



PINS NOTE 05/2018

To: All Inspectors, HoSs Planning, Enforcement & Specialist Casework, Major Applications and Plans (England and Wales)

Relevancy: Planning casework, Enforcement & Specialist Casework, NSIP casework and Local Plan examinations

Date of Issue: 09 May 2018

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Consideration of avoidance and reduction measures in Habitats Regulations Assessment: *People over Wind, Peter Sweetman v Coillte Teoranta*¹

Action

1. Inspectors should be aware that on 12 April 2018, the Court of Justice of the European Union (CJEU) issued a judgment¹ which ruled that Article 6(3) of the Habitats Directive² must be interpreted as meaning that mitigation measures (referred to in the judgment as measures which are intended to avoid or reduce effects) should be assessed within the framework of an appropriate assessment (AA)³ and that it is not permissible to take account of measures intended to avoid or reduce the harmful effects of the plan or project on a European site⁴ at the screening stage⁵.
2. Prior to this judgment, case law⁶ in England and Wales had established that avoidance or reduction measures that form part of a proposal could be taken into account when considering whether the plan or project would be likely to have a significant effect on a European site. If the risk of a significant effect could be excluded on the basis of objective information, there was no need to undertake an AA.
3. This Note provides guidance to Inspectors on the proposed approach to be taken where the proposed plan or project is subject to Habitats Regulation Assessment (HRA), and where the HRA relies on avoidance or reduction measures to conclude there would be no likely significant effects on European site(s). It should be noted that avoidance and

reduction measures can still be taken into account in the AA when the effects on site integrity are being assessed.

4. The CJEU reasoned that: *"Taking account of such measures at the screening stage would be liable to compromise the practical effect of the Habitats Directive in general, and the assessment stage in particular, as the latter stage would be deprived of its purpose and there would be a risk of circumvention of that stage, which constitutes, however, an essential safeguard provided for by the directive."* (paragraph 37 of the judgment).
5. The implication of the CJEU judgment is that **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.**
6. 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 measures.

Implications for Local Plans

7. In Local Plan examinations, the Local Planning Authority (LPA) will be the competent authority throughout the local plan process. However, in determining soundness of the plan the examining Inspector will need to carefully consider whether the requirements of the Habitats Regulations have been met.
8. For local plan examinations which are ongoing or for which examining Inspectors have not yet issued their recommendations by 12 April 2018 (the date of the CJEU judgment), the HRA report for the plan should be reviewed:
 - If the HRA report⁷ identifies that the plan is likely to have significant effects on European site(s) and their designated features and an appropriate assessment of the plan has been carried out then **no further action is required.**
 - If the HRA report includes information that concludes that there are no pathways for the policies/allocations in the plan to cause significant effects on European site(s) and their designated features then **no further action is required.**
 - If the HRA report includes information that identifies likely significant effects on European site(s) and their designated features but concludes that they can be mitigated through avoidance or reduction measures (and does not go on to the AA stage) **then examining Inspectors should:**

- Ask the he LPA to confirm the extent to which they consider their HRA report is legally compliant in light of the judgment and ask them to re-visit the screening assessment in doing so.
 - If the revised screening assessment concludes that an AA is required this should be carried out.
 - Consider whether the AA necessitates any main modifications (MM) to the plan. The extent to which MM are likely will decrease where adequate avoidance and reduction measures were already identified and secured. If the avoidance and reduction measures are adequate to exclude adverse effects on European site(s) integrity, the approach required is primarily a procedural one ensuring that the AA has been undertaken where required.
9. Further consultation may be required on any revised screening assessment or AA. The Habitats Regulations require the competent authority (the LPA in this instance) to consult the appropriate statutory nature conservation body (SNCB) and have regard to any representations made by that body.
10. When reviewing the HRA report it is important to remember that more than one European site could be affected by the allocations/policies in a plan. The local authority may therefore have screened out some European sites (or designated features of a site) on the grounds that there was no pathway for effects, screened out others because of avoidance/reduction measures and finally taken only one or two European sites to full AA. It is only where likely significant effects have been screened out on the grounds of avoidance or reduction measures that further action needs to be taken.
11. It should be noted that there is no authoritative definition of what constitutes an integrated or additional avoidance or reduction measure and this should be considered on a case by case basis. If a measure is being introduced to avoid or reduce an effect on a European site then it can be viewed as mitigation. It may be helpful to consider whether a proposal could be considered integral to a plan or whether it is a measure to avoid harm. For instance, the HRA report could identify European sites whose designated features are vulnerable to disturbance caused by people visiting the site. If evidence presented in the HRA report and during the examination demonstrates that the housing allocation is too far from the European site to lead to increased visitor numbers then it could be concluded that there is no pathway for likely significant effects to occur. However if the HRA report determines that the housing allocation would be likely to increase visitor use of the European site and relies on measures which reduce visitor pressure (such as securing land to provide a buffer to the European site or ensuring footpaths and car parks are located away from the site) to avoid or reduce likely significant effects an AA will be required to assess whether the plan will affect the integrity of the European site.

Appropriate Assessment (AA) and Paragraph 119 of the NPPF

12. Inspectors should be aware that in accordance with paragraph 119 of the National Planning Policy Framework (NPPF) the presumption in favour of sustainable development (paragraph 14) does not apply where development requiring AA under the Birds or Habitats Directives is being considered, planned or determined.

Implications for Planning Casework/Enforcement/Non-planning Casework

13. For on-going casework, and for any decisions or recommendations to be issued after 12 April 2018 where there is a risk that the proposed development may have a significant effect on a European site (either individually or in combination with other plans or projects), Inspectors must review the position regarding HRA in light of this CJEU judgment.
14. There are three possible outcomes from any review for each European site covered by the HRA:
 - A conclusion that likely significant effects can be excluded because there are no pathways that could lead to such effects. **If so, no further action is required.**
 - A conclusion that likely significant effects cannot be excluded and therefore an AA is required to consider the implications of the proposed development for the conservation objectives⁸ of the European site. If so, and an AA has been undertaken, **no further action is required.**
 - A conclusion that likely significant effects have been screened out on the basis of avoidance or reduction measures. **Consider whether the conclusions of the screening are valid and if it is concluded that likely significant effects have been screened out on the basis of avoidance or reduction measures then either undertake an AA or ensure that the competent authority has the necessary evidence available to them to undertake an AA.**
15. If the Inspector is the competent authority for HRA or is making a recommendation to the Secretary of State as the competent authority, the Inspector must ensure that the relevant steps have been considered, before concluding / recommending whether an AA should be undertaken. Consideration should be undertaken on a precautionary basis. If the information necessary to inform the HRA is not present, then it must be requested of the appellant and / or relevant parties such as the SNCB.
16. Where the proposed development has the potential to affect a European site, the Inspector must determine on a case-by-case basis whether further action (such as referring back to the parties for comment) needs to be undertaken. Where an AA is undertaken the Inspector must ensure that they have consulted the relevant SNCB and had regard to any representations made by those bodies.

17. As noted above, there is no definition of what constitutes avoidance and reduction measures and what could be viewed as an integral part of a works or development proposal. If a measure is being introduced to avoid or reduce an effect on a European site then it can be viewed as mitigation. This includes measures outlined in SPDs such as the provision of Sustainable Alternative Natural Greenspace and Strategic Access Management and Monitoring as in the Thames Basin Heaths approach. However it can also include 'embedded mitigation' such as a commitment within a development proposal to employing standard methods to prevent run-off from vehicles contaminating watercourses.

Contacts for further information

18. Please contact Knowledge Centre on x45885 if you have any general queries on this Note.
19. If you have a case involving a potentially affected European site and are unclear how to proceed, please seek advice from the Environmental Services Team.
20. Non-salaried Inspectors should approach the NSI Contract Management Unit with any queries in the first instance, on which the NSI CMU will liaise with Knowledge Centre.

¹Case C-323/17

² Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

³Assessment of whether the plan or project will affect the integrity of a European Site; a competent authority can only agree to a plan or project where it has been ascertained that that it will not adversely affect the integrity of the European site unless the plan or project falls into the Article 6(4) exception.

⁴European Sites' are: candidate Special Areas of Conservation (cSACs), Special Areas of Conservation (SACs) and Sites of Community Importance (SCIs) designated pursuant to the Habitats Directive; and Special Protection Areas (SPAs) designated pursuant to the Birds Directive. The requirements of the Habitats and Birds Directives have been transposed into domestic legislation by The Conservation of Habitats and Species Regulations 2017 ('the Habitats Regulations'). Paragraph 118 of the National Planning Policy Framework also requires proposed SPAs, possible SACs, listed or proposed Ramsar sites, and sites required to provide compensatory measures to be treated as European sites in England. In Wales, TAN5 requires proposed SPAs and listed Ramsar sites to be treated as European sites.

⁵Consideration whether the proposal is likely to have a significant effect on the internationally important features of the site, alone or in combination with other plans or projects. If the risk or possibility of significant effects cannot be excluded, appropriate assessment must be undertaken.

⁶ *Hart DC v SSCLG, Luckmore Limited & Barratt Homes Limited* [2008] EWHC 1204 (Admin)

⁷The HRA report is a collective term used to refer to the information which has been provided to support determination of the plan/project in accordance with the HRA Regulations. The HRA report will include the screening level information which is particularly relevant to the CJEU judgment.

⁸ Natural England has made the Conservation Objectives for European [terrestrial] Sites and Conservation Advice for European Marine Sites available electronically. Natural Resources Wales also make Conservation Objectives for

European Marine Sites available. Conservation Objectives for terrestrial sites can be searched for through this page of the NRW website. Ramsar sites do not have formal conservation objectives so NE or NRW should be contacted for advice on the appropriate objectives to be used.