

Planning Skills Habitats Regulations Appraisal Part 2

NatureScot
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Improvement Service - Habitats Regulations Appraisal – Part 2



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Outline for the session

- IROPI derogation
- HRA for local development plans
- Intrinsic vs bespoke mitigation
- Cumulative effects
- HRA for permitted development
- Questions

Habitats Regulations Appraisal (HRA)

For plans and projects that could potentially affect a European site three basic sequential tests:

- Is the proposal directly connected with or necessary to the management of the site?
- Is it likely to have a significant effect (an LSE) either alone or in combination?
- Can it be ascertained that the proposal will not adversely affect the integrity of the site?



Derogation

Proposals can only be permitted or carried out if:

- There are no alternative solutions

AND

- There are imperative reasons of overriding public interest

AND

- Any necessary compensatory measures are taken to ensure that the overall coherence of the national site network is protected

Alternative solutions

Developers must explore all possible alternative solutions

These could include:

- alternative locations or routes;
- different scales or designs of development;
- alternative processes.

If an alternative solution could potentially impact a European site, they must also be subject to HRA



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Imperative Reasons of Overriding Public Interest (IROPI)

- Imperative - essential that it proceeds for public interest reasons
- In the public interest - it has benefits for the public, not just benefits for private interests
- Overriding - the public interest outweighs the harm, or risk of harm, to the integrity of the European site that's predicted by the appropriate assessment

Imperative Reasons of Overriding Public Interest (IROPI)

- For priority habitats the over-riding reasons are restricted to
 - reasons relating to human health
 - public safety
 - beneficial consequences of primary importance to the environment, or
 - any other imperative reasons of overriding public interest subject to the opinion of the Scottish Ministers.

Compensatory measures

- These aim to offset the negative impact of a plan or project on the species or habitats concerned.
- NatureScot's advice likely to be sought.

Could include:

- designation of an alternative site;
- extension of the same or another site to include habitat equivalent to that lost or damaged;
- restoration of non-qualifying habitat to qualifying standard on this or another site;
- measures to protect breeding populations.



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Compensatory measures – Offshore wind generation

Revised compensation provisions – apply **only** to wind generation infrastructure in the marine area

- Compensatory measures that are reasonably proportionate to the adverse effects on the marine protected area suite
- Can follow a compensation hierarchy, which may include non-like-for-like compensation
- All set out in guidance from the Scottish Ministers

Decision-making

- Competent authority decides whether to give an IROPI derogation
- Must consult the Scottish Ministers beforehand, and have regard to their opinion (unless competent authority is Scottish Ministers)
 - If the site contains a priority habitat, the Scottish Ministers must consult JNCC and other 3 UK Governments before giving its opinion
- Scottish Ministers must secure the necessary compensatory measures

Local Development Plans

- The overall process should be familiar – applies the same 3 tests that we covered last time:
 - Is there a likely significant effect
 - Can it be ascertained that the plan will not have an adverse effect on site integrity
 - Are there imperative overriding reasons of public interest
- The difference between HRA of plans and projects is in the level of detail.
- HRA is an integral part of the plan-making process and should inform and be informed by the plan as it is prepared
- Above all, the HRA should be proportionate, practical, realistic and effective.

- We recommend that NatureScot is informally consulted on an early/ working draft of the HRA record. Early consultation with NatureScot can help:
 - Resolve doubt, e.g. over whether to consider a particular European site.
 - Focus the appraisal on the key issues and avoid unnecessary work.
 - Inform plan policies and proposals, noting that if planning authorities are unable to ascertain that policies or proposals will not adversely affect the integrity of a European site, they should not be included in proposed plans.

Site Assessment

- NatureScot will provide advice on connectivity to European sites.
- The SEA also plays a role in site assessment and the potential for likely significant effect of preferred and alternative sites should be identified in the SEA of the LDP.
- NatureScot won't comment on all potential allocations; this doesn't mean there is no connectivity to a European site. As the competent authority, the planning authority must be content that due process has been followed.

Good practice for LDPs

DO

- Start thinking about HRA early
- Talk to us about it
- Keep it simple and proportionate
- Use our guidance – Habitats Regulations Appraisal (HRA) of Local Development Plans (LDPs) - Guidance for planning authorities in Scotland

DON'T

- Overthink it
- Leave it too late
- Rely on the presence, or subsequent insertion, of a general policy seeking to protect European sites, in order to ascertain that the plan would not have an adverse effect on site integrity

‘Intrinsic’ mitigation

- European caselaw clarifies that mitigation cannot be taken into account when determining whether a plan or project has a likely significant effect
- BUT further EU caselaw tempers this
- Any conditions or features that are included in the plan or project that are
 - standard for the type of development, and
 - are not included simply to mitigate impacts on a European sitecan be included in the LSE test.

‘Intrinsic’ mitigation - examples

- Pollution control measures
- Silt control measures
- Species licence requirements
- EASR licence requirements

- Positive effects for biodiversity requirements - ? Some measures can be compensation
- Timing of works – ? Can vary

Cumulative effects/in combination

What is included?

- Any plan/project already permitted or agreed since the site was first designated
- Developments that have been completed, in construction and not yet started
- Developments in a statutory permitting process or being worked up prior to submission

Not included

- Developments completed on the site before it was designated – part of the ‘baseline’

Permitted Development & European Sites

Regulation 60

- Automatic permitted development rights are removed for plans/projects on/affecting a European site
- A developer must receive prior approval from the LPA for any project otherwise permitted by the GPDO that is likely to have a significant effect on a European site

Permitted Development & European Sites

Regulation 61

- A developer may consult NatureScot on whether the project has a likely significant effect (LSE) on a European site
- NatureScot must notify the developer and the LPA of their opinion
- If NatureScot determines that there is no LSE, this is conclusive to rely on planning permission granted by the GPDO

Permitted Development & European Sites

Regulation 62

- A developer may apply to the LPA for their approval for development otherwise permitted by the GPDO
- LPA must assume that the proposal will have a LSE, and consult NatureScot
- If NatureScot determines that there will be **no LSE**, the works can go ahead under permission granted by the GPDO
- If there **is LSE**, the LPA must carry out an appropriate assessment
- The LPA cannot give their approval unless there is no adverse effect on site integrity