

Re. Habitats Regulation Assessment

Representations by the NHG

Introduction

1. At the SIR examination hearing on 25 June 2018 an agenda item for discussion was the “HRA and implications of the People over Wind v Coillte Teoranta”.
2. Relying on the report prepared by LUC, “Addendum to the HRAs of the Forest Heath SIR and SALP (Modifications stage)” (June 2018) (“**the Addendum HRA**”), FHDC argued that the requirements under the Habitats Regs had been met by the work undertaken by LUC and set out in their earlier reports “HRA of the Forest Heath Site Allocations Local Plan (Modifications stage)” (April 2018) (“**the April 2018 SALP HRA**”) and “HRA of the Single Issue Review of Forest Heath Core Strategy Policy CS7 Overall Housing Provision and Distribution (Modification stage)” (April 2018) (“**the April 2018 SIR HRA**”) (collectively “**the April 2018 HRA**”).
3. At the SIR hearing, the NHG submitted that:-
 - (1) LUC had taken into account mitigation measures in ruling out likely significant effects at the HRA screening assessment stage and had not therefore undertaken an Appropriate Assessment;
 - (2) LUC accept in the Addendum HRA that, in the absence of mitigation, likely significant effects on Breckland SPA from recreation pressure from housing could *not* be ruled out;
 - (3) FHDC (as the competent authority) has not undertaken an Appropriate Assessment to determine whether the proposed housing strategy would adversely affect the integrity of Breckland SPA;
 - (4) In the absence of FHDC undertaking an Appropriate Assessment of the effects on the integrity of Breckland SPA there has been a failure to comply with Article 6 of

the Habitats Directive and reg. 102 of the Habitats Regs. contrary to the CJEU's decision in *People over Wind v Coillte Teoranta* (C-323/17).

4. On 27 June 2018, Inspector Christa Masters directed FHDC and any other party who wished to do so to provide written representations as regards FHDC's compliance with the Habitats Regs by Friday 6 July 2018.

People over Wind

5. The issue referred to the CJEU was 'Whether, or in what circumstances, mitigation measures can be considered when carrying out screening for appropriate assessment under Article 6(3) of the Habitats Directive?'
6. In the HRA Addendum (para. 1.2), LUC included limited extracts from the CJEU's judgment. Those extracts must be read in the context of the earlier paragraphs of the judgment as follows (emphasis added):-

"27 Thus, by its question, the referring court asks, in essence, whether Article 6(3) of the Habitats Directive must be interpreted as meaning that, in order to determine whether or not it is necessary to carry out subsequently an appropriate assessment of a project's implications for a site concerned, it is possible, at the screening stage, to take account of the measures intended to avoid or reduce the project's harmful effects on that site.

28 The 10th recital of the Habitats Directive states that an appropriate assessment must be made of any plan or programme likely to have a significant effect on the conservation objectives of a site which has been designated or is designated in future. That recital finds expression in Article 6(3) of the directive, which provides inter alia that a plan or project likely to have a significant effect on the site concerned cannot be authorised without a prior assessment of its implications for that site (judgment of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging*, C-127/02, EU:C:2004:482, paragraph 22).

29 As the Court has pointed out, Article 6(3) of the Habitats Directive refers to two stages. The first, envisaged in the provision's first sentence, requires the Member States to carry out an appropriate assessment of the implications for a protected site of a plan or project when there is a likelihood that the plan or project will have a significant effect on that site. The second stage, which is envisaged in the second sentence of Article 6(3) and occurs following the aforesaid appropriate assessment,

allows such a plan or project to be authorised only if it will not adversely affect the integrity of the site concerned, subject to the provisions of Article 6(4) of the directive (judgment of 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583, paragraphs 44 and 46 and the case-law cited).

- 30 It should be added that Article 6(3) of the Habitats Directive also integrates the precautionary principle and makes it possible to prevent in an effective manner adverse effects on the integrity of protected sites, resulting from the plans or projects envisaged. A less stringent authorisation criterion than that set out in that provision could not ensure as effectively the fulfilment of the objective of site protection intended under that provision (judgment of 26 April 2017, *Commission v Germany*, C-142/16, EU:C:2017:301, paragraph 40 and the case-law cited).
- 31 In the present instance, as the parties to the main proceedings and the Commission agree, the uncertainty of the referring court concerns only the screening stage. More specifically, the referring court asks whether measures intended to avoid or reduce the harmful effects of a plan or project on the site concerned can be taken into consideration at the screening stage, in order to determine whether it is necessary to carry out an appropriate assessment of the implications, for the site, of that plan or project.
- 32 Article 6(3) of the Habitats Directive sets out clearly that the obligation to carry out an assessment is dependent on both of the following conditions being met: the plan or project in question must not be connected with or necessary to the management of the site, and it must be likely to have a significant effect on the site.
- 33 It is apparent from the file before the Court that the referring court considers the first of those conditions to be met.
- 34 As regards the second condition, it is settled case-law that Article 6(3) of the Habitats Directive makes the requirement for an appropriate assessment of the implications of a plan or project conditional on there being a probability or a risk that the plan or project in question will have a significant effect on the site concerned. In the light, in particular, of the precautionary principle, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have a significant effect on the site concerned (judgment of 26 May 2011, *Commission v Belgium*, C-538/09, EU:C:2011:349, paragraph 39 and the case-law cited). The assessment of that risk must be made in the light inter alia of the characteristics and specific environmental conditions of the site concerned by such a plan or project (see, to that effect, judgment

of 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583, paragraph 45 and the case-law cited).

- 35 As the applicants in the main proceedings and the Commission submit, the fact that, as the referring court has observed, measures intended to avoid or reduce the harmful effects of a plan or project on the site concerned are taken into consideration when determining whether it is necessary to carry out an appropriate assessment presupposes that it is likely that the site is affected significantly and that, consequently, such an assessment should be carried out.
- 36 That conclusion is supported by the fact that a full and precise analysis of the measures capable of avoiding or reducing any significant effects on the site concerned must be carried out not at the screening stage, but specifically at the stage of the appropriate assessment.
- 37 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.
- 38 In that regard, the Court's case-law emphasises the fact that the assessment carried out under Article 6(3) of the Habitats Directive may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on the protected site concerned (judgment of 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583, paragraph 50 and the case-law cited).
- 39 It is, moreover, from Article 6(3) of the Habitats Directive that persons such as the applicants in the main proceedings derive in particular a right to participate in a procedure for the adoption of a decision relating to an application for authorisation of a plan or project likely to have a significant effect on the environment (see, to that effect, judgment of 8 November 2016, *Lesoochranské zoskupenie VLK*, C-243/15, EU:C:2016:838, paragraph 49).
- 40 In the light of all the foregoing considerations, the answer to the question referred is that Article 6(3) of the Habitats Directive must be interpreted as meaning that, in order to determine whether it is necessary to carry out, subsequently, an appropriate assessment of the implications, for a site concerned, of a plan or project, it is not appropriate, at the screening stage, to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on that site.

7. It is plain from the CJEU's judgment that two stages are contemplated, a screening stage and a subsequent Appropriate Assessment if likely significant effects cannot be ruled out at the screening stage (disregarding any proposed measures intended to avoid or reduce the harmful effects of the plan or project). Taking into account mitigation measures at the screening stage and/or failing to undertake an Appropriate Assessment where one is required is a breach of Article 6 of the Habitats Directive.

April 2018 SIR HRA

8. Section 5 of the April 2018 SIR HRA contains FHDC's screening of the overall housing provision. Paragraph 5.7 states (emphasis added):-

"Initial screening assessment prior to mitigation

5.7 The potential for recreational disturbance exists from any housing development that is within 7.5 km of the non-farmland parts of the Breckland SPA, or within 1.5 km of the farmland parts of the Breckland SPA, or within 1.5 km of stone curlew nesting attempts areas providing supporting habitat to Breckland SPA. As shown in Figure 4.2, this zone of influence covers most of Forest Heath District and it was judged unlikely that any reasonable alternative distribution of 6,800 homes would be able to avoid this zone of influence entirely. A potential for likely significant effects on Breckland SPA due to recreation pressure from the overall housing distribution was therefore identified, prior to consideration of mitigation."

9. Paragraphs 5.10 - 5.22 of the April 2018 SIR HRA then consider existing mitigation measures which could rule out likely significant effects which comprise (1) adopted Local Plan policies (Core Strategy and Development management policies); and (2) a proposed recreation mitigation strategy to provide accessible natural green space. Paragraphs 5.23 - 5.26 set out the conclusions of the Stage 1 screening exercise and states:-

"HRA Screening conclusion

Likely significant recreation pressure effects from SIR overall housing distribution on European sites can be ruled out, either from the SIR alone or in-combination with other relevant plans and projects. This conclusion relies on appropriate elements of FHDC's Recreation Mitigation and Monitoring Strategy being implemented via the SALP (a lower tier plan) and the fact that the SALP has itself been subject to HRA with a finding of no likely significant effect in relation to recreation pressure."

10. A similar screening exercise is undertaken in section 6 of the April 2018 SIR HRA in relation to the broad distribution of housing and similarly relies on Core Strategy policy as mitigation to rule out likely significant effects – see paragraphs 6.23 – 6.27. The approach applied to the assessment of recreational pressure and the distribution of housing is in marked contrast to the assessment of the disturbance from the construction and operation of the new roads required for the planned housing growth where, notwithstanding existing mitigation measures, it was concluded that the likely effects on Breckland SPA could *not* be ruled out and that a second stage Appropriate Assessment was *required* – see para. 6.34.

The Addendum HRA

11. Table 3.1 of the Addendum HRA states in relation to recreation pressure that the HRA of the SIR “relies on findings of HRA of SALP – see review in Table 3.2” and Table 3.2 makes clear in relation to recreation pressure that an Appropriate Assessment was not carried out because of the reliance placed on mitigation measures at the screening stage – see Table 3.2 and paragraph 3.5. Paragraphs 3.13 – 3.16 then state as follows (emphasis added):-

“Changes required to current approach in light of CJEU judgment and revised HRA conclusions

3.13 As described above, in coming to a conclusion of no likely significant effect from recreation pressure, HRA Screening placed reliance on avoidance and reduction measures in the form of:

- Forest Heath Local Plan policies to provide and enhance open space and rights of ways networks and the linkage of these to a coherent Recreation Mitigation and Monitoring Strategy; and
- policies in the adopted development plans of Breckland District and St Edmundsbury Borough (in relation to in-combination effects).

3.14 The CJEU judgment states that such reliance on avoidance and reduction measures is not appropriate at the screening stage. In the absence of mitigation, the amended conclusion of the HRA Screening of the SALP in relation to recreation pressure is therefore that **likely significant recreation pressure effects on Breckland SPA cannot be ruled out.**

3.15 It is LUC’s professional opinion that, notwithstanding its description as ‘screening’, the information provided in Appendix 1 and Chapters 5 and 6 of the HRA of the SALP provides the information required of an Appropriate

Assessment of the implications of the recreation pressure arising from the SALP for Breckland SPA in view of that site's conservation objectives.

3.16 Under the CJEU judgment, avoidance and reduction measures should be taken into account as part of an Appropriate Assessment and Chapter 6 of the HRA of the SALP describes the avoidance and reduction measures that are already identified and secured. In summary, these avoidance and reduction measures are policies to provide and enhance open space and rights of ways networks and the linkage of these to a coherent Recreation Mitigation and Monitoring Strategy set out in the Accessible Natural Greenspace study. The relevant policies are:

- adopted Core Strategy policies CS2 and CS13;
- adopted Development Management policies DM12, DM42, DM44;
- site allocation policies SA2, SA4, SA5, SA7, SA8, SA9, SA10, SA11, SA13, A14 within the SALP that implement the principles of the Recreation Mitigation and Monitoring Strategy as they relate to the specific sites being allocated; and
- policies in the adopted development plans of Breckland District and St Edmundsbury Borough (in relation to in-combination effects).

3.17 These avoidance and reduction measures are sufficient to avoid and reduce recreation pressure such that there will be **no adverse effect on the integrity of Breckland SPA, either alone or in combination with other plans and projects**. As such, no further assessment is required and no additional main modifications are required to the SALP to meet the requirements of the Habitats Regulations."

NHG submissions

12. It is clear from the April 2018 HRA and the Addendum HRA that in relation to the effects of recreation pressure LUC took account of measures intended to avoid or reduce the harmful effects of the SIR and SALP at the screening assessment and did not, therefore, go on to undertake a second stage Appropriate Assessment of those effects.
13. It is equally clear (and FHDC accepts) that likely significant effects from recreational pressure on Breckland SPA cannot be ruled out in the absence of mitigation measures. Consequently, in light of the CJEU's judgment in *People over Wind v Coillte Teoranta*, by not going on to undertaking an Appropriate Assessment of those effects FHDC, as the competent authority, is in breach of Article 6 of the Habitats Directive and regulation 105 of the Habitats Regs.

14. Further, where it must undertake an Appropriate Assessment regulation 102(3) of the Habitats Regs requires the competent authority, where it considers it to be appropriate, to consult with the public and take appropriate steps to do so.
15. The NHG's submissions are reinforced by PINS Note 05/2018 providing guidance to Inspectors on the implications of *People over Wind v Coillte Teoranta*. In particular, paragraphs 7 - 11 address the implications for Local Plans and states, amongst other things, that:-

"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 report 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 the 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.

16. FHDC's argument at the SIR hearing (relying on *R (oao Champion) v North Norfolk District Council* [2015] UKSC 52) that it has in effect undertaken an Appropriate Assessment is

misplaced. First, it pre-dates the CJEU's judgment in *People over Wind* and the Supreme Court's judgment in *Champion* needs to be read in light of the CJEU's judgment.

17. Secondly, the CJEU's judgment makes clear that where likely significant effects of a plan cannot be ruled out at the screening stage, Article 6 of the Habitats Directive requires a discrete Appropriate Assessment to be undertaken during which mitigation measures can be taken into account. On FHDC's own admission it has not undertaken an Appropriate Assessment and now seeks to circumvent that stage, which as the CJEU held "constitutes... an essential safeguard provided for by the directive".
18. Thirdly, by attempting to circumvent undertaking an Appropriate Assessment, FHDC has also precluded any consideration as to whether the public should be consulted. This is an important lacunae because, as Advocate General Sharpston observed in her Opinion in *Sweetman v An Board Pleanala* (C-258/11):-

"49. ... Members of the general public may also be invited to give their opinion. Their views may often provide valuable practical insights based on their local knowledge of the site in question and other relevant background information that might otherwise be unavailable to those conducting the assessment."

19. For all the above reasons, FHDC has failed to comply with the Habitats Directive and Regs and the SIR & SALP are therefore not legally compliant and are unsound. Indeed, if the plan were now adopted without undertaking an Appropriate Assessment it would be liable to be quashed by the High Court. That would be particularly unfortunate not least because the purpose of the SIR was to remedy the consequences of FHDC's previous breach of environmental legislation resulting in the quashing in 2011 of the earlier allocation of Hatchfield Farm in the Local Plan.

Dated 4th July 2018