



National Conservation Council Guidance Notes to Government Entities

Pursuant to Section 41 of the National Conservation Act, 2013

A. Introduction

1. These Guidance Notes are issued by the National Conservation Council (“**the Council**”) under sections 3(12) and 41(2) of the National Conservation Act 2013 (“**the Act**”).
2. Copies of the Act may be downloaded here: https://doe.ky/wp-content/uploads/2015/01/NationalConservationLaw-Es052014_web.pdf
3. The Guidance Notes apply to all three Cayman Islands. They are directed to every “entity” as defined by section 2 of the Act, namely “any body of the government” including “the Cabinet, any ministry, portfolio, statutory authority, government company or any other body which exercises a public function”. Entities must act in accordance with these Guidance Notes when making decisions under sections 41(3) and (4) of the Act.
4. The Guidance Notes explain the duties of entities under sections 41(3) and (4) of the Act and give guidance on how those duties should be discharged. They have been updated to give effect to the judgment of the Court of Appeal in *The Central Planning Authority v The National Conservation Council* (Appeal No.022 and 025 of 2022).
5. It is our collective responsibility to ensure that the provisions of the highest law in the land, our Constitution, are implemented.
6. Our 2009 Constitution Order contains in the list of affirmations as the start of the document that we are a: “*A country that respects, protects and defends its environment and natural resources as the basis of its existence*”.

7. Further, Section 18 of the Bill of Rights which deals with Protection of the environment states the following:
8. *18.—(1) Government shall, in all its decisions, have due regard to the need to foster and protect an environment that is not harmful to the health or well-being of present and future generations, while promoting justifiable economic and social development.*
9. *(2) To this end government should adopt reasonable legislative and other measures to protect the heritage and wildlife and the land and sea biodiversity of the Cayman Islands that— (a) limit pollution and ecological degradation; (b) promote conservation and biodiversity; and (c) secure ecologically sustainable development and use of natural resources.*
10. Section 41 of the National Conservation Act, at its core, is the legislative embodiment of this constitutional provision.

B. Section 41 of the Act

11. The purpose of the National Conservation Act is to promote and secure biological diversity and the sustainable use of natural resources, to protect and conserve endangered threatened and endemic wildlife and their habitats; to provide for protected terrestrial, wetland and marine areas and to give effect to international agreements and conventions to which the Cayman Islands are a party.
12. The Council is specifically charged with promoting the biological diversity and conservation and sustainable use of natural resources. Under the Act “sustainable use” means using the components of biological diversity and natural resources in a way that does not lead to long term decline, thereby maintaining their potential to meet the needs and aspirations of present and future generations. One of the ways that the Act enables the Council to fulfill its mandate is by facilitating the integration of environmental considerations into national decision-making

processes through a consultation process with the Council which is set down in sections 41 through 43 of the Act.

13. Section 41 of the Act provides as follows:

(1) Subject to subsections (2), (3) and (4), every entity shall comply with the provisions of this Law and shall ensure that its decisions, actions and undertakings are consistent with and do not jeopardise the protection and conservation of a protected area or any protected species or its critical habitat as established pursuant to this Law.

(2) For the purposes of subsection (1) the Council shall formulate and issue guidance notes to entities on their duties under this Law, and any action taken in full accordance with such guidance shall be deemed to be in compliance with this Law.

(3) Every entity shall, in accordance with any guidance notes issued by the Council, consult with the Council and take into account any views of the Council before taking any action including the grant of any permit or licence and the making of any decision or the giving of any undertaking or approval that would or would be likely to have an adverse effect on the environment generally or on any natural resource.

(4) Every entity, except Cabinet, in accordance with any guidance notes issued by the Council and regulations made under this Law, shall apply for and obtain the approval of the Council before taking any action including the grant of any permit or licence and the making of any decision or the giving of any undertaking or approval that would or would be likely to have an adverse effect, whether directly or indirectly, on a protected area or on the critical habitat of a protected species.

(5) In the case of a proposed action to which subsection (4) applies, the Council may, having regard to all the material considerations in this Law and regulations made under this Law- (a) agree to the proposed action subject to such conditions as it considers reasonable, in which case the originating authority shall ensure that the proposed action is

made subject to such conditions; or (b) if the Council considers that the adverse impact of the proposed action cannot be satisfactorily mitigated by conditions, the Council shall so direct the originating authority and that authority shall refuse to agree to or refuse to proceed with the proposed action.

(6) Any person aggrieved by a decision of the Council under this section may appeal against it to the Cabinet in accordance with section 39.

C. The duty to consult the Council under s.41(3) of the Act

14. When engaged, section 41(3) requires an entity to consult the Council and take into account the views of the Council.
15. Section 41(3) is engaged if an entity considers that any action it takes would or would be likely to have an adverse effect on the environment generally or on any natural resource.
16. “Action” means anything that would or would be likely to have an adverse effect. For example, if the implementation of a grant of planning permission would be likely to have an adverse effect on the environment, then the grant of planning permission would constitute an “action” for the purposes of section 41(3).
17. It is possible that more than one entity may take relevant “action” in respect of a proposed activity. For example, the decision to acquire environmentally-sensitive land for the Crown would constitute an “action” and the decision to plan a nationally-important project using that land would constitute an “action”. Both entities responsible would trigger the requirement to consult.
18. “Adverse effect” is defined by section 2 of the Act to mean “an effect that may result in the physical destruction or detrimental alteration of a protected area, a conservation area, an area

of critical habitat or the environment generally”. Section 2 sets out a non-exhaustive list of actions that will have such an effect.

19. The effect of section 41(3) when read with the definition of adverse effect in section 2 is that the duty to consult the Council is triggered in any case where the action would be likely to create a risk to the environment or to any natural resource. Because of the words “may result” in the definition of “adverse effect”, the threshold for triggering the duty to consult the Council is low.

20. It is unlawful for any entity to take “action” within the meaning of section 41(3) without consulting the Council.

21. The Council considers that any action that falls within the following categories is likely to create a risk to the environment or to a natural resource. Accordingly, these Guidance Notes require entities to consult the Council before taking any action or making any decision which falls within the following categories:

- i. Location triggers: where the action or decision relates to the locations set out below or relates to activity that will occur in the locations set out below.
- ii. Activity triggers: where the action relates to activities of the kind set out below.
- iii. Strategic Triggers: where the action relates to the making of plans of the kind set out below.

22. For example, the duty of consultation under s.41(3) will arise whenever the Central Planning Authority considers granting planning permission or a change of zoning in relation to a site falling within one of the location trigger areas.

- i. Entities contemplating an action, decision, or undertaking, that falls within the trigger categories should not rely on another entity, which has oversight of their action, to consult on their behalf.

- ii. For example when entities are contemplating developments which require Permission of the Central Planning Authority or the Development Control Board, and that fall within the trigger categories. That the Authority or Board can be relied upon to consult on their own decisions does not remove the need for the applying entity to also consult directly regarding their decision. This consultation should ideally occur prior to applying for planning permission.

23. The **Location Triggers** are shown on the attached Screening Map. They are:

- (1) Activities occurring on the coast, i.e., within 500 feet landward of the high water mark and activities occurring on land parcels with canal frontage;
- (2) Activities occurring seaward of the high water mark;
- (3) Activities in areas of primary habitat or critical habitat (as defined in a Conservation Plan); and
- (4) Activities in or adjacent to a protected area.

24. The **Activity Triggers** are:

- (1) Subdivision, clearing, filling, or excavation on land of one acre or more;
- (2) Land reclamation projects;
- (3) Large scale residential developments and special purpose developments, including projects of national importance, mixed use and Planned Area Developments;
- (4) Agriculture on land area greater than one acre, and installation of aquaculture and the reclamation of land from the sea for such purpose of any scale;
- (5) Telecommunication, broadcast or radar installations;
- (6) Transportation infrastructure, including planning or construction of new roads, including construction of road extensions;
- (7) Industrial Processing, Manufacturing, Rendering, Production, Treatment, Storage or Similar Facilities;
- (8) Storm water drainage and management schemes;
- (9) Petroleum fossil fuel, biofuel and other fuel or chemical production, processing, holding, transfer or transport facilities;
- (10) Waste Management Activities, Solid & Liquid, including new facilities, expansion,

- enhancement or change of system at existing facilities;
- (11) Excavation and extractive operations, including - marine dredging; quarries; extraction of minerals; deep drillings (including geothermal drilling); extraction of petroleum, natural gas or ores; an installation for the disposal of controlled waste(s) from mines and quarries;
 - (12) Energy Generating, Transfer or Transmission Facilities;
 - (13) Ground water or sea water abstraction;
 - (14) Airports and Airstrips;
 - (15) Ports, harbours, yacht marina and inland waterways which permit the passage of vessels;
 - (16) Water Generating Facilities, including Desalinization Plants;
 - (17) Discharge, Emission or Disposal of Effluents or other materials;
 - (18) Decommissioning or Decontamination of industrial installations;
 - (19) Physical, Chemical or Biological Pest Control Activities, including application of pesticides, including larvacides and adulticides, herbicides, insecticides, rodenticides, etc.;
 - (20) Setting fires for the clearance of land;
 - (21) Burial at Sea or other than in a designated cemetery;
 - (22) Marine Moorings, etc.;
 - (23) Anchorage Areas;
 - (24) Control of Nuisance Animals or Plants;
 - (25) Licensing of Trade Or Business Activities Which Utilize Local Natural Resources For Their Core Activity; and
 - (26) Discharge or Modification of Permissions and Conditions Attached to Permissions.

25. The **Strategic Triggers** are the formulation of National or Sectoral Policies or Projects including, but not limited to:

- (1) Tourism Plans;
- (2) Economic Plans;
- (3) Energy Policies, including Power Needs/Purchase Planning Development Plans;
- (4) Transport Plans;
- (5) Infrastructure Planning;
- (6) Socio-Economic Planning;

- (7) Port Plans, Air or Sea;
 - (8) Emergency Response Planning, Including State of Emergency Derogations;
 - (9) Industrial Activity Plans;
 - (10) Emergency or Disaster Response Management Plans; and
 - (11) Acquisition/Sale/Disposal/Lease/Loan of Crown Land.
26. Even if an activity does not fall within one of the location, activity or strategic triggers, an entity must still consider whether the action would be likely to create a risk to the environment or to any natural resource so as to trigger the duty of consultation under s.41(3) of the Act.
27. In assessing whether an activity would be likely to create a risk to the environment or to any natural resource for the purpose of deciding to consult under s.41(3) or applying for approval under s.41(4) of the Act, an entity must not take into account any conditions that might be imposed to limit the environmental impact of the activity. This is because the power to consider and decide the extent to which conditions mitigate adverse effect is conferred on the Council under s.41(5) of the Act. The entity is, however, invited if they wish to propose possible mitigation measures which they feel would be effective and appropriate, for Council to consider. Such proposed measures are welcomed as part of either the s.41(3) or s.41(4) processes singly, jointly or in sequence.
28. If an entity is unsure whether it is required to consult the Council in accordance with s.41(3) of the Act and these Guidance Notes, it should contact the Department of Environment for further advice (EMU.DoE@gov.ky).
29. When the duty to consult the Council is triggered under s.41(3) of the Act, the entity should take the following steps:
- i. Notify the Council that its views are sought in accordance with s.41(3) of the Act;
 - ii. Identify the action that it is considering taking;
 - iii. Identify the basis on which that action would or would be likely to create a risk to the environment or to any natural resource, including by identifying all applicable location, activity and/or strategic triggers;

- iv. Provide a plan sufficient to identify the location of the proposed activity; and
 - v. Provide a detailed description of the nature and purpose of the activity, including any plans in the case of developments or similar, and the activity's possible effects on the environment, so as to enable the Council to assess the environmental risks to which the action may give rise.
30. This material should be emailed to EMU.DoE@gov.ky or sent by mail care of the Department of Environment.
31. If the Department of Environment, on behalf of the Council, considers that it has not been provided with enough information to provide an informed consultation response, it may request additional information from the entity.
32. Consulting the Council under other statutory powers (such as s.7 of the Development and Planning Act) is not a substitute for the duty of consultation under s.41(3) of the Act.

D. Consultation responses by the Council

33. When consulted under s.41(3) of the Act, the Council will assess the environmental impact of the proposed action by reference to its characteristics, its location and the potential for adverse impact on the environment, particularly the cumulative effect of the characteristics.
34. The characteristics may include:
- (1) The size of the action;
 - (2) The cumulation with other actions;
 - (3) The use of natural resources;
 - (4) The production of waste;
 - (5) Pollution and nuisances; and
 - (6) The risk of accidents, having regard in particular to substances or technologies used.
35. In considering the location of action, the Council may have regard to:

- (1) The existing land use;
- (2) The relative abundance, quality and regenerative capacity of natural resources in the area; and
- (3) The absorption capacity of the natural environment, paying particular attention to the following areas-
 - i. Wetlands;
 - ii. Dry forest;
 - iii. Xerophytic shrubland;
 - iv. Protected areas;
 - v. Coastal zones;
 - vi. Marine Parks or Reserves;
 - vii. Densely populated areas;
 - viii. Landscapes of historical, cultural or archaeological significance.

36. In considering potential impact, the Council may have regard to:

- (1) The extent of the impact (geographical area and size of the affected population);
- (2) The magnitude and complexity of the impact;
- (3) The probability of the impact; and
- (4) The duration, frequency and reversibility of the impact.

37. In response to a s.41(3) consultation, the Council may require an environmental impact assessment to be carried out in respect of the proposed action in accordance with s.43(1) of the Act.

38. The Director of the Department of Environment has delegated authority to make s.41(3) consultation response decisions on behalf of the Council.

E. An entity's obligations in response to a consultation response from the Council

39. An entity should not proceed to take any action until the Council has provided its consultation

response or confirmed in writing that it will not provide a consultation response.

40. An entity must give careful consideration to the Council's consultation response. Given the experience and expertise of the Council and the Department of Environment, an entity should ordinarily accept the Council's assessment of the environmental impact of the proposed action. Cogent and compelling reasons would be needed for departing from those views. If, exceptionally, an entity proposes not to accept the Council's assessment, it should provide its proposed reasons to the Council, afford the Council an opportunity to comment and address those comments before making a final decision.
41. If, in light of the Council's consultation response, it is apparent that the proposed action would jeopardize the protection and conservation of a protected area or any protected species or its critical habitat, then the entity is prohibited from taking that action under s.41(1) of the Act.
42. If, in light of the Council's consultation response, it is apparent that the adverse effect relates, directly or indirectly, to a protected area or the critical habitat of a protected species, then the entity (unless the entity is Cabinet) is prohibited by s.41(4) of the Act from taking the action without the express approval of the Council. Such approval will only be valid if given in writing.
43. An application for approval under s.41(4) of the Act should be emailed to EMU.DoE@gov.ky, or sent by mail care of the Department of Environment. The application should include details of any proposed conditions and any other matters that it wishes the Council to consider when making the s.41(5) decision.
44. The Director of the Department of Environment has delegated authority to make s.41(5) decisions on behalf of the Council.
45. If, in light of the Council's consultation response, it is apparent that the proposed action would risk harm to the environment, but not in a way that engages sections 41(1) or (4) of the Act, then the entity must decide whether it is appropriate to take the action. In doing so, the entity

must, pursuant to s.18 of the Cayman Islands Constitution Order 2009:

- i. Have due regard to the need to foster and protect an environment that is not harmful to the health or well-being of present and future generations, while promoting justifiable economic and social development; and
- ii. Take all reasonable steps to limit pollution and ecological degradation, promote conservation and biodiversity, and secure ecologically sustainable development and use of natural resources.

46. If an entity decides to take action that would risk harm to the environment, but not in a way that engages sections 41(1) or (4) of the Act, then as a matter of good practice the Council would expect it to provide reasons for its decision which explain how it has complied with the requirements set out at paragraphs 39.1 and 39.2 above.

47. These Guidance Notes will be reviewed periodically by the Council as appropriate.

F. An entity's option for a single consultation

48. If an entity considers that an action it is contemplating taking would or would be likely to have an adverse effect on the environment generally or on any natural resource, and it is apparent to the entity that the adverse effect relates, directly or indirectly, to a protected area or the critical habitat of a protected species, then the entity may submit a single request for review under sections 41(3) and approval under section 41(4) simultaneously.

49. If an entity is

- (i) unsure whether an action it is contemplating taking would have an adverse effect, directly or indirectly, to a protected area or the critical habitat of a protected species, in addition to a likely adverse effect on the environment generally or on any natural resource; and
- (ii) the entity takes the decision to leave this determination to the Council, i.e., not await the

receipt of the section 41(3) consultation response to decide if an application for approval under s.41(4) of the Act is required; then the entity may submit a single request for review under section 41(3) and approval under section 41(4) simultaneously.

50. Such a single application for review and approval if needed under s.4 of the Act should be emailed to EMU.DoE@gov.ky, or sent by mail care of the Department of Environment. The application should include details of any proposed conditions and any other matters that it wishes the Council to consider when making the s.41 decision.
51. If the Department of Environment, on behalf of the Council, considers that it has not been provided with enough information to provide an informed consultation decision, it may request additional information from the entity.

*Approved, National Conservation Council
General Meeting, 6 December 2024*

G. Screening Maps



