



Implications of recent site casework for the definition of SPA boundaries and the application of the Habitats Regulations

A discussion paper by the RSPB

Natura 2000 and Ramsar Forum meeting
25 November 2004

Purpose

1. Recent site protection casework in which the RSPB has been involved has drawn attention to the important relationship between the definition of SPA boundaries and the application of the protective mechanisms under Regulations 48 and 49 of the Conservation (Natural Habitats, &c.) Regulations 1994 (**the Habitats Regulations**).
2. This paper brings to the attention of the Forum some of the practical and legal issues resulting from the definition of SPA boundaries.

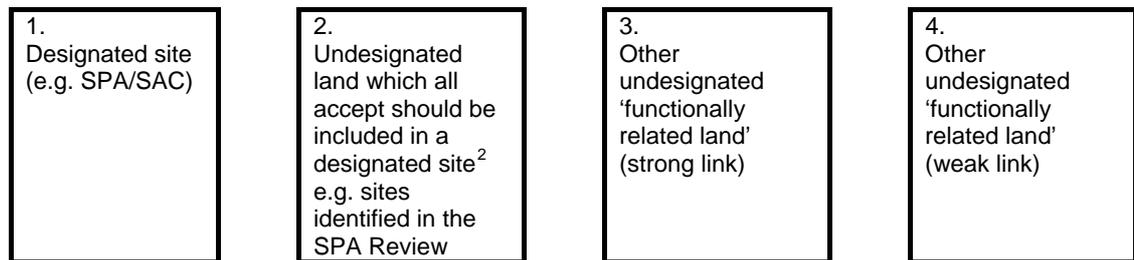
Introduction

3. Decisions on whether to allow plans or projects likely to have a significant effect on an SPA are, in general, governed by the provisions Articles 6(3) and 6(4) of the EU Habitats Directive. These articles have been implemented in Great Britain¹ by Regulations 48, 49 and 53 of the Conservation (Natural Habitats, &c.) Regulations 1994 (**the Habitats Regulations**).
4. It is Government policy to treat potential SPAs (**pSPAs**) as if they were designated. However, since the publication of the UK SPA Review, there has been no explicit published guidance on what constitutes a pSPA or when, in the Government's view, an area of land formally becomes a pSPA.
5. Any plan or project likely to have a significant effect on an SPA must be subject to an appropriate assessment to determine whether it will have an adverse effect on the integrity of the SPA, in view of the site's conservation objectives. If an adverse effect cannot be ruled out, then in order to proceed the plan or project must pass the strict tests on alternative solutions and imperative reasons of overriding public interest and provide adequate compensatory measures.
6. It has become apparent to the RSPB through recent site protection casework that when SPA qualifying interests utilise land outside the SPA boundary, difficult issues of legal interpretation are raised which have significant implications for the judgements on whether or not a plan or project will result in an adverse effect on an SPA's integrity. These in turn raise the question of whether SPA site boundaries have been defined properly.

¹ In Northern Ireland, articles 6(3) and 6(4) have been implemented by regulations 43, 44 and 48 of the Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995

7. The SPA Review process is likely to accentuate some of the issues outlined in this paper, as in many cases SPAs have been identified with boundaries far more limited than the corresponding BirdLife International Important Bird Areas. In the RSPB's view, important areas used by a qualifying interest of a site have been omitted for other than ecological reasons. An example would be goose feeding areas, where the roost has been designated but available feeding areas have not.
8. To assist in understanding the issues raised, it may be helpful to envisage the spatial distribution of the SPA qualifying interests in the following way:

Figure 1
Spatial relationship between the 'core' designated site and functionally-linked land outside the site boundary



9. The boxes above reflect the spatial relationship from the 'core' designated site (box 1) to other functionally linked but outlying areas (box 4). This relationship is important because it may affect judgements on likely significant effect and, ultimately, adverse effect.

Box 2

Refers to land, which can be included within an existing site or designated in its own right. It has often, but not always, been accepted as qualifying for designation by Statutory Conservation Agencies and Government.

Box 3

Functionally related land that may also include undesignated land where the case for designation is unresolved.

Box 4

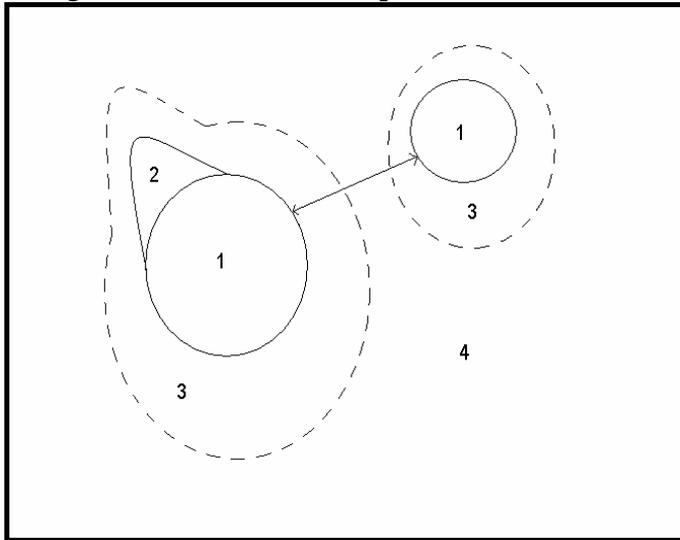
Usually land where there is no strong case for designation.

10. Figure 2 below shows this relationship as it might occur 'on the ground', including a situation where one or more connected sites are involved. The numbers shown refer to each of the four boxes above:

² Either as an extension to an existing SPA or as a completely new SPA in its own right.

Figure 2

Illustrative spatial relationship between the 'core' designated site and land with different strength functional relationship



Key question

11. In dealing with plans or projects affecting land outside an SPA, the fundamental question is:

Can a proposal, which relates to land outside a designated site, have an adverse effect on that site's integrity?

12. Based on the typology described above, this question centres on land in Box 2 and Box 3, with most challenges arising from Box 3 (strong functional relationship).

Issues arising from Box 2

13. Where the land in question has been accepted as qualifying for SPA designation by the Statutory Conservation Organisation (SCO) and/or Government, it is usually straightforward to deal with a plan or project. It is Government policy to treat such sites as if they had been designated, and therefore apply Regulations 48, 49 and 53 to plans or projects like to affect them (although see below for the implications of the European Court of Justice (ECJ) ruling on Basses Corbieres).
14. However, life is not always that simple and it is often the closer scrutiny that comes with assessing the possible effects of a plan or project that improves our understanding of the value to birds of an area of land. This often means that a potential new SPA or extension to an SPA emerges during the assessment process that does not have formal acceptance of the SCO or Government and is in a state of limbo as far as the protective requirements of the Habitats Regulations are concerned. The debate on these areas is whether they should be treated as pSPAs under Box 2 or not (i.e. Box 3). The Humberstone Marshes case study in the Annex to this paper helps illustrate the point. Similar issues were raised at the Dibden Bay public inquiry in respect of the land known as the Dibden Reclaim.

15. The ECJ ruled in the case known as 'Basses Corbieres', that where there is a habitat which qualifies as an SPA and a member state has failed to include it within a classified SPA, there is no scope for the full range of derogations for damaging development permitted under Article 6 of the EU Habitats Directive. The reason behind the judgement was to provide an incentive on member states to classify areas which should be classified and so benefit from the less strict derogations under Articles 6(3) and 6(4).
16. This means, in practice that when such sites are affected, a member state can only grant permission in very restricted circumstances (for example for imperative reasons of human health and safety); it does not have the flexibility to use other reasons (i.e. socio-economic ones) that might otherwise apply as justification to allow a damaging development to proceed.
17. It is the RSPB's understanding that Defra consider the Basses Corbieres ruling applies when a proposed SPA (or its extension) has been submitted by the SCO to Government for ministerial approval. Thus, at present it appears that Government would take the view that the judgement would not apply to sites identified in the UK SPA Review as they have not been consulted on. However, given the delay between sites being recognised as meeting SPA qualifying criteria and them being submitted to Government, it is arguable that this approach denies such sites the stricter protection envisaged by the ECJ.
18. The RSPB considers the ruling should apply earlier in the process, as the ECJ's intention was to encourage the designation of land that qualified for protection.
19. The following questions are raised:
 - Can/should undesignated areas of land that clearly meet the SPA qualifying criteria be treated as potential SPAs if they have not been formally recognised as pSPAs by the SCO or Government?
 - If not, should they be subject to stricter protection under the EU Birds Directive by virtue of the ECJ Basses Corbieres ruling?
 - At what point should the Basses Corbieres ruling apply?

Issues arising from Box 3

20. This concerns land with a strong functional relationship to a designated site and is often adjoining land, although it may be further away (geese using fields away from a coastal SPA or freshwater SPA roost site is an example). Concerns typically centre on whether the loss of such land (or other impacts on its function and quality) adversely affects birds using the designated site nearby.
21. There is work underway by the SPA/Ramsar Scientific Working Group to investigate the site-based conservation needs of birds using cropped habitats (the Cropped Habitat Information Project). This work will assess the future suitability of such land for SPA designation.
22. In addition to considerations under the Box 2 scenario outlined above, the debates at the Dibden Bay public inquiry and, indeed, Humberstone Marshes, have suggested two approaches to appropriate assessment of plans or projects under the Box 3 scenario. These are outlined below and the key issues drawn out.

Approach 1

23. It has been argued that the protection afforded to SPA qualifying interests should follow those interests whether or not they are within the SPA itself. This, it is argued, is the purpose of the Directive i.e. to sustain the birds for which the SPA has been designated.
24. Therefore, the Habitats Regulations should apply outside an SPA if the negative effects on areas outside the SPA are severe enough to give rise to an adverse effect on the integrity of the SPA e.g. a reduction in the range/population within the SPA of the birds for which the SPA is classified. However, some have argued this is unacceptable in Human Rights Act terms as use of land by the owner/occupier may be restricted in circumstances where they will not have been notified of its interest.
25. Arguments on adverse effects will depend on scientific evidence to show that the birds of the relevant species, which use the SPA, are suffering negative effects from impacts outside the site.
26. If this approach is followed, then it is likely that significant areas of land outside an SPA would be brought within the protective ambit of the Habitats Regulations without the extension of SPA boundaries. However, each case would have to be argued on its merits.
27. In practical terms the lack of a clear boundary definition of where the SPA interest was distributed when outside the SPA, would cause uncertainty in terms of deciding whether or not an appropriate assessment is required. In addition, if this approach was applied too conservatively it could result in a failure to provide appropriate protection to SPA qualifying interests.

Approach 2

28. An alternative view is that if the functional relationship of such land with an existing SPA is so strong, it should be designated anyway. There is a strong argument that it should be designated (or treated as such) as a matter of logic. If damage or loss to the undesignated land will result in an adverse effect (or a risk of one) to the integrity of a designated SPA, then the area of land affected must, by definition, be integral to the site and should be included in the designated area. Thus, the site boundary embraces all the functional land used by the qualifying interests of the site; by definition, appropriate assessment would not extend to land outside the revised site boundary used by birds (i.e. Box 4).
29. From where we are now, this would require extensive areas of land to be included within the existing SPA network.

The issue of land management

30. While the current debate has been held in the context of development proposals and the application of the Habitats Regulations, it is of wider relevance to land management, as in the case of Approach 1 it is being argued the protective regime offered by Article 6 of the Habitats Directive extends beyond the site boundary.

Conclusion

31. Recent site casework has identified some important issues relating to the treatment of land outside SPAs that is utilised by birds from the SPA. These raise significant questions on how we define SPA site boundaries.
32. The key implication is that either SPA boundaries are extended to capture more fully the full distribution of their qualifying interests, or the application of the protective regime of the Habitats Regulations outside of SPA boundaries is extended.

RSPB

22 November 2004

Annex

Case study

Microlight flying school proposal at Humberstone Farm, adjacent to Breydon Water SPA/Ramsar site, Norfolk

A proposal to site a microlight flying school at Humberstone Farm raised concerns about the potential disturbance effects on the adjacent Breydon Water SPA/Ramsar site. Further analysis revealed that undesignated grazing marshes (Humberstone Marshes) adjacent to the proposed flying school and the SPA/Ramsar site, supported internationally important populations of passage and wintering black-tailed godwits of the *islandica* race. This information was new to both English Nature and the RSPB and was provided by the local WeBS counter.

A good data set (5 years) established that the series of fields supporting the black-tailed godwits could qualify in their own right as an SPA, although they formed a natural extension to the existing SPA/Ramsar site.

This site clearly merited SPA designation, but was not identified in the UK SPA Review, the Important Bird Areas book, let alone having been consulted upon. The Inspector at the appeal hearing/inquiry (subsequently withdrawn) wrestled with whether or not the effects on the undesignated land could be subject to the tests of the Habitats Regulations, given that the site was not formally recognised.