

Functional linkage: How areas that are functionally linked to European sites have been considered when they may be affected by plans and projects - a review of authoritative decisions

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B Why ‘functional links’ to European sites are important to decision making

B.1 What is meant by ‘functional linkage’

In the context of this report, the term ‘functional linkage’ refers to the role or ‘function’ that land or sea **beyond the boundary** of a European site might fulfil in terms of supporting the populations for which the site was designated or classified. Such an area of land or sea is therefore ‘linked’ to the site in question because it provides a (potentially important) role in maintaining or restoring a protected population at favourable conservation status. Whilst areas beyond a site boundary might serve a function in respect of a designated habitat type, for example by being linked hydrologically to the qualifying habitat, in the context of this report ‘functional linkage’ refers only to land or sea which is linked to a qualifying species (whether an Annex II species for which a SAC has been designated, or a bird species for which a SPA has been classified).

Whilst the boundary of a European site will usually be drawn to include key supporting habitat for a qualifying species, this cannot always be the case where the population for which a site is designated or classified is particularly mobile. Individuals of the population will not necessarily remain in the site all the time. Sometimes, the mobility of qualifying species is considerable and may extend so far from the key habitat that forms the SAC or SPA that it would be entirely impractical to attempt to designate or classify all of the land or sea that may conceivably be used by the species. Thus, for some sea birds the SPA may be confined to the cliffs where the sea birds breed, and will not extend to their feeding areas, which may be many kilometres away, or to the routes used by the birds either to reach their feeding grounds, or on migration, or during the winter. In respect of bats, for example, the SAC may need to be confined to the key roost sites used for hibernation, resting or breeding. The majority and, in many cases, the whole of the foraging areas of the bats in that roost, and the ‘commuting’ routes (flyways) between the foraging areas and the roosts, cannot practically be included in the SAC.

This approach to the definition of boundaries for SACs, where a qualifying species is mobile, is reflected in Article 4(1) of the Habitats Directive which states:

“...For animal species ranging over wide areas these sites shall correspond to the places within the natural range of such species which present the physical or biological factors essential to their life and reproduction. For aquatic species which range over wide areas, such sites will be proposed only where there is a clearly identifiable area representing the physical and biological factors essential for their life and reproduction...”

In practical terms, if the boundaries of a designated site were drawn to include *all* land or sea which might serve some function, at some point in time, in terms of the population for which the site had been designated or classified, the strict protection afforded by Article 6 would be applied more extensively than would be necessary to meet the objectives of the Directives. This could potentially place unnecessary restrictions on plans and projects which might not otherwise be required. By way of example, sites designated for harbour porpoise would need to potentially include vast areas of sea, if the boundaries were drawn to include all the areas

which might possibly provide some degree of support, at some point in time, for a given population. Regulatory procedures would be imposed on plans and projects simply on the basis that a harbour porpoise *might* occasionally feed or travel through the area affected by them.

The concept of 'functional linkage' is best explained in the context of the protection afforded to species under the Directives. EC guidance⁶ on the strict protection of animal species of community interest refers to the Habitats Directive laying down two main 'pillars' which aim to meet the Directive's broad objectives. The first is linked to the protection afforded through designation of SACs (Articles 4-6 of the Directive) and the second is the protection of individuals of the 'European protected species' throughout a Member State's territory under Article 12. In summary:

"In order to achieve its objectives, the Habitats Directive provides for two main instruments: the Natura 2000 network of protected sites and the species protection provisions. The provisions for species protection apply to the whole of a Member State's territory and concern the physical protection of specimens as well as their breeding sites and resting places. Both regimes allow for exceptions under certain conditions. Both instruments are complementary and jointly aim to ensure a favourable conservation status for all species of Community interest."

The favourable conservation status of a given species is not therefore limited to how the species fares within the defined boundary of designated SACs. The guidance states at paragraph 17 that:

"Assessing and evaluating the conservation status of habitats and species within the Natura 2000 network is therefore not always enough, especially when the occurrences of habitats or species are only partly covered by the network, maybe even in some cases only to a relatively small extent."

Likewise, the Birds Directive refers not only to the protection of species within special protection areas, with reference to the network of SPAs, Article 4(4) provides:

"...Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats".

In practice, therefore, in respect of protected species, three potential situations arise as set out below. This report is relevant to the second of these three situations:

1. Land or sea within the boundary of a SAC or SPA which supports a qualifying species is strictly protected by the assessment approach set out in Article 6 (commonly referred to in the UK as a 'Habitats Regulations Assessment');
2. Supporting habitat in areas beyond the boundary of a SAC or SPA which are connected with or 'functionally linked' to the life and reproduction of a population for which a site has been designated or classified should be taken into account in a

⁶ Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC, February 2007.

Habitats Regulations Assessment. However, that assessment will need to determine how critical the area may be to the population of the qualifying species and whether the area is necessary to maintain or restore the favourable conservation status of the species. Effects which would not be acceptable within the boundary of a European site may or may not be acceptable if they occur on functionally linked land or sea;

3. Individuals of a protected species, whether or not they are part of a population for which a European site has been designated or classified, are in any event afforded protection under the Directives, including in most cases their breeding and resting places, wherever they may be, inside or outside of the designated area. Species listed under Annex IV of the Habitats Directive are protected under the provisions of Article 12 as a 'European protected species'. Wild birds are similarly protected under the provisions of the Birds Directive.

The provisions of Article 6(3) and 6(4) of the Habitats Directive, as applied through a Habitats Regulations Assessment, do not apply to individuals of European protected species or individuals of species of birds which are not part of a population for which a European site has been designated or classified.

B.2 How functional linkage relates to the Habitats Regulations Assessment process

The concept of functional linkage is therefore an important consideration in decision making under the Habitats Regulations because the tests arising from Article 6(3) and 6(4) will need to be applied in respect of plans or projects which may significantly affect such supporting habitat and its contribution to the favourable conservation status of the relevant species.

Figure B.1 on the next page, provides an outline of the four stage process of Habitats Regulations Assessment. **The key question which this report is looking to address is how decision-makers have applied the Habitats Regulations Assessment (HRA) process where effects on species relate to functionally linked land or sea (situation 2 above) rather than the area within the boundaries of the relevant European site (situation 1 above).** Few plans or projects will progress to stages 3 and 4 so the majority of the authoritative decisions referred to in this report concern the stage 1 'screening' test and the stage 2 'appropriate assessment' and 'integrity test'. These initial stages are briefly introduced below, but the relevance of functionally linked land (FLL) to the Habitats Regulations Assessment process is encapsulated in the following quote from paragraph 27 of the High Court judgment in *RSPB and others v Secretary of State and London Ashford Airport Ltd* [2014 EWHC 1523 Admin]:-

"There is no authority on the significance of the non-statutory status of the FLL. However, the fact that the FLL was not within a protected site does not mean that the effect which a deterioration in its quality or function could have on a protected site is to be ignored. The indirect effect was still protected. Although the question of its legal status was mooted, I am satisfied that while no particular legal status attaches to FLL, the fact that land is functionally linked to protected land means that the indirectly adverse effects on a protected site, produced by effects on FLL, are scrutinised in the same legal framework just as are the direct effects of acts carried out on the protected site itself. That is the only sensible and purposive approach where a species or effect is not confined by a line on a map or boundary