

## Making Natura 2000 Impact Assessments Truly Appropriate: NGO proposal for an Action Plan

Organisations supporting this paper:



## 1. Introduction

The Natura 2000 network, created under the auspices of EU Birds and Habitats Directives, is the world's largest and most ambitious coordinated network of protected areas. Sites of this network, designated by Member States (MS) are afforded general protections under the Directives and in addition MS must implement site-specific conservation measures, such as management plans. On a very practical, everyday level, one of the main general protection provisions found in the EU Directives to ensure protection of the sites and coherence of the whole network is the requirement that decisions on development plans and projects<sup>1</sup> should be subject to so-called appropriate assessment (hereinafter also AA). Found in Articles 6(3) and (4) of the Habitats Directive, the rules on appropriate assessment have gained significant attention in the case-law of the CJEU which has on numerous occasions clarified specific aspects of the assessment process. CJEU has set high standards both with regard to the quality of assessments as well as with regard to applying the precautionary principle in decision-making.

In practice, however, appropriate assessment is not always carried out according to these high standards<sup>2</sup>. Together with a range of other issues, this has resulted in a solely partial implementation of the EU Birds and Habitats Directives on the ground that has allowed the decline of EU biodiversity to continue. Although sometimes the projects involved may not seem such a huge threat on their own, their cumulative effects may be detrimental to the coherence and functioning of the sites and wider network. In light of the results of the regulatory fitness-check (REFIT) of the EU Birds and Habitats Directives, J&E has developed the following action plan to improve the practice of appropriate assessments across the EU. Key areas where improvement is needed are highlighted, alongside proposed solutions to address the problem identified. Based on these, a set of action points for different stakeholders is proposed. Although there are many actors whose input is needed to turn the tide on this critical issue, the European Commission can and should play a leading and coordinating role, as part of its upcoming action plan to improve the implementation of the EU Birds and Habitats Directives.

## 2. Assessment procedures

Appropriate assessments are just one type of environmental assessment required by the EU and corresponding national laws. Environmental Impact Assessment (EIA) may also be required for specific projects and Strategic Environmental Assessment (SEA) for plans and programmes. Although sharing some similar features, there are also important differences between these assessment procedures, most notably in the scope of the assessments, public participation requirements and the assessment/decision-making criteria. Therefore national rules should be designed in a way that promotes synergies, whilst avoiding waste of resources or creating unwanted side-effects.

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<sup>1</sup> With the exception of plans and projects that are connected with or necessary to the management of the site as well as plans and projects that do not have „likely significant effects“ on a site within the meaning of the Directive as interpreted by the CJEU.

<sup>2</sup> This has been acknowledged by a number of studies, e.g. Study on evaluating and improving permitting procedures related to Natura 2000 requirements under Article 6.3 of the Habitats Directive 92/43/EEC (Ecosystems LTD, 2013), Evaluation Study to support the Fitness Check of the Birds and Habitats Directives (Milieu, 2016), Practical problems in implementation of the Appropriate Assessment Natura 2000 (J&E, 2016).

## 2.1. Relationship between AA, EIA and SEA

MS have different approaches to coordinating the above-mentioned different assessments. Whereas in some countries, assessment procedures are not directly interlinked, in others, such as Hungary, the AA is carried out as part of the EIA or SEA (in cases where an EIA or SEA is carried out). In cases where no EIA or SEA is carried out, a standalone appropriate assessment of impacts on Natura 2000 sites is carried out. In yet others, such as Estonia and Slovakia, the need to carry out an appropriate assessment should trigger a full EIA or SEA procedure, therefore a standalone appropriate assessment is never carried out, even where protection of Natura 2000 sites is the sole reason for carrying out an assessment of potential impacts.

Although it is up to the Member States to choose which approach to take, based on our practical experience we can recommend the following approach:

- In case an EIA or SEA has to be carried out, carry out the AA as part of the same procedure to reduce the administrative burden on all stakeholders and ensure that the AA results will be given due attention;
- Where the AA is carried out as part of the EIA or SEA procedure, pay careful attention to the different assessment criteria and role in the decision-making process of AA on the one hand and of EIA or SEA on the other hand. This will ensure that the decisions on the plan or project are made on the correct basis under Article 6(3) of the Habitats Directive;
- Where only assessment of impacts on a Natura 2000 site is needed, the appropriate assessment procedure should be used instead of requiring a full EIA. This is because the AA is a more targeted, and therefore more efficient procedure for such cases. Although a formal consultation process is not required under EU law for such an AA, it would be best practice to include at least environmental NGOs in the assessment procedures (see also p 2.2.).

The last recommendation does not only serve to reduce administrative burdens. It is sadly our experience that in systems where AA can currently only be carried out as part of an EIA, the need for appropriate assessment is nearly always ignored as the developer and authorities consider carrying out a full EIA too burdensome when an EIA is not strictly required (the project does not fall under Annex I of the EIA Directive). Therefore, projects are permitted without any proper assessment - this is the least favourable outcome and may in some cases be a breach of the Habitats Directive.

## 2.2. Involvement of the public/NGOs

Article 6 of the Habitats Directive does not contain specific provisions requiring the competent authorities to set up a public participation procedure in relation to the AA. However, best practice would be to involve the public and environmental NGOs, in line with public participation principles, which are enshrined in the Aarhus Convention and the Treaties of the European Union. The CJEU has also recently commented that environmental NGOs should be afforded an opportunity to participate effectively in the permitting procedures where the planned activity might have a significant effect on a Natura 2000 site<sup>3</sup>. Even if they are not directly involved in the AA process, the public and NGOs must at least be able to comment on and challenge the AA and its results. Including conservation groups who aim to protect public interests in the assessment procedure has also many practical

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<sup>3</sup> Judgement of the Court of Justice in case [C-243/15](#) (*Lesoochránárske zoskupenie VLK*)

benefits, such as contributing specialist knowledge, representing the collective interests of the public and rationalising their arguments.<sup>4</sup>

Involvement of the public or at least environmental NGOs as their representatives also serves the aim of avoiding or reducing conflicts and legal challenges. This is especially effective in cases where public consultations take place at an early stage and also on a strategic level (see also p 3.1.-3.2.).<sup>5</sup> It is also the experience of J&E and its members that the absence of involvement or late involvement of these stakeholders can lead to serious conflicts, delays and legal challenges.

### 3. Taking a strategic approach

In order to streamline and facilitate the assessments of specific projects, using some strategic approaches can be a key success factor. These include drafting useful site management plans as well as strategic and spatial planning. In addition to these useful tools, targeted guidance on specific habitat types, species and likely impacts of common activities on these habitats and species would usefully improve the AA process.

#### 3.1. Site management plans

Site management plans can provide a useful basis for planning future developments in and around protected sites. These plans should identify site-specific features and factors related to ensuring site integrity, which should be taken into consideration in AA. Site management plans may also contribute to understanding the significance of the site to achieving the objectives of the wider Natura 2000 network (how crucial a specific site is in a Europe-wide context). This would provide a useful insight into implications of any given plan or project on a wider scale than one specific site.

To improve their usefulness, site management plans already include an initial assessment of whether and under which conditions certain activities, such as mining, construction of infrastructure and housing or tourism industry operations, could be carried out without adversely affecting the integrity of the site. Although such guidelines cannot replace the AA for specific projects in specific locations (which may identify additional threats/pressures or re-evaluate the significance of these), they can provide a good indication to potential developers as to whether to consider such activity in this area and which aspects should be carefully considered early in the project development process. Therefore, thoroughly drafted and well-distributed site management plans can ensure that environmental considerations are being integrated into development plans at an early stage.

#### 3.2. Strategic and spatial planning

In addition to site management plans, a strategic approach to Natura 2000 site protection can also be taken by carrying out good quality AAs of strategic and spatial plans. Although it's clear from the wording of the Habitats Directive as well as relevant CJEU case law<sup>6</sup> that this is obligatory, it is our experience that sometimes the AAs of strategic and spatial plans are carried out in a *pro forma* fashion, which is insufficiently location-specific.

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<sup>4</sup> See in this regard also [opinion of Advocate-General Sharpston in C-263/08 \(Djurgården\)](#), para 59-61.

<sup>5</sup> On the importance of early and constructive engagement, see „[An overview of the RSPB's engagement with the site protection system](#)“ (RSPB, 2012), p 14-24 as well as case studies.

<sup>6</sup> See judgement in [case C-6/04, Commission vs United Kingdom](#), para 51-56.

There are many good reasons to avoid generic AAs of strategic and spatial plans. A well-designed and executed strategic and spatial plan which takes into account the results of a robust AA:

- Enables early engagement with relevant stakeholders, which in turn helps to reduce conflicts and therefore costs and decision delays (which can also be caused by legal challenges)<sup>7</sup>.
- Helps to identify potential conflicts between development plans and Natura 2000 protection requirements early in the development process and therefore avoid unwanted economic, social and biodiversity impacts<sup>8</sup> (if necessary, then by designing zones where some particular activities are precluded).

Especially with spatial plans on the municipal level, setting appropriate land-use rules may help to avoid threats to Natura 2000 sites “upstream” and direct potentially harmful activities to ecologically less sensitive areas.

### 3.3. Guidance on habitats, species & activities

In addition to different strategic decisions and plans, more specific guidance on habitats, species and the likely effects of common activities on them at a regional/national level would enable early consideration of conservation needs. Although there are already some sector-specific guidance materials made available by the European Commission, these serve as a basic reference point only due to their very general and generic nature. It is also evident that it is difficult if not impossible to issue habitats- and species-specific guidance covering large geographical areas.

Therefore, it would be preferable to draw up specific guidance on habitats and species and activities that may affect them negatively on a regional or national level. There are already some positive examples of such specific guidance<sup>9</sup>, which describe both activities that are generally considered “safe” as well as those which may harm the habitats and species. Although such guidance cannot replace the AAs of specific projects, they do serve as a handy tool for guiding the work of both developers as well as authorities. In any case such guidance should take a broad approach to potential impacts on habitats, species and the underlying factors that influence them.

In order to ensure that there are no unjustified differences between guidance issued by different regions or states, biogeographical seminars could be used as fora to discuss and harmonise such guidance.

## 4. Requirements on experts

Although the regulatory and institutional framework for appropriate assessments and other outside factors play an important role in ensuring high quality assessments, the role of experts is easy to underestimate. The outcome of the assessment is to a large degree influenced by their degree of

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<sup>7</sup> See to that effect, RSPB, 2012, p 14-15, as well as „Theory and Practice of Strategic Environmental Assessment“ T. Fischer, 2007, pages 12-13

<sup>8</sup> See also Milieu 2016, p 167.

<sup>9</sup> See for example: [http://www4.lubw.baden-wuerttemberg.de/servlet/is/13940/beeintraechtigung\\_ffh\\_gebieten.pdf?command=downloadContent&filena me=beeintraechtigung\\_ffh\\_gebieten.pdf](http://www4.lubw.baden-wuerttemberg.de/servlet/is/13940/beeintraechtigung_ffh_gebieten.pdf?command=downloadContent&filena me=beeintraechtigung_ffh_gebieten.pdf). In the marine context, an example would be <http://necmsimarinetest.esdm.co.uk/SiteSearch.aspx>, which has been applied to certain sites, such as Lundy Island (<http://necmsimarinetest.esdm.co.uk/Marine/FAPMatrix.aspx?SiteCode=UK0013114>)

qualification and experience, as well as by whether they are independent from the developers and the potential consequences (or lack of consequences) in case of poor performance on a given AA.

#### **4.1. Qualification & experience**

According to CJEU case-law, AAs must be based on “best scientific knowledge in the field”<sup>10</sup>. It is evident that in order to ensure that the assessment truly is based on such scientific knowledge, the experts carrying them out must be properly qualified.

There are, in principle, several ways in which to ensure that the experts capable of applying best scientific knowledge in the field are used for drafting AAs. One of the clearest and most transparent ways would be to set up a licensing requirement for the experts that is specific to the AA process. According to the evidence gathered in the course of the Fitness Check of the Nature Directives, this is also seen as a cost-effective solution.<sup>11</sup> In order to ensure the effectiveness of such licensing schemes, the issuing of licenses should be dependent on sufficient expertise; licences should preferably be limited in time and their renewal dependent on quality of experts’ work. Successful completion of training courses could also be considered as a prerequisite for licence renewal. In case of significant misgivings about the quality of experts’ work, such licences should be revoked.

To ensure high level of expertise among the experts carrying out the assessments and ensure a sufficient number of qualified experts, regular trainings should be organised for them.

#### **4.2. Independence from the developers**

In addition to ensuring that the experts are capable of delivering good quality work, it is also necessary to ensure that their assessment results are not unduly influenced by the developers.<sup>12</sup> This would require a degree of independence from developers. At the same time, according to the “polluter pays” principle, the developer should still bear the costs related to AA.

One way of achieving these outcomes would be to cut the direct contractual and financial ties between the developer and the expert. The easiest way to do this would be to use the competent authority as “intermediary” for the financial side of the relationship between the developer and expert, i.e. it would be up to the competent authority to appoint the expert (e.g. in a similar way to appointment of experts in court proceedings) and decide on if and when the experts’ assessment fulfils the requirements foreseen and payment for the work can be made. In MS where the AA is carried out before the public authorities are involved in the process, alternative measures should be taken, e.g. stating the qualifications of the ecologists involved in the AA and include a declaration of independence by experts (similar to expert witnesses in court proceedings).

#### **4.3. Sanctions for misleading, incomplete or false information**

Even the best experts can sometimes perform their tasks poorly. To ensure that poor performance and providing incomplete assessments will not become a competitive advantage for some experts, it is essential to provide adequate sanctions in cases where the experts are knowingly underperforming their tasks. This could include financial penalties, revocation and suspension of licences etc.

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<sup>10</sup> Case C-127/02, *Waddenzee*, para 54

<sup>11</sup> *Milieu*, 2016, p 254

<sup>12</sup> In comparison, in case of EIAs this has been established as a clear requirement

## 5. Awareness-raising & sharing of best practices

One of the key issues which hampers the proper application of AAs is the lack of knowledge and capacities of different stakeholders. Even in cases where the stakeholders are aware of the key AA requirements, sharing of best practices among them would ensure both more efficient use of resources as well as more uniform application practice.

### 5.1. Awareness-raising and capacity-building of key stakeholders

Admittedly, the appropriate assessment system and rules are complex and not all stakeholders are fully aware of them. The “threshold” for engagement of the AA process is low<sup>13</sup> - almost any plan or project proposed in or in the vicinity of a Natura 2000 site could be subject to the need for an AA. This low threshold combined with the fact that AAs may be needed for plans and projects in many sectors (e.g. agriculture, transport, water management etc.) also means that there are a lot of decision-makers, including on the regional and local level, that may be faced with being in charge of carrying out an AA or taking its results into account in decision-making. Lack of skills, knowledge and/or capacity among decision-makers has also been brought out as a major issue in previous studies.<sup>14</sup>

It is our experience as a network of national organisations that the most critical groups whose knowledge and capacities to a large degree determine the relevance and quality of AAs are:

- Public authorities in charge of conservation efforts and environmental permits;
- Public authorities in charge of implementing plans, granting other permits or deciding whether to permit plans or projects that may affect Natura 2000 sites, e.g. transport and road authorities, local municipalities etc.;
- Experts carrying out the assessments;
- Local citizen groups and NGOs.

It is our experience that sufficient in-depth knowledge of appropriate assessment rules (legal base and interpretations of the CJEU) and ways in which these should be applied is sometimes missing among members of some of the above groups. Therefore there is a need to raise awareness of the rules in these groups. We believe that the most efficient way to conduct such awareness-raising is at a national/regional level. Such awareness-raising activities (training, workshops, written guidance etc.) can then take into account the relevant national/regional legislation in this area.

### 5.2. Best practice sharing and application

In addition to raising knowledge of the requirements related to AAs, sharing of best practices would benefit both the effectiveness as well as efficiency of the assessments carried out. Such sharing of best practices could take place both at national, as well as at EU level. Therefore, the efforts made by

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<sup>13</sup> See, for example, Case 127-02, *Waddenvereniging and Vogelsbeschermingsvereniging*, paragraphs 44 -49, which confirms in relation to the risk of a plan or project having adverse effects on site integrity that “such a risk exists if it cannot be excluded” (para. 44).

<sup>14</sup> See, for example, *Ecosystems*, 2013, pages 52-53.

the European Commission in this area<sup>15</sup> should be continued in the future, and they should also be made at national level.

In addition to raising awareness of stakeholders about the best practices available, targeted efforts at the national level should also be made in order to adopt these practices in a way that would take into account relevant national law and administrative practices.

## 6. Baseline data

According to CJEU case law, appropriate assessments must be based on “best scientific knowledge” and assess all potential impacts on the conservation objectives of a given site. Fulfilling these requirements will be impossible unless the assessment is based on sufficient, objective data on the actual state of the habitats and species protected under the Nature Directives, i.e. the baseline data. In our experience, there are several challenges regarding the use and availability of data for this purpose, including a lack of available data, failure to use data that is already publicly available, and difficulty in accessing existing data. Tackling these challenges would significantly improve the effectiveness of the appropriate assessments for the purpose of protection of Natura 2000 sites.

### 6.1. Lack of available and appropriate data

One of the major obstacles to effective implementation of the EU Habitats and Birds Directives is the lack of available and appropriate data for AAs. To overcome this problem, a two-fold approach should be taken. On one hand, the MS should ensure gathering of up-to-date data on the protected habitats and species on their territory. Without this data, it would be impossible for the MS to also fulfil its other obligations under the Directives (in particular obligations stemming from Art 6(2) of the Habitats Directive). To ensure that this data is gathered and regularly updated, funding for such purposes could also be made available by the EU.

On the other hand, if no baseline data has yet been gathered by MS or it is not up-to-date, it should be the task of experts to gather data relevant to the specific plan or project on their own. In many cases this may mean the need to carry out field surveys. The latter must naturally be of high quality too (e.g. carried out in the appropriate season, have sufficient scope etc.).

In case no data is available or gathered, the precautionary principle needs to be applied to the decision-making process, i.e. lack of data should never be interpreted as lack of habitats or species in the area. On the contrary, if the non-existence of habitats or species cannot be proved, they must be presumed to exist.

### 6.2. Use of available and up-to-date data

In many Member States, there are publicly available databases with data on protected species and habitats. Some of this data is collected and made available by public authorities; however there are also publicly available datasets created by universities and even databases which function on the “crowdsourcing” principle, i.e. are created by amateur bird-watchers and other wildlife enthusiasts.<sup>16</sup> Although use of such publicly available databases alone may not always be enough, up-to-date and publicly available data should be used in AAs to the fullest extent.

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<sup>15</sup> See [http://ec.europa.eu/environment/nature/natura2000/management/best\\_practice\\_en.htm](http://ec.europa.eu/environment/nature/natura2000/management/best_practice_en.htm) for details on previous efforts in this field

<sup>16</sup> e.g. database e-Elurikkus in Estonia, found at <http://elurikkus.ut.ee/>

Additionally, scientific publications, almanacs and similar materials should also be used as long as they are considered to be sufficiently up-to-date to contain relevant information by all experts and authorities involved. When older sources are used, these must be treated with caution and interpreted in light of known changes, e.g. in population numbers of protected species in the wider region.

While use of pre-existing, publicly available baseline data should be in all cases encouraged, ignoring relevant and available data should in no cases be accepted by the competent authorities. In such a case, it should be deemed that the AA in question is not based on the best scientific knowledge and unless the assessment is updated, a positive decision may not be granted.

### **6.3. Access to existing data**

Field studies necessary to establish baseline data, although at times unavoidable, can be both time-consuming as well as costly. To increase efficiency of appropriate assessment procedures, duplication of studies should be avoided as far as this is possible. To this end, public authorities should require experts to submit gathered data on protected species and habitats to the authorities. Thereby, the data which undoubtedly is „environmental information“ in the sense of the Environmental Information Directive (EID)<sup>17</sup>, is readily available to experts assessing impacts of future development plans as well as the general public.

In this context it is also important to ensure that different authorities that are holding the information share it between themselves or alternatively, data is stored in a common database. This would help to reduce unnecessary burdens created by gathering overlapping data that may in some cases be incomparable (due to methodologies used etc.).

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<sup>17</sup> Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC

## 7. Action points

Based on the above-mentioned challenges and ways to overcome these we propose the following action points to be taken by different actors.

### 7.1. European Commission

- Coordinate and assist Member States in their efforts to improve the AA rules and practice in their respective countries (incl. issuing further guidance and recommendations in this field);
- Continue efforts to gather and disseminate best practice examples from different MS whilst also taking action in cases of non-compliance by MS;
- Propose appropriate funding schemes on the EU level for actions that improve the AA practice and have a European dimension (e.g. gathering of baseline data on protected habitats and species).

### 7.2. Legislative authorities in MS

- Evaluate the effectiveness and efficiency of the AA rules on the national level and amend them as necessary, paying particular attention to:
  - integration of AA with the EIA and SEA procedures;
  - inclusion of the environmental NGOs in the AA procedure;
  - requirements with regard to the experts carrying out AA;
  - legislative and institutional framework that ensures independence of AA experts from the developers;
  - availability of data needed for AAs;
  - legislative and institutional framework to ensure high quality decision-making by the competent authorities.

### 7.3. Central and/or regional governments in MS

- Ensure that high quality site management plans are drawn up for all Natura 2000 sites;
- Ensure that national and regional strategic plans that may affect Natura 2000 sites are based on high quality AAs;
- Lead the process of creation of good quality, specific guidance on protected habitats, species and activities that as a rule should be avoided (or, on the contrary, would generally be permitted) and coordination of such guidance between MS in the same biogeographical area;
- Coordinate and provide resources for continuous training of experts carrying out the assessments;
- Create licensing schemes for AA experts or similar mechanisms to ensure their qualification and expertise;
- Coordinate and provide resources for awareness-raising and capacity-building of key stakeholders (e.g. on AA rules, effective involvement of stakeholders etc);
- Coordinate gathering and application of best practices of AA;
- Create data platforms and other tools needed to efficiently provide access to baseline data.

### 7.4. Competent authorities

- Ensure drawing up and application of good quality site management plans and strategic plans, e.g. species protection plans, regional and local land use plans;

- Apply strict criteria to the AAs and take their results into account in decision-making;
- Involve relevant stakeholders, including environmental NGOs early in the decision-making processes and do so in an effective manner;
- Gather best practices related to AAs and share them with central/regional governments and the EC;
- Require all available data to be used in AAs;
- Gather and make available baseline data on Natura 2000 site conservation objectives.

#### **7.5. Project promoters and developers**

- Engage competent authorities and environmental NGOs at an early stage of project development to ensure that considerations related to Natura 2000 sites are taken into account early on;
- In case the expert assessment needs to be provided by the developer, ensure that experts used have necessary expertise, knowledge and skills to provide a high-quality study.

#### **7.6. Appropriate assessment experts**

- Use all available data on the site's baseline data and best scientific knowledge to assess a project's potential impacts on Natura 2000 sites;
- If the existing data is not sufficient for removing scientific doubts about the impacts of plans and projects, gather additional data or apply the precautionary principle;
- Make any new data gathered during the assessment available to public authorities;
- Maintain independence at all times;
- Use networks of experts to gather and share best practices and latest assessment methodologies.

#### **7.7. Environmental NGOs**

- Actively participate in the appropriate assessment procedures, to ensure that high standards are applied in practice;
- Educate landowners, small-scale developers and other relevant stakeholders in Natura 2000 areas on the appropriate assessment rules and ways to implement them.