



The Planning Inspectorate  
Yr Arolygiaeth Gynllunio

# Developments of National Significance

## Appendix 4: Habitats Regulations Assessment



## Appendix 4: Habitats Regulations Assessment

4.1 This chapter should be read in conjunction with the Habitats Directive, the Conservation of Habitats and Species Regulations 2017 (as amended), and the Conservation of Offshore Marine Habitats and Species Regulations 2017, and all other relevant legislation and policy. It is the applicant's responsibility to ensure that all relevant and current policy, legislation and guidance have been considered.

### *HRA Regulations – purpose and effect*

4.2 The Welsh Ministers are the competent authority for the purposes of the Habitats Directive<sup>1</sup> and the Habitats Regulations<sup>2</sup> in relation to applications for DNS. The Welsh Ministers are therefore required to carry out and consult on an Appropriate Assessment (AA) in circumstances where the plan or project is likely to have a significant effect on a European site or a European Marine site.

4.3 If a DNS, when taken alone or with existing and known future plans and projects is likely to affect a European site, the applicant must provide the competent authority with such information as may reasonably be required for the purposes of the AA<sup>3</sup>.

4.4 This information normally takes the form of a No Significant Effects Report (NSER) or a Likely Significant Effect Report (LSER). HRA matrices should be appended to or included in the applicant's NSER (screening matrices) or LSER (both matrices); but they do not replace the applicant's NSER or LSER.

4.5 Where an AA is carried out and results in a negative assessment, consent can only be granted if there are no alternative solutions, there are Imperative Reasons of Overriding Public Interest (IROPI) for the development<sup>4</sup>, and compensatory measures have been secured.

### *European Sites*

4.6 Sites of Community Importance (SCIs), Special Areas of Conservation (SACs), candidate Special Areas of Conservation (cSACs) and Special Protection Areas (SPAs) are protected under Regulation 8 of the Habitats Regulations.

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1 Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (as codified)

2 The Conservation of Habitats and Species Regulations 2017 (as amended)

3 Regulation 63(2) of the Habitats Regulations 2017 (as amended), Regulation 28(3) of the Conservation of Offshore Marine Habitats and Species Regulations 2017

4 If the site hosts a priority natural habitat type or a priority species further conditions apply in relation to the reasons as explained in this note. "Priority" habitat types and species are particular SAC features for which EC member states have particular responsibility. They are listed in the Annexes to the Habitats Directive and usually also identified on individual SAC designation documents. They are not relevant to SPAs or Ramsar sites.

## Developments of National Significance

- 4.7 TAN 5 paragraphs 5.2.2 and 5.2.3 apply the procedures described below to possible SACs (pSACs), potential SPAs (pSPAs), Ramsar sites and sites identified, or required, as compensatory measures for adverse effects on any of the above sites. For the purposes of this chapter, all these sites are referred to as “European sites”.

### **Coordinating HRA with the DNS process**

#### *Early Engagement*

- 4.8 It is advised that the applicant commences consultation with NRW at the earliest point in the pre-application process.
- 4.9 Evidence of the outcome of this consultation with NRW should therefore be appended to the NSER or LSER. This will be key to the decision making process, as the competent authority must consult NRW and have regard to any representations made by them<sup>5</sup>.

Applicants are strongly advised to engage with NRW early on to agree baseline information, methodology, and evidence. Evidence plans, jointly agreed between NRW and the applicant, are useful in establishing a work programme for the pre-application stage.

- 4.10 The applicant’s NSER or LSER should provide the reasoning and evidence behind its conclusions. This is likely to be supported by the information presented in the ES for the DNS application. The applicant’s NSER or LSER must show how the information gathered has been applied to the HRA and the tests applicable to the Habitats Directive.
- 4.11 Applicants are strongly advised to use completed HRA matrices to identify and discuss issues with consultees, particularly NRW, with the aim of resolving issues prior to the examination.

### **HRA Stage 1: Screening**

- 4.12 The scope of the HRA should be defined and justified. The HRA should include screening for Likely Significant Effects (LSE). If there are no LSE identified for all the European sites considered, then the report is likely to take the form of a No Significant Effects Report (NSER) and HRA stages 2-4 will not be required.
- 4.13 The applicant’s HRA Stage 1 screening information to be presented in the NSER or LSER should include:

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<sup>5</sup> Regulation 63(3) of the Habitats Regulations 2017 (as amended)

## Developments of National Significance

- a detailed description of the development, processes, timings, and method of work proposed as part of the DNS;
- details of the methodology used to determine which European sites should be included within the assessment, plus definition of and justification for the scope of the assessment;
- a plan and description of the European site(s) potentially affected, including a description of all qualifying features (a copy of the site data sheet is useful to include);
- an appraisal of the potential effects resulting from the construction and operation of the project (e.g. noise) and the likely significant effect on the European site(s) and qualifying features (e.g. disturbance to bird species);
- an outline and interpretation of the baseline data collected to inform the findings;
- an appraisal of the effects of any other plans or projects which, in combination with the proposed development, might be likely to have a significant effect on the European site(s). The scope of that appraisal should be well-defined and agreed with the local authorities and NRW;
- an evaluation of the potential for the scheme to require other consents requiring consideration of LSE by different competent authorities (other than secondary consents which form part of the DNS application);
- a statement which identifies (with reasons) whether significant effects on European sites in other EEA States are considered to be likely; and
- evidence of agreement between the applicant and NRW on the scope, methodologies, interpretation, and conclusions of the screening assessment (such as copies of correspondence, Evidence Plans, or Statements of Common Ground).

4.14 At Stage 1, in relation to each European site and qualifying feature, the applicant will need to conclude from baseline information and consultation responses received that either:

- There are no LSE on all the European site(s) and qualifying features considered, either alone or in combination with other plans or projects, and therefore no further assessment is required (see later section entitled 'NSER'), OR
- LSE on any of the European site(s) and qualifying features considered exist, either alone or in combination with other plans or projects, therefore requiring an AA by the competent authority (see later section entitled 'HRA Stage 2: AA').

4.15 Competent authorities cannot take account of any integrated or additional avoidance or reduction measures when considering at the HRA screening stage whether the plan or project is likely to have an adverse effect on a European site.

4.16 The screening stage must be undertaken on a precautionary basis without regard to any proposed integrated or additional avoidance or reduction measures. Where the likelihood of significant effects cannot be excluded, on the basis of objective information the competent authority must proceed to carry out an AA to establish whether the plan or project will affect the integrity of the European site, which can include at that stage consideration of the effectiveness of the proposed avoidance or reduction measure.

## Developments of National Significance

### *In combination effect(s) on European site(s)*

- 4.17 Applicants must conclude whether the project, either alone or in combination with other plans or projects, is likely to have a significant effect on a European site.
- 4.18 Some projects may be unlikely to have significant effects on their own but effects in combination with other plans or projects may be significant. The applicant must therefore provide evidence in the NSER or LSER that it has considered effects, both alone and in combination with other plans and projects.

### *No significant effects report (NSER)*

- 4.19 The European Court of Justice (ECJ) in the *Waddenzee* case considered that the effects of the project should be '*identified in the light of the best scientific knowledge in the field*<sup>6</sup>. There should be a continuous evaluation of the assessment findings against thresholds of LSE.
- 4.20 If, during the process, the competent authority determines that there is 'no significant effect (alone or in combination)' and no reasonable scientific doubt remains, then the assessment can be concluded. The applicant should then summarise the results in an NSER.
- 4.21 In considering the NSER's conclusion that there are no LSE requiring AA, the Inspector will have regard to the decision in the *Waddenzee* case, in which the ECJ took the view that '*the competent national authorities, taking account of the conclusions of the appropriate assessment.....are to authorise such activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects*<sup>7</sup>'.
- 4.22 There is no prescribed format for the NSER or for the reporting of the outcomes of the screening stage. The NSER must be clear, be supported by sufficient information, and provide convincing reasons why the applicant has reached the view that there are no LSE and that an AA will not be required.

### *Screening outcomes*

- 4.23 If the applicant has concluded that the project is likely to have a significant effect on any European site, alone or in combination with other projects, the applicant must provide information in accordance with the HRA Stage 2: AA of the process.
- 4.24 If Stage 1 identifies LSE for any of the European sites considered, an assessment of the implications of the project on the site(s)'s conservation objectives<sup>8</sup> will be

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6 Paragraph 54 of *Waddenzee* (see footnote 5 for details)

7 Paragraph 59 of the ECJ judgment in *Waddenzee* (see footnote 5 for details)

8 Regulation 61(5) of the 2010 Habitats Regulations

## Developments of National Significance

required. This will take the form of an LSER and should include sufficient information for the AA.

- 4.25 Along with their HRA Stage 2: AA information, the applicant should also clearly state which European site(s) and qualifying features are being taken forward from HRA Stage 1: Screening and which European site(s) and qualifying features have been screened out of further assessment.
- 4.26 The HRA Stage 2: AA information should be presented in the applicant's LSER and should include:
- evidence about the project's effects on the integrity of protected sites;
  - a description of any mitigation measures proposed which avoid or reduce each effect, and any remaining residual effects;
  - a schedule indicating the timing of mitigation measures in relation to the progress of the development;
  - cross references to the relevant DNS requirements and any other mechanisms proposed to secure mitigation measures, and identification of any factors that might affect the certainty of their implementation;
  - a statement as to which (if any) residual effects constitute an adverse effect on the integrity of European sites, either alone or in combination with other plans or projects, and therefore need to be included within the AA; and
  - evidence to demonstrate that the applicant has fully consulted and had regard to comments received by NRW during pre-application consultation.
- 4.27 The applicant's LSER is also expected to include the integrity matrices for all the European sites taken to HRA Stage 2.

### *Negative Appropriate Assessment*

- 4.28 Unless the applicant's LSER concludes that no reasonable scientific doubt remains '*identified in the light of the best scientific knowledge in the field*<sup>9</sup>; and that the project will not adversely affect the integrity of any European site, alone or in combination with other plans or projects, the applicant's assessment will need to move to HRA Stages 3 and 4 of the process.

### **HRA Stages 3 & 4: Assessment of Alternatives & Consideration of IROPI**

- 4.29 If Stage 2 concludes that the project will adversely affect the integrity of the site(s), or is inconclusive; consideration of alternatives, compensatory measures and whether the project is justified by IROPI will be required. This will also form part of the LSER.
- 4.30 An assessment of alternative solutions should be undertaken, and details of how these have been identified and considered should be provided in the applicant's

## Developments of National Significance

LSEr. The applicant's assessment constitutes information to inform the competent authority's assessment.

- 4.31 Where it can be demonstrated that there are no alternative solutions to the project that would have a lesser effect or avoid an adverse effect on the integrity of the European site(s), the project may still be carried out if the competent authority is satisfied that the scheme must be carried out for IROPI. Where priority natural habitats or species will be affected, the IROPI justification should be provided in the LSEr and must relate to either:
- human health, public safety or beneficial consequences of primary importance to the environment; or
  - have due regard to any opinion from the European Commission, any other imperative reasons of overriding public interest.

### ***Submission and examination***

- 4.32 Following submission, checks for validity will be mainly procedural, but during this time, the Inspectorate will also check that sufficient information is submitted in order to determine the application.
- 4.33 Where the applicant's conclusions have been disputed during the examination, the report will include revisions to any HRA matrices submitted. The report, and any related consultation responses and examination material, will form part of the evidence base for the Inspector's report and recommendation to the Welsh Ministers.

### ***The Inspector's report***

- 4.34 The Inspector's report will address the LSE of the project on any European site(s) and qualifying features and, if appropriate, also consider whether the project will have an adverse effect on the integrity of European site(s). Where necessary, the Inspector's report will assess evidence from the examination relating to the case for no alternatives, IROPI and compensatory measures. Welsh Ministers will then consider all the examination evidence prior to making a determination on the DNS application.