

Mid Devon Local Plan HRA: Advice note to Mid Devon District Council in response to recent HRA case law

- 1.1 This note has been prepared in response to a request from Mid Devon District Council that LUC reviews the Habitats Regulations Assessment (HRA) of the Mid Devon Local Plan Review and whether we consider it to be legally compliant in light of the recent judgement 'People over Wind, Peter Sweetman v Coillte Teoranta (Case C-323/17)'. This judgement ruled that Article 6(3) of the Habitats Directive should be interpreted as meaning that mitigation measures should be assessed as part of an Appropriate Assessment, and should not be taken into account at the screening stage. The precise wording of the ruling is as follows:

"Article 6(3)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 measures intended to avoid or reduce the harmful effects of the plan or project on that site."

- 1.2 It should be noted that the implications of this ruling are still being considered by the legal profession and other interested stakeholders, including Natural England. As the planning consultants commissioned to undertake the HRA on behalf of Mid Devon District Council, LUC is not able to provide a legal opinion, but we have provided below an opinion on the compliance of the HRA work undertaken to date on the Mid Devon Local Plan Review based on professional expertise and our interpretation of this recent case law.
- 1.3 In summary, it is LUC's professional opinion that the overall conclusions of the HRA remain robust in light of the above case law. Although mitigation was taken into account at the screening stage (as detailed below), the Local Plan Review was also subject to Appropriate Assessment. Had mitigation not been taken into account at screening stage, the Appropriate Assessment would still have been undertaken in the same way, i.e. including an assessment of the same type of impacts on the same European sites.

HRA work undertaken for the Mid Devon Local Plan Review

- 1.4 The most recent iteration of the full HRA Report for the Mid Devon Local Plan Review is dated March 2015 and relates to the Publication Draft version of the Local Plan Review.
- 1.5 Two HRA Addenda were prepared in 2016. The first (dated August 2016) was prepared in order to update the findings of the March 2015 HRA Report in light of changes to the supply of housing and employment land that were made in the Submission version of the Local Plan Review. That HRA Addendum screened the changes to policies in the Local Plan Review and concluded that, for each change, the screening conclusions of the March 2015 HRA Report would have been the same and the same Appropriate Assessment work would therefore have been undertaken.
- 1.6 The second HRA Addendum (December 2016) presented Appropriate Assessment work that was undertaken in relation to potential air pollution impacts on the Culm Grasslands SAC that could result from development at the Junction 27 site and the associated additional housing required.
- 1.7 Neither of the above HRA Addenda contain screening work that would be influenced by the case law considered in this note, and the note therefore focuses on the approach taken in the March 2015 HRA report.

Assessment of the compliance of the March 2015 HRA Report in light of recent case law

- 1.8 The HRA Report for the Publication Draft Local Plan Review (March 2015) which was submitted alongside the Mid Devon Local Plan Review sets out the findings of the screening stage in Chapter 4 and the detailed screening matrix is presented in Appendix 3. The approach taken to screening the policies and proposals in the Local Plan Review is explained in Chapter 3. As described in

paragraphs 3.31 and 3.32, during the screening stage consideration was given to mitigation measures that could be implemented in order to avoid likely significant effects. This information is recorded in the fifth column of the screening matrix in Appendix 3. Mitigation measures considered include measures within Local Plan Review policies as well as general mitigation measures that could be implemented, such as the use of good practice construction techniques.

1.9 Most of the policies in the Local Plan Review that were screened out were screened out on the basis that they would not result in development; therefore consideration of mitigation measures did not influence the screening conclusions for those policies. However, three of the proposals in the Local Plan Review were screened out on the basis that, while they could potentially result in development which could affect European sites, it was considered that any resulting development was likely to be small-scale and mitigation proposals were identified that were considered to justify an overall screening conclusion of no likely significant effects on European sites. This was the case for the policies detailed in **Table 1** below. For these policies, consideration of mitigation measures did influence the conclusions of the screening stage of the HRA and in this sense the HRA may not be compliant with the recent court judgement referred to above.

1.10 **Table 1** also shows which types of effects on which European sites would have been taken forward to the Appropriate Assessment stage, had those policies not been screened out after considering mitigation. For each European site and type of effect, the final column then shows whether they were included in the Appropriate Assessment anyway, as a result of other policies in the Local Plan review that were not screened out.

Table 1: Policies that were screened out on the basis of mitigation considerations

| Local Plan Review policy | Potential likely significant effects identified at screening stage | European sites potentially affected | Were these potential likely significant effects included in the Appropriate Assessment as a result of other policies? |
|--------------------------|--|--|---|
| S10: Environment | Loss of/damage to offsite habitat Non-physical disturbance such as noise/vibration and light pollution | Noise, vibration and light pollution effects, as well as effects relating to the loss of offsite habitat, could only affect the Culm Grasslands SAC due to the distance of other European sites from the District boundary. | Yes (see pages 76-77 of the March 2015 HRA Report) |
| S15: Countryside | Loss of/damage to offsite habitat Non-physical disturbance such as noise/vibration and light pollution Air pollution | Noise, vibration and light pollution effects, as well as effects relating to the loss of offsite habitat, could only affect the Culm Grasslands SAC due to the distance of other European sites from the District boundary. Air pollution could affect the Culm Grasslands SAC, Exe Estuary SPA and Exe Estuary Ramsar site. | Yes (see pages 76-78, 83 and 85 of the March 2015 HRA Report) |
| Minor amendments | Uncertain but may | Recreation-related | Yes (see pages 76- |

| | | | |
|--|--|---|---|
| <p>proposed to the wording of the policy relating to Rural Exceptions Sites that was brought forward from the adopted LP3 document</p> | <p>include: Loss of/damage to offsite habitat Non-physical disturbance such as noise/vibration and light pollution Erosion/trampling Air pollution</p> | <p>effects could potentially affect any European sites around Mid Devon. Air pollution could affect the Culm Grasslands SAC, Dartmoor SAC, Exe Estuary SPA and Exe Estuary Ramsar site. Noise, vibration and light pollution effects, as well as effects relating to the loss of offsite habitat, could only affect the Culm Grasslands SAC due to the distance of other European sites from the District boundary.</p> | <p>88 of the March 2015 HRA Report)</p> |
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- 1.11 For all of the policies in the Local Plan Review that were not able to be screened out, Appropriate Assessment was undertaken – the process undertaken and conclusions reached are described in Chapter 5 of the March 2015 HRA report and the detailed screening matrix can be found in Appendix 4. The Appropriate Assessment was undertaken in relation to each European site and type of effect for which likely significant effects could not be ruled out at the screening stage.
- 1.12 **Table 1** above shows that all of the potential likely significant effects that were associated with the three policies that were screened out on the basis of mitigation were included in the Appropriate Assessment anyway, as a result of other policies that were not screened out.
- 1.13 Therefore, the same process for the Appropriate Assessment was undertaken as would have been if mitigation had not been considered at screening stage. It is LUC’s professional opinion that the overall conclusions of the HRA for the Mid Devon Local Plan Review are therefore robust and would not have been different had the screening assessment been undertaken without any consideration of mitigation measures.

LUC
24th May 2018