



Project Valorous Scoping Report

Appendix A: Habitats Regulations Assessment Approach

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Document Notes

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Appendix A: Habitats Regulations Assessment Approach

1.1 UK Exit from the European Union and HRA

Following the UK's exit from the European Union (EU) and end of transition period on the 31 December 2020, various pieces of legislation have been passed to remove the domestic constitutional basis for EU law in the UK. This includes changes to the 2017 Habitats Regulation¹ through The Conservation of Habitats and Species and Planning (Various Amendments) (England and Wales) Regulations 2018 and the Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019.

The amendments that have been applied are expected to provide legal certainty and minimise disruption immediately following EU exit. Legislation has been maintained as closely as possible to that which was already in place, to ensure the Regulations continue to have the same working effect following the UK's exit from the EU. Overall, the legislative changes do not result in material changes in how HRAs are undertaken in the UK.

References to "European sites" and "Natura 2000 sites" throughout this report, are to be read as references to "European sites within the UK national site network, (as defined by Regulation 3 of the Conservation of Habitats and Species Regulations 2017)" designated before the UK left the EU or designated after the UK left the EU under transposing regulations².

1.2 Habitats Regulations Assessment (HRA)

The HRA process comprises 4 main stages as shown in the bullet points below (extracted from Circular 06/2005 produced by the Office of the Deputy Prime Minister (ODPM)). The stages are:

- **Stage 1:** screening to identify the likely impacts of a project on a European site and consider whether the impacts are likely to be significant;
- **Stage 2:** Appropriate Assessment (AA) to determine whether the integrity of the European site will be adversely affected by the project;
- **Stage 3:** assessment of alternative solutions to establish if there are any that will result in a lesser effect on the European site;
- **Stage 4:** Imperative Reasons of Overriding Public Interest (IROPI) and Compensatory Measures to establish whether it is necessary for the project to proceed despite the effects on the European site, and to confirm that necessary compensatory measures are in place to maintain the coherence of the Natura 2000 network.

All 4 stages of the process are referred to collectively as the HRA, to clearly distinguish the whole process from the step within it referred to as the 'Appropriate Assessment' (AA). Stage 3 and Stage 4 of the process are only required should an AA conclude that an adverse effect on site integrity cannot be ruled out. The HRA stages are detailed in the following sections.

¹ The Conservation of Habitats and Species Regulations 2017 (as amended) and The Conservation of Offshore Marine Habitats and Species Regulations 2017 (as amended)

² Defra, 2020. Guidance to the UK Marine Policy Statement from 1 January 2021. Available at: <https://www.gov.uk/government/publications/uk-marine-policy-statement/guidance-to-the-uk-marine-policy-statement-from-1-january-2021> [Accessed January 2021]

Environmental assessments may also be required additionally, under the Environmental Impact Assessment (EIA) Directive (85/337/EEC). HRA is not the same as an EIA and does not replace the requirement for such a study.

1.2.1 Stage 1 - Screening

The screening stage examines the likely effects of a project either alone, or in combination with other projects and plans on a Natura 2000 site, and seeks to answer the question “*can it be concluded that no likely significant effect will occur?*”. To determine if the activities in question are likely to have any significant effects on the designated site, the following issues will be considered:

- Could the proposals affect the qualifying interest and are they sensitive/vulnerable to the effect;
- The probability of the effect happening;
- The likely consequences for the site’s conservation objectives if the effect occurred;
- The magnitude, duration and reversibility of the effect.

Outcomes of the screening stage will allow determination of 1 of the following 3 conclusions:

1. No likely significant effect;
2. A likely significant effect;
3. It cannot be concluded that there will be no likely significant effect.

Where the assessment concludes outcomes 2 or 3, then the need for an AA will be triggered.

‘Likely significant effect’ in this context is any effect that may reasonably be predicted as a consequence of the project, that may significantly affect the conservation or management objectives of the features for which a site was designated³, but excluding trivial or inconsequential effects.

The ‘shadow’ and formal HRA screening for likely significant effect will ensure compliance with the 2018 EC Managing Natura 2000 site guidance. The 2018 EC guidance updated existing guidance which included how to take account of recent caselaw such as the Court of Justice of the European Union (CJEU) caselaw ‘*People Over Wind & Sweetman* (Case C-323/17)’. The CJEU’s ruling in ‘*People Over Wind*’ – that it is not appropriate at the screening stage of HRA to take account of measures to avoid or reduce harmful effects on a Natura 2000 site – will be fully considered and applied. Therefore, screening for likely significant effects is based solely upon the presence/absence of a spatial interaction between pressure envelopes/footprints (from activity/sub activities associated with plan or project) and the boundary of any designated site. Mitigation measures can only be considered during the Stage 2 AA.

In effect the Stage 1 Screening process is an exercise that identifies a list of European sites or European marine sites that may be affected by the proposed plan or project and assesses if any likely significant effects can be ruled out (for each site).

Where no likely significant effects can be determined then those Natura 2000 sites are screened out of any further requirement for assessment.

Where likely significant effects are predicted, or where no likely significant effects cannot be ruled out, then those sites are carried forward for detailed assessment as part of the Stage 2 AA process.

³Habitats Regulations Guidance Note 3. The Determination of Likely Significant Effect under The Conservation (Natural Habitats &c) Regulations 1994. English Nature, 1999.

1.2.2 Stage 2 – Appropriate Assessment (AA)

An AA is an assessment carried out under Article 6(3) of the Habitats Directive or under Regulation 63 of The Conservation of Habitats and Species Regulations 2017 (as amended) and Regulation 28 of The Conservation of Offshore Marine Habitats and Species Regulations 2017 (as amended). The aim is to assess whether the proposals will have any adverse effects on the integrity of the European site, or European marine site. Site integrity is defined as:

“the coherent sum of the site’s ecological structure, function and ecological processes, across its whole area, which enables it to sustain the habitats, complex of habitats and/or populations of species for which the site is designated”.

The AA should answer the question “can it be demonstrated that the proposals will not adversely affect the integrity of the site?” focusing on the qualifying features for which the site is designated for. In accordance with the Waddenzee judgment (ECJ Case 127/02), the European Court of Justice ruled that a plan or project may be authorised only if a competent authority has made certain that the plan or project will not adversely affect the integrity of the site “that is the case where no reasonable scientific doubt remains as to the absence of such effects” (ECJ). In terms of what is reasonable, guidance from Scottish Natural Heritage (SNH) states “to identify the potential risks, so far as they may be reasonably foreseeable in the light of such information as can be reasonably obtained.”

The 2018 EC ‘Managing Natura 2000’ guidance document emphasises the conservation objectives of a site as the basis for defining adverse effect:

“The integrity of the site involves its constitutive characteristics and ecological functions. The decision as to whether it is adversely affected should focus on and be limited to the habitats and species for which the site has been designated and the site’s conservation objectives”.

The decision on whether the integrity of the site could be adversely affected by the proposals should focus on, and be limited to, the site’s conservation objectives.

The conservation objectives set out what needs to be achieved for the European marine site to make the appropriate contribution to the conservation status of the features for which the site is designated, and thus deliver the aims of the Habitats and Birds Directives i.e. favourable conservation status for the Natura 2000 network as described under Article 17 of the Habitats Directive.

The assessment also accounts for any avoidance or mitigation measures which will be implemented to avoid or reduce the level of impact from the activity. The competent authority may also consider the use of further/additional conditions or restrictions to help avoid adverse effects on site integrity.

If the AA concludes that the proposals will not adversely affect the integrity of a Natural 2000 site, either alone or in combination with other plans and projects, then permission may be granted. However, if the AA concludes that there will be an adverse effect on the integrity of the Natura 2000 site, or that there is uncertainty and a precautionary approach is taken, then consent can only be granted through a derogation process, if there are no alternative solutions, and there are IROPI and compensatory measures have been secured.

1.2.3 Stage 3 – Assessment of Alternative Solutions

All feasible alternatives have to be analysed, including do nothing option, to ensure that there are none which “better respect the integrity of the site in question” and its contribution to the overall coherence of the Natura 2000 network. Alternatives could include the location of the site, its scale and design, and the way in which it is constructed and operated. The do-nothing option also has to be considered.

The comparisons of alternatives should not allow other assessment criteria (e.g. economics) to overrule ecological criteria⁴. However, the same guidance also refers to the opinion for the case C-239/04, where the opinion of the Advocate General was that:

“...the choice does not inevitably have to be determined by which alternative least adversely affects the site concerned. Instead, the choice requires a balance to be struck between the adverse effect on the integrity of the SPA and the relevant reasons of overriding public interest”.

The absence of alternatives must be demonstrated before an assessment of IROPI can be undertaken.

1.2.4 Stage 4 – Imperative Reasons of Overriding Public Interest (IROPI) and Compensation Measures

Where a development has an adverse effect on the integrity of a Natura 2000 site, and there are no alternative solutions, consent can only be granted in 1 of the following ways as described in Regulation 64 of the 2017 Habitats Regulations (as amended):

- If the competent authority is satisfied that the plan or project must be carried out for imperative reasons of overriding public interest; or
- Where the Natura 2000 site concerned hosts a priority natural habitat type or a priority species, the reasons must be either:
 - reasons relating to human health, public safety or beneficial consequences of primary importance to the environment; or
 - any other reasons which the competent authority, having due regard to the opinion of the European Commission, considers to be imperative reasons of overriding public interest.”

If the importance of the proposed development is deemed to outweigh the effects which will result to the Natura 2000 site, and there are no alternatives, compensatory measures must be secured before consent is granted. Compensatory measures are independent of the project and intended to offset the adverse effects of a project. The compensatory measures must ensure that the overall coherence of the Natura 2000 network is maintained. Article 3(1) describes Natura 2000 as:

“a coherent European ecological network of special areas of conservation” that shall enable *“the natural habitat types and species’ habitats concerned to be maintained, or where appropriate, restored at a favourable conservation status in their natural range”* (EC, 2018).

To be acceptable compensatory measures should:

- Take account of the comparable proportions of habitats and species which are adversely affected;
- Be within the same bio-geographical range within which the European site is located;
- Provide functions which are comparable to those which justified the selection of the of the original site; and
- Have clearly defined implementation and management objectives so the measures can achieve the aim of maintaining the overall coherence of the network.

⁴ EC (European Commission), 2007. Guidance Document on Article 6(4) of the Habitats Directive 92/43/EEC. EC.