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# Habitats Regulations Toolkit 2020

Changes and challenges

July 2020



# Habitats Regulations Assessment/Appraisal

The EU nature directives (the Birds and Habitats Directives) underpin the network of European protected sites known as Natura 2000. The Habitats Directive manages the plans and projects that may impact these sites through the process known as Habitats Regulations Assessment, or in Scotland, Habitats Regulations Appraisal.

Significant changes to the Habitats Regulations Assessment/Appraisal (HRA) process have resulted in numerous challenges to planning decisions and quashing of permissions with HRA becoming a key consenting risk to Nationally Significant Infrastructure Projects and other major developments.

CMS has been at the forefront of HRA for a number of years. This guide draws on our experience to provide a short toolkit for developers navigating the modern HRA process.

## Stage 1



### Screening for Likely Significant Effects (LSE)

- Is the the project likely to have a significant effect (alone or in-combination with other plans or projects) on a European site?
- Low bar: unless LSE can be ruled out with certainty, the plan or project must be screened in for appropriate assessment.
- Remember – recent case law means mitigation measures can no longer be taken into account at this stage. Neither can compensatory measures.
- Screening for LSE differs from Environmental Impact Assessment (EIA), so conclusions may be contrasting.
- Ultimately screening decision is for the 'competent authority' (usually the consent decision maker), but to avoid delays the developer should ideally identify and confirm any need for formal screening with the authority at the pre-application stage.

## Stage 2



### Appropriate Assessment (AA)

- Can LSE on a European site be ruled out? If not, AA must be undertaken.
- The developer should present a detailed assessment of whether the project has an adverse effect on the site's integrity considering the best scientific knowledge and the site's conservation objectives. This will inform the competent authority's AA.
- Mitigation measures can be taken into account at AA stage: compensatory measures cannot.
- Consent may only be granted at this stage if the AA can conclude beyond reasonable scientific doubt that the plan or project will not have adverse effects (alone or in-combination with other plans or projects).

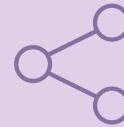
## Stage 4



### IROPI and compensation

- If there are no feasible alternative solutions, then a plan or project may only proceed if the competent authority is satisfied that the scheme must be carried out for imperative reasons of overriding public interest (IROPI).
- The IROPI grounds on which a plan or project can proceed include reasons relating to human health, public safety, or beneficial consequences of primary importance to the environment. For non-priority habitats and species, grounds relating to social or economic benefit can also be considered. Other IROPI may only be considered following an opinion from the EC (or other body post-Brexit).
- Compensatory measures, to compensate for the known negative effects of the plan or project, may be needed. The feasibility of such measures must be assessed, and they must be secured before consent is given.

## Stage 3



### Alternative Solutions

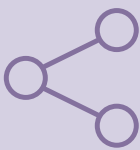
- Where adverse effects cannot be ruled out, the developer should produce a report presenting a robust analysis of optioneering and site selection, an important piece of evidence for navigating Stage 3. This can include alternative technologies, scales, locations and a 'do nothing' alternative.
- The developer's report will inform the competent authority's assessment of whether there are feasible alternative solutions that meet the core objectives of the project.
- Defining the objective of the plan or project is important to assessing alternatives.
- It may become increasingly common for developers to provide a pre-emptive report to satisfy stages 3 and 4, in the event that the stage 2 AA cannot conclude no adverse effects.



### Alternatives and IROPI – How high are the bars?

As more projects come forward and the potential impacts of projects (both alone and in-combination) on the environment increase, and with the stricter HRA process, the need to consider alternatives and IROPI may increase. The substantial delay to the Hornsea Three and Norfolk Vanguard DCOs demonstrates this.

This leads to the question: how hard are these tests to satisfy?



### Alternative Solutions

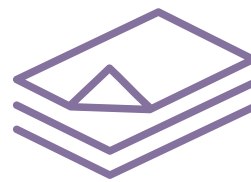
There have been cases where projects have been refused on the basis that they did not adequately assess alternatives. Alternative solutions must be feasible and must meet the core policy objectives of the project. In the challenge to the Airports National Policy Statement (ANPS), the Court of Appeal ruled that the Divisional Court was correct to reject the option of a second runway at Gatwick as an 'alternative solution'. The UK Government had identified that expansion at Gatwick would not enhance the UK's global aviation hub status and the Gatwick alternative therefore did not meet the ANPS's core objective of bolstering that status.

For some projects, the extent of the assessment of alternatives depends on the nature of the project. For example, DEFRA guidance states that for offshore wind projects, only other offshore wind solutions need be assessed; while for motorway projects, other modes of transport need not be assessed. However, we are aware of pressure from consultees to broaden this scope.



### IROPI

IROPI is currently still a rare step, but there are numerous examples in the UK and across Europe where factors, including economic and environmental factors, have been held to constitute IROPI. For example, in the UK, renewables projects have been determined to have met the IROPI test given their contribution towards decarbonisation and security of supply.



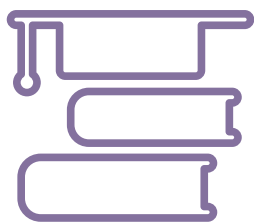
## A Fifth Stage?: The Review of Consents (RoC) Procedure

Where a new European site is designated, the Habitats Regulations usually require a RoC (including planning permissions and DCOs) with likely significant effects on that site.

Where projects will require financing and investment, a RoC procedure can represent a significant project threat because the outcome of a RoC process can include consents being retrospectively modified or revoked.

A high-profile example of this has been the Southern North Sea SAC RoC. This lengthy process involving numerous projects has led to the imposition of additional planning requirements on some projects. In addition, each project must now produce, discharge and comply with a site integrity plan.

Early engagement and a strategy for developers faced with a RoC is an essential risk mitigation tool.



## What is mitigation?

There is no authoritative definition of mitigation measures. However, case law and guidance explain that they are measures aimed at minimising, avoiding or even cancelling the likely negative effects of a plan or project on a European site. The UK Courts have taken a flexible approach, ruling in *Langton* (2018) that measure that are ‘integral features of the project’ are not mitigation measures and can therefore be considered at the screening stage.

In its landmark 2018 judgment *People Over Wind* Case C-323/17, the European Court of Justice concluded that mitigation measures may not be considered at Stage 1. Previously, mitigation measures could be considered at that stage, frequently negating the need to progress to Stage 2 and undertake an appropriate assessment. This position has been confirmed in the UK, with the High Court in *Gladman* (2019) following *People Over Wind*.

As a result of *People Over Wind*, many more developments will now be screened in, with developers incurring the additional time and cost needed to inform the AA. Also, non-compliant planning decisions may be quashed, as in the case of *Crodall Parish Council v SSCLG*. The uncertainty about what “mitigation measures” means is increasing the importance of pre-application engagement.



## What is compensation?

Guidance from the European Commission clarifies that compensatory measures are those aimed at offsetting the known negative effects of a project, to ensure that the overall ecological coherence of the Natura 2000 network is maintained. Following *Grace v An Bord Pleanala C-164/17*, compensatory measures cannot be taken into account at appropriate assessment stage.

Compensatory measures could consist of habitat creation, habitat enhancement, or even the designation of a new site. To accord with the precautionary principle, it is necessary to provide evidence of the feasibility and effectiveness of the proposed measures.

## What about HRA post-Brexit?

- The Habitats Regulations are planned to be retained post-Brexit.
- New legislation will retain the requirements of the Habitats Regulations, while making practical adjustments for the UK's exit from the EU.
- But what does this really mean for the UK's European sites? After Brexit, sites that previously contributed to the EU's Natura 2000 network will instead form part of a 'national site network'.
- The implications of this are that a number of decisions in relation to site designation and HRA under the Habitats Regulations may be made with reference to the UK, rather than the EU context.
- Species such as Great Crested Newts, which are more common in the UK than other parts of the EU, may see protections being diluted.



## Certainty, 'reasonable scientific doubt' and the 'precautionary principle'

European case law (see e.g. Waddenzee Case C-127/02) has clarified that there must be 'certainty' about the absence of adverse effects on European sites – this will be the case where no 'reasonable scientific doubt' remains as to the absence of such effects.

This demonstrates how the precautionary principle underpins the HRA process. In other words, the decision-maker must be satisfied beyond reasonable scientific doubt that there will be no adverse effects - and where uncertainty remains, the competent authority's decision must be precautionary.



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