further Information Request when the application is formally submitted as any delays might be costly.
- Follow up telephone call with ecological consultant/applicant
- A site visit and written report of the advice given during the site visit
- A written advice note highlighting any issues that need to be addressed and giving our 'in principle' decision on the tests. This note will aim to provide the applicant with a degree of certainty that provided they adequately cover the issues highlighted as needing to be addressed, they will be successful in getting the licence on their first formal application.
- Where required, adviser telephone support to clarify any highlighted issues prior to formal submission.
- It is expected that where an applicant wishes to seek further screening of the next iteration of the application, this will constitute a separate stage, with the clock restarting and a further fee applied where appropriate.

Natural England must not compromise its role as regulator. Its staff will therefore not write proposals, design mitigation, submit applications on the applicant's behalf, or take on any other aspects of the role of the ecological consultant or applicant. Moreover, we will establish clear arrangements within Natural England so that staff providing services to applicants will not be involved in decision taking in those cases. There will always be a clear separation of duties between our discretionary advisory role and our regulatory decision taking role. Staff may, of course, be involved in decision taking in cases where they have not previously been involved in the provision of advice.

The service mirrors a new assessment process that Natural England is putting in place to meet the needs of the Infrastructure Planning Commission when assessing Nationally Significant Infrastructure Projects (NSIPs), summarised at below.

BENEFITS OF THE SERVICE

The service is expected to bring a range of benefits including:

- increased certainty for developers that their mitigation proposals will meet licensing requirements, reducing costs from delays.
- reduced developer costs by avoiding gold-plating of mitigation proposals that applicants occasionally attempt in the mistaken belief that it will bring more certainty
- quicker turnaround times once the planning consent is in place and an application is formally submitted, thus reducing delays and associated costs. The site in question and the mitigation proposals will be familiar to the adviser assessing the application, who can therefore focus only on any changes made in response to advice given at the pre-submission screening stage.
- Provision of assistance to the LPAs in discharging their species protection duty and inform the conservation-related planning conditions they may choose to impose.

STEPS AND TIMELINE TO FORMAL LAUNCH:

To date	Under the Natural Environment and Rural Communities Act 2006, Natural England must seek authority from Secretary of State to charge for discretionary services. This approval was obtained in June 2011.
June 2011	Natural England is conducting a small scale pilot of the pre-submission screening service. This pilot is necessarily limited given the resource pressures resulting from an increased volume of licence applications and requests for advice (especially in relation to NSIPs). The pilot is principally to understand how Natural England can maximise the usefulness of the screening service for developers applying for mitigation licences and to understand the likely resource requirements. It also aims to help Natural England determine the limits of the service.
to	
December 2011	In tandem with this pilot, work is underway to develop the legal, financial, procurement, infrastructure and promotional components needed before such a service is launched. This will address issues such as the contractual terms & conditions on which the service is offered, establish a mechanism for fee receipts, and so on.
February 2012	These aspects will inform a business case to be put to Natural England's Board aimed at securing formal approval of our decision to offer the pre-submission screening service and to recruit (or allocate) the necessary resources to deliver in line with customer expectations on quality and timeliness.
September 2012.	Allowing for recruitment and training, Natural England's ambition is to formally launch the pre-submission screening service from September 2012. This date is subject to confirmation.

Nationally Strategic Infrastructure Projects

These processes will operate slightly differently in cases involving nationally strategic infrastructure projects. We have, therefore, adjusted European Protected Species Licensing Procedure to provide wildlife advice and licensing input ahead of a Development Consent Order being issued by the Infrastructure Planning Commission (IPC). It aims to provide developers and the IPC with confidence that the mitigation

proposals and other supporting evidence will meet licensing requirements, subject to a DCO being granted. This process is set out in the following table.

Step 1	<p>Is a licence required? The developer and their consultant ecologist use Natural England’s published guidance on the relevant species to decide whether a mitigation licence is required.</p>
Step 2	<p>Informal engagement Should the developer, in consultation with Natural England, decide there is a need for a mitigation licence, Natural England’s Land Use team will facilitate the early informal engagement with the developer, their consultant ecologist and Natural England’s Regulation team (who issue licences) for high level discussions of licensing requirements.</p>
Step 3	<p>Submit draft application The developer and their consultant ecologist prepare and submit to Natural England Regulation team a full draft licence application</p>
Step 4	<p>Natural England assessment of draft application A full assessment of the draft licence application will be undertaken to determine whether the appropriate level of detail has been provided and whether the statutory licensing tests set out in the Habitats Regulations 2010 have been met.</p>
Step 5	<p>Letter of comfort Unless further information has had to be sought during the assessment stage, within 30 working days of receipt of the draft application Natural England will decide whether to issue a ‘letter of comfort’. If a letter of comfort is issued, it will make clear that, on the basis of the species information and proposals presented, Natural England is satisfied that the licensing tests can be met, subject to the Development Consent Order being granted by the IPC. The developer may then use this letter to support their application to the IPC.</p>
Step 6	<p>Formal licence process and issue Once the DCO application is accepted for examination, Natural England will liaise with the IPC and applicant to ensure that the formal licence application is submitted at an appropriate time to Natural England’s Regulation team, which will seek to conclude the approval process on the EPS licence within the examining authority’s statutory timetable</p>