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Addendum to the HRAs of the Forest Heath SIR and SALP (Modification stage)

Implications of CJEU judgment in Case C-323/17 People Over Wind and Sweetman v. Coillte Teoranta

Prepared by LUC
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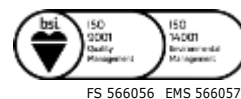
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Contents

1	Introduction	1
	Background	1
	HRA work undertaken for the Forest Heath SIR and SALP	1
2	Approach to the review of the HRAs of the SIR and SALP	3
3	Review of the HRAs of the SIR and SALP	5
	Review of HRA of the SIR	5
	Review of HRA of the SALP	6
4	Summary and conclusions	9
	Conclusions of review of HRA of SIR	9
	Conclusions of review of HRA of SALP	10

Tables

Table 2.1	Scale at which each type of potential effect was assessed	4
Table 3.1	Reliance of HRA screening on avoidance or reduction measures to rule out LSE	5
Table 3.2	Reliance of HRA screening on avoidance or reduction measures to rule out LSE	6

1 Introduction

Background

- 1.1 This note has been prepared in response to a request from Forest Heath District Council (FHDC) that LUC reviews the Habitats Regulations Assessment (HRA) of the Single Issue Review (SIR) of Forest Heath Core Strategy Policy CS7 and the HRA of the Forest Heath Site Allocations Local Plan (SALP) in light of the 12 April 2018 Court of Justice of the European Union (CJEU) judgment in the case of *People over Wind and Peter Sweetman v Coillte Teoranta*¹. Both Natural England and the Inspectors examining the Local Plan have requested that the Council carries out such a review.
- 1.2 The CJEU judgment 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 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 site at the screening stage of HRA. The reasons given for this are:

"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.

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..."

- 1.3 The precise wording of the ruling is as follows:

"Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora 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."

- 1.4 As the planning consultants commissioned to undertake the HRA on behalf of FHDC, LUC is not able to provide a legal opinion. Instead, we have provided below an opinion on the implications of the CJEU judgment for the HRA work undertaken to date on the SIR and SALP, based on our professional expertise in HRA and our interpretation of the CJEU judgment.

HRA work undertaken for the Forest Heath SIR and SALP

- 1.5 HRA reports were produced by LUC to accompany the August-October 2015 consultation on the 'Issues and Options' versions of the SIR and SALP, the April-July 2016 consultation on the 'Preferred Options' versions, and the January-March 2017 consultation on the 'Proposed Submission' versions. This review relates to the latest version of the HRAs - those prepared to accompany the April-June 2018 consultation on the modification versions of the SIR and SALP.

¹ Available from <http://curia.europa.eu/juris/document/document.jsf?docid=200970&doclang=EN>

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

- 1.6 A screening of air quality effects indicated the need for Appropriate Assessment in relation to air quality effects on Breckland SAC (including Rex Graham Reserve SAC) and Breckland SPA. This was carried out by AECOM and the results are presented in a separate report³ which forms part of the HRAs of SIR and SALP. Where relevant, this HRA review also considers the separately documented assessment of air quality effects.

³ Forest Heath District Council, Single Issue Review of CS7 and Site Allocations Local Plan - Air Quality Assessment Regarding Breckland SAC and Breckland SPA, AECOM, 2018

2 Approach to the review of the HRAs of the SIR and SALP

- 2.1 The HRA reports for the SIR and SALP have been reviewed as follows to determine whether the HRA Screening relied on avoidance and reduction measures to rule out the need for Appropriate Assessment, contrary to the direction of the CJEU judgment:
- If the HRA report identifies that the plan is likely to have a particular type of significant effect on European site(s) and their designated features and an Appropriate Assessment of the plan has been carried out in relation to that type of effect 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 a particular type of likely significant effect on European site(s) and their designated features then **no further action is required**.
 - If the HRA report includes information that identifies particular types of 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 Appropriate Assessment stage) then **action is required to amend the HRA in line with the CJEU judgment**. In this case the screening assessment has been revised in line with the methodology required by the CJEU judgment, any required Appropriate Assessment has been carried out, and consideration has been given to whether the Appropriate Assessment necessitates any main modifications to the plan, in light of the avoidance and reduction measures already identified and secured.
- 2.2 As explained in the HRAs of the SIR and SALP, the potential for some types of effect was most appropriately assessed by reference to the total amount of housing development being proposed, as set out in the 'Provision' section of the SIR. Other types of effect were more appropriately assessed by reference to the amount of development proposed at broad locations (as set out in the 'Broad Distribution' section of the SIR) or by reference to the specific development sites being allocated (as set out in the HRA of the SALP document being prepared and consulted on in parallel with the SIR). In some cases, although the potential effect was most appropriately assessed at a detailed scale, it was necessary to rule out the possibility that a likely significant effect could not be avoided under any conceivable spatial distribution of the housing provision, leading to assessment of the effect at more than one scale. Table 2.1 summarises the scale/ level in the planning process at which each of the types of potential effect was assessed.

Table 2.1 Scale at which each type of potential effect was assessed

Potential effect	HRA of SIR overall housing provision	HRA of SIR Broad distribution of housing	HRA of individual site allocations in the SALP
Direct loss or physical damage due to construction			✓
Disturbance and other urban edge effects from construction or occupation of buildings		✓	✓
Disturbance from construction or operation of roads		✓	
Recreation pressure	✓	✓	✓
Water quantity		✓	
Water quality		✓	
Air quality		✓	

2.3 The screening stage of the HRAs of the SIR and SALP therefore came to a conclusion on the existence of likely significant effects and the need for Appropriate Assessment in relation to each of the types of potential effect shown in Table 2.1 on European sites. This review considers the HRA carried out for each of these types of potential effect, following the approach outlined above. If any potential effect was screened out by reliance on the mitigation provided by avoidance or reduction measures, further consideration is given to whether the requirements of the Habitats Regulations have been met, in light of the CJEU judgment.

3 Review of the HRAs of the SIR and SALP

Review of HRA of the SIR

- 3.1 Table 3.1 applies the three step approach outlined in Chapter 2 to determine whether HRA Screening of the SIR relied on avoidance or reduction measures to rule out likely significant effects (LSE).

Table 3.1 Reliance of HRA screening on avoidance or reduction measures to rule out LSE

Potential effect considered by HRA Screening of SIR	1. LSE not ruled out - Appropriate Assessment carried out	2. LSE ruled out due to no pathways for significant effects	3. LSE ruled out by reliance on avoidance or reduction measures	Additional notes
Effects of overall housing provision				
Recreation pressure	HRA of SIR relies on findings of HRA of SALP – see review in Table 3.2			
Effects of broad distribution of housing				
Disturbance and other urban edge effects from construction or occupation of buildings	HRA of SIR relies on findings of HRA of SALP – see review in Table 3.2			
Disturbance from construction or operation of roads	✓	No further action required		
Recreation pressure	HRA of SIR relies on findings of HRA of SALP – see review in Table 3.2			
Water quantity	✓	No further action required		
Water quality	✓	No further action required		
Air quality	✓	No further action required		Assessment of air quality effects is presented in a separate report ⁴ which forms part of the HRA of the SIR and SALP.

- 3.2 The housing provision strategy set out in the SIR is implemented via allocation policies in the SALP that are being prepared, consulted on, and being subject to HRA in parallel to preparation and HRA of the SIR. The parallel HRA of the SALP concludes that it is feasible to implement the overall housing provision and broad distribution of housing within the SIR without likely significant effects and/or adverse effects on integrity in relation to recreation pressure, disturbance and other urban edge effects, or road disturbance. The HRA of the SIR relies on the separately presented findings of the HRA of the SALP in relation to these types of effect. The following section reviews the findings of the HRA of the SALP in light of the CJEU judgment.

⁴ Forest Heath District Council, Single Issue Review of CS7 and Site Allocations Local Plan - Air Quality Assessment Regarding Breckland SAC and Breckland SPA, AECOM, 2018

- 3.3 For the remaining types of effect considered by the HRA of the SIR, Table 3.1 shows that the HRA proceeded to the Appropriate Assessment stage and thus no further action is required in relation to the CJEU judgment.

Review of HRA of the SALP

- 3.4 Table 3.2 applies the three step approach outlined in Chapter 2 to determine whether HRA Screening of the SALP relied on avoidance or reduction measures to rule out likely significant effects.

Table 3.2 Reliance of HRA screening on avoidance or reduction measures to rule out LSE

Potential effect considered by HRA Screening of SALP	1. LSE not ruled out - Appropriate Assessment carried out	2. LSE ruled out due to no pathways for significant effects	3. LSE ruled out by reliance on avoidance or reduction measures	Additional notes
Direct loss or physical damage due to construction	x	✓	No further action required	LSE ruled out because no site allocation proposed by the SALP overlaps any European site or any 1 km grid square functionally linked to Breckland SPA with five or more stone curlew nesting attempts during 2011-2015.
Disturbance and other urban edge effects from construction or occupation of buildings	✓	No further action required		
Recreation pressure	x	x	✓	Reliance placed on 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 - further action required (see below).

- 3.5 As shown in Table 3.2, the HRA Screening of the SALP relied on avoidance or reduction measures to rule out likely significant effects in relation to recreation pressure. The compliance of the HRA in relation to this type of effect is therefore considered further below.

Further consideration of compliance with requirements of the Habitats Regulations and revised HRA conclusions

Current approach to HRA in relation to recreation pressure

- 3.6 The HRA of the SALP presents an 'Initial screening' in Appendix 1 and Chapter 5. This is an assessment of which site allocations have the potential for likely significant effects on European sites, prior to the consideration of existing mitigation (i.e. avoidance or reduction measures).
- 3.7 In assessing the effect of recreation pressure, this 'initial screening' considers the location of the SALP housing allocations in relation to zones of influence around sensitive European sites, these zones being based on a detailed review of evidence and consultation with Natural England. Prior to consideration of mitigation, the 'initial screening' assumed that it is not possible to rule out likely significant effects for any housing development (potential for species mortality or disturbance):
- within 7.5 km of the boundary of non-farmland parts of Breckland SPA, or

- within 1.5 km of the boundary of farmland parts of Breckland SPA or of stone curlew nesting attempts areas.
- 3.8 The finding of this 'initial screening' was that prior to consideration of mitigation, the potential for likely significant recreation pressure effects exists for a number of identified housing and mixed use allocations.
- 3.9 Chapter 6 of the HRA of the SALP then presents the conclusions of the HRA Screening, having considered in-combination effects and whether any existing mitigation could rule out the potential likely significant effects identified by the 'initial screening'.
- 3.10 In relation to in-combination effects, Chapter 6 notes that recreation pressure acts at a strategic scale (7.5 km zone of influence). A potential for recreation pressure to arise within this zone of influence from development proposed by Breckland District Core Strategy and St Edmundsbury Borough Core Strategy, was identified in the review of other plans and projects. As reported in the HRAs for these development plans, mitigation has been put in place to avoid recreation pressure effects on European sites from the development plans for those districts. The HRA of the SALP assumed that the residual (post-mitigation) recreation pressure from development in neighbouring districts is negligible and need not be considered further in the HRA of Forest Heath's Local Plan documents. That conclusion continues to hold good because those mitigation measures are secured as part of the policies of adopted development plans but should be expressed as a finding as part of the information required for an Appropriate Assessment of Forest Heath's Local Plan documents. It was considered that economic and tourism development proposed by adopted Forest Heath Core Strategy policy CS 6 could have recreation effects which are insignificant alone but which could combine with those of the SIR and SALP to become significant. The HRA of the SALP therefore considers the recreation effects of its site allocations in combination with these otherwise insignificant effects.
- 3.11 In relation to mitigation of recreation pressure, Chapter 6 describes the measures provided by adopted Core Strategy policies, adopted Development Management policies, and implementation by the SALP's allocation policies of the FHDC's Recreation Mitigation and Monitoring Strategy.
- 3.12 The HRA Screening concludes that the mitigation offered by 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 is sufficient to avoid likely significant effects due to recreation pressure on any European site both alone and in combination with other relevant plans and projects and therefore Appropriate Assessment was not required.
- 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, SA14 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.

4 Summary and conclusions

- 4.1 This addendum report to the HRAs of the Forest Heath SIR and SALP has reviewed the approach and findings of each of those HRAs in light of the CJEU judgment in the case of People over Wind and Peter Sweetman v Coillte Teoranta.
- 4.2 The HRAs were reviewed to determine whether the screening stage of each HRA relied on avoidance and reduction measures to rule out the need for Appropriate Assessment, contrary to the direction of the CJEU judgment. Where this was found to be the case, action was taken to amend the HRA in line with the CJEU judgment.
- 4.3 The findings of the review and the overall conclusion of each HRA, as reviewed in light of the CJEU judgment, are summarised below.

Conclusions of review of HRA of SIR

Potential effect considered by HRA Screening of SIR	Review finding
Effects of overall housing provision	
Recreation pressure	<p>HRA of SIR relies on findings of HRA of SALP. As set out for the review of the SALP below, HRA Screening of SALP relies on avoidance and reduction measures to rule out likely significant effects and need for Appropriate Assessment</p> <p>Conclusion of HRA Screening is now revised to state that likely significant recreation pressure effects on Breckland SPA cannot be ruled out</p> <p>Conclusion of Appropriate Assessment is now that avoidance and reduction measures are sufficient to ensure no adverse effect on the integrity of Breckland SPA, either alone or in combination with other plans and projects</p>
Effects of broad distribution of housing	
Disturbance and other urban edge effects from construction or occupation of buildings	HRA of SIR relies on findings of HRA of SALP. As set out for the review of the SALP below, this effect was subject to Appropriate Assessment therefore no change required to HRA of SALP
Disturbance from construction or operation of roads	Effect subject to Appropriate Assessment therefore no change required to HRA of SIR
Recreation pressure	<p>HRA of SIR relies on findings of HRA of SALP. As set out for the review of the SALP below, HRA Screening of SALP relies on avoidance and reduction measures to rule out likely significant effects and need for Appropriate Assessment</p> <p>Conclusion of HRA Screening is now revised to state that likely significant recreation pressure effects on Breckland SPA cannot be ruled out</p> <p>Conclusion of Appropriate Assessment is now that avoidance and reduction measures are sufficient to ensure no adverse effect on the integrity of Breckland SPA, either alone or in combination with other plans and projects</p>
Water quantity	Effect subject to Appropriate Assessment therefore no change required to HRA of SIR
Water quality	Effect subject to Appropriate Assessment therefore no change required to HRA of SIR

Potential effect considered by HRA Screening of SIR	Review finding
Air quality	Effect subject to Appropriate Assessment (presented in a separate report ⁵) therefore no change required to HRA of SIR

- 4.4 The HRA of the Forest Heath SIR comprises the main HRA report prepared by LUC dated April 2018, the Air Quality Assessment report prepared by AECOM dated April 2018, and this addendum report; these documents should therefore be read together. In LUC's opinion **the HRA of the SIR, as amended by this addendum, meets the requirements of the Habitats Regulations, taking into account the CJEU judgment.**
- 4.5 The overall conclusion of the HRA of the SIR is that it will have **no adverse effect on the integrity of any European site, either alone or in combination with other plans and projects.**

Conclusions of review of HRA of SALP

Potential effect considered by HRA Screening of SIR	Review finding
Direct loss or physical damage due to construction	Effect ruled out due to no pathways for significant effects therefore no change required to HRA of SALP
Disturbance and other urban edge effects from construction or occupation of buildings	Effect subject to Appropriate Assessment therefore no change required to HRA of SALP
Recreation pressure	HRA Screening of SALP relies on avoidance and reduction measures to rule out likely significant effects and need for Appropriate Assessment Conclusion of HRA Screening revised to state that likely significant recreation pressure effects on Breckland SPA cannot be ruled out Conclusion of Appropriate Assessment is that avoidance and reduction measures are sufficient to ensure no adverse effect on the integrity of Breckland SPA, either alone or in combination with other plans and projects

- 4.6 The HRA of the Forest Heath SALP comprises the main HRA report prepared by LUC dated April 2018, the Air Quality Assessment report prepared by AECOM dated April 2018, and this addendum report; these documents should therefore be read together. In LUC's opinion, **the HRA of the SALP, as amended by this addendum, meets the requirements of the Habitats Regulations, taking into account the CJEU judgment.**
- 4.7 The overall conclusion of the HRA of the SALP is that it will have **no adverse effect on the integrity of any European site, either alone or in combination with other plans and projects.**

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⁵ Forest Heath District Council, Single Issue Review of CS7 and Site Allocations Local Plan - Air Quality Assessment Regarding Breckland SAC and Breckland SPA, AECOM, 2018