



# PINS NOTE 02/2017r1

To: All Inspectors, HoSs Planning Casework, Major Applications and Plans, Infrastructure Planning Leads

Relevancy: Planning casework, NSIP casework and Local Plan examinations in England

Date of Issue: 05 April 2017

Last updated: 08 May 2017 – new paragraph 8, on the role of an Inspector in relation to local plan examination and Habitats Regulation Assessment. Paragraph 13 refers Inspectors to the guide questions inserted at Annex A.

## **Wealden District Council v SSCLG, Lewes District Council & South Downs National Park Authority relating to Habitats Regulation Assessment requirements**

### **Action**

1. Inspectors should be aware that on 20 March 2017, the High Court issued a judgment<sup>1</sup> which found that policies SP1<sup>2</sup> and SP2<sup>3</sup> of the Lewes District Local Plan Part 1 Joint Core Strategy 2010-2030 were flawed for legal error, through reliance on advice from Natural England (NE) in respect of Habitats Regulation Assessment (HRA). The judge found that the advice was not clearly soundly based. This note provides guidance to Inspectors on the approach to be taken in relation to cases where NE gives HRA advice.
2. The challenge was brought under s113 of the Planning and Compulsory Purchase Act 2004, and sought to quash part of the core strategy prepared and adopted jointly by Lewes District Council (DC) and South Downs National Park Authority (NPA) ('the Joint Core Strategy' or JCS). The challenge related to the

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<sup>1</sup> Citation Number: [2017] EWHC 351 (Admin)

<sup>2</sup> Spatial Policy 1 – provision of housing and employment land

<sup>3</sup> Spatial Policy 2 – distribution of housing

requirement of the Habitats Directive and Regulations to consider the likely significant effects of projects or plans on European protected sites, individually or in-combination, before deciding whether Appropriate Assessment (AA) was required.

3. The relevant effect in this case was with regard to increased levels of deposition of nitrogen resulting from increased traffic movements on a road traversing the Ashdown Forest Special Area of Conservation (SAC).
4. The challenge against Lewes DC was held to be out of time and the Joint Core Strategy for Lewes has been adopted. The challenge was, however, upheld against the Secretary of State (SoS) and South Downs NPA. As a consequence, an order has been issued whereby policies SP1 and SP2 have been quashed to the extent that they form part of the development plan for the South Downs NPA area.
5. It is not known at this stage whether the SoS will seek permission to appeal the judgment. Unless and until it is overturned on appeal, the judgment will stand and affected casework must be approached and determined on the basis of the Court's order.
6. In the light of the judgment, all on-going casework where effects of nitrogen deposition (alone or in-combination) on European protected sites may be an issue must be carefully reviewed by Inspectors. The impact of the judgment is not limited to the Ashdown Forest SAC. Particular care needs to be exercised where a plan or project may result in effects (alone or in-combination) there or at other sites where increased deposition may affect the European protected site. Decision makers need to be aware that this is likely to apply to cases in Lewes DC, South Downs NPA, Wealden DC, Mid Sussex DC, Tunbridge Wells Borough Council (BC), Sevenoaks DC and Tandridge DC but may also extend to other neighbouring authorities and potentially other localities near European protected sites.

7. The judgment will not have retrospective effect upon adopted plans where the HRA included an AA that addressed air quality effects, but the issue may need to be considered at the project level. Local Planning Authorities (LPAs) without an up to date plan, or that have adopted plans where AA was not undertaken, will need to take appropriate steps to ensure that the issue is addressed and the HRA requirements are adhered to at the project level.
8. Whilst the LPA remains the competent authority throughout the local plan process, the examining Inspector will need to carefully consider whether the requirements of the Habitats Regulations have been met. Where there is concern that HRA has not been properly considered, the examining Inspector must raise this with the LPA. If the LPA refuses to engage with those issues, then the implication is that the plan would be at risk of being found unsound.
9. Where development of an appeal site has the potential to increase road traffic on roads in proximity to the Ashdown Forest SAC or any other relevant European protected site, the appointed Inspector must determine, on a case-by-case basis, whether further action (such as referring back to the parties for comment), needs to be undertaken. If the information necessary to inform this decision is unavailable then it must be requested of the Appellant and/or relevant parties e.g. NE.
10. Inspectors will need to ensure, where there are concerns about the evidence base and/or expert advice, that a precautionary approach is taken in relation to HRA. Where concerns have been raised, Inspectors should not rely upon NE's position or advice, or any HRA undertaken by the LPA which follows that position or advice, without careful examination and testing of the advice.
11. As competent authority for HRA, Inspectors must ensure that the relevant steps have been considered, including an evaluation of the weight to attach to the evidence that has been presented, before

concluding whether AA should be undertaken. This should include evaluation of any expert evidence or advice provided by NE.

12. Where proposed avoidance or mitigation measures have been proposed, Inspectors must ensure that they have been appropriately secured before taking the measures into account in the HRA.
13. Inspectors may find that the guide questions at Annex A assist with consideration of the HRA process.

## **Background**

14. The challenge was brought by Wealden DC. The Ashdown Forest SAC sits wholly within Wealden's administrative area. The South Downs NPA is the planning authority for the part of Lewes DC which is in close proximity to the SAC.
15. The Court considered two issues, whether:
  - (a) the JCS was in breach of the requirements of the Habitats Directive, in that they failed to take account of the Wealden Core Strategy (WCS) when assessing whether the JCS would have a likely significant effect upon the SAC; and
  - (b) the Inspector failed to have regard to representations made by the Wealden DC during the examination process that the WCS could have an in-combination likely significant effect on the SAC when considered with the JCS.
16. In respect of (a), the Judge found that the JCS HRA did take account of the in-combination effects at the scoping (likely significant effects) stage. However the Judge found that NE's advice, that the JCS would not have a significant environmental effect on the SAC either alone or in-combination and so could be

scoped out of the appropriate assessment stage, was erroneous.

17. The scoping mechanism/methodology used by NE derived from Highways England's Design Manual for Roads and Bridges (DMRB) and, in part, from an assessment approach used by the Air Quality Technical Advisory Group (AQTAG), who provide scientific advice to Defra. These state that if the proposals or projects generate less than 1000 annual average daily traffic movements (AADT), they would have a negligible effect upon nitrogen deposition levels whether alone or in-combination with other proposals or projects. The Judge found that the methodology was not scientific, sensible or logical. He could not understand why NE was advising that a cumulative assessment did not require the aggregation of the known effect from the WCS and the JCS when considering in-combination effect.

18. In respect of (b), the judge found that the Inspector should have recognised that NE's advice was wrong and that he acted in a Wednesbury unreasonable manner in accepting that advice.

### **Contacts for further information**

19. Please contact XXXX if you have any general queries on this Note.

20. Contact XXXX for advice on individual cases. If you have a case involving a potentially affected site and are unclear how to proceed, please seek advice from XXXX.

**GUIDE QUESTIONS IN RELATION TO HABITATS REGULATION  
ASSESSMENT FOR DEVELOPMENT LIKELY TO GENERATE  
INCREASED VEHICLE MOVEMENTS**

Caveat – The questions below are of relevance to cases that would generate increased transport movements and are not intended for use in connection with proposed developments where point source emissions are the primary concern.

The questions are intended to provide useful prompts to Inspectors regarding the HRA process and are not a substitute for the assessment itself.

**Questions:****First Stage Screening - Identifying Pathway of Effect**

1. Is the plan/proposed development likely to generate increased transport movements along route corridors in proximity to European sites?
2. Has NE confirmed there is no pathway of effect for emissions to air on the European site?
  - If the Inspector can confirm there is no increased transport movement along route corridors in proximity to the European site and NE has confirmed there is no pathway of effect for air emissions on the European site then it is safe to conclude that the proposed development will not require any further form of assessment. The Inspector should ensure that his/her decision explains the position reached in this regard.
  - If the answer to any of the questions above means that there is a pathway of effect whereby the plan/proposed development may result in additional air emissions on the European site then the Inspector should move to consideration of Second Stage Screening.

**Second Stage Screening – Determining a Likely Significant Effect**

3. Will increased transport movements along route corridors (alone or in combination with other plans/projects) result in a likely significant effect on the European site necessitating the need to conduct an AA?

The Inspector will need to ensure there is sufficient and relevant information on which to base this judgment. Where effects are

uncertain then to comply with case law it must be assumed that adverse effects will occur. The relevant information will likely involve the following:

An assessment provided by the LPA/appellant that includes information to demonstrate:

- A robust understanding of the increase in vehicle movements generated by the plan/proposed development along route corridors in proximity to the European site alone and in combination with other plans and projects.
- An understanding of the site's sensitivity to changes in air emissions and specific pollutants of concern. The main effects from traffic are eutrophication (nutrient enrichment) and acidification. Sensitivity to these effects varies between habitat types and should be explained in context of the site concerned.
- An understanding of the likely additional air emissions that will occur at the European site resultant from the predicted increase in vehicle transport movements.
- An understanding of the background level of the relevant pollutant and the current 'headroom' (if any) with regard to the likely affected habitats' Critical Load factor.
- An understanding of any uncertainties that exist in the modelling information and the effect they may have on the conclusions being reached.
- A clear conclusion from the LPA/appellant as to the absence of a Likely Significant Effect.
- A consultation response from NE confirming that the information required above is sufficient and that the conclusions drawn are supported.

If this information is unavailable or if there is dispute the Inspector should consider the need to request further information/evidence or to ask specific questions in this regard.

- If the answer to question 3 is 'No' then the Inspector should use the information provided to demonstrate why that is the case and the confidence that can be had in it. If the outcome of the assessment is predicated on the need to secure mitigation then the Inspector should ensure that the points covered in question 4 are met.
- If the answer to question 3 is 'Yes' then an AA is required, move to question 5.
- If the answer to question 3 is 'Don't know' then an AA is likely to be required but in the first instance the Inspector should consider the need to request further evidence from the LPA/appellant as the case may be.

4. Is the mitigation relied upon to determine the outcome of question 3:

- Clearly identified and tangible e.g. are specific measures proposed that are capable of being enforced?

- Is the likely efficacy of the mitigation explained (and quantified if possible)?
- If monitoring is proposed as a form of mitigation is it linked to specific remedial measures?
- Legally secured through adequate planning condition or other suitably robust legal agreement?

### **Third Stage - Appropriate Assessment**

5. Has the likely effect on the site been appropriately quantified? Have the designated features likely to be affected been clearly identified?
6. Do you understand the contribution of the proposed development/plan to the deposition of pollutants on European sites alone or in combination with other plans or projects? This is usually expressed as a percentage contribution to the 'critical load'. Information on the relevant critical load for a habitat or feature can be found online in the [Air Pollution Information System](#).
7. Do you have access to the conservation objectives for the European site? N.B site conservation objectives can be obtained from NE's [website](#).
8. Do you have sufficient information to confirm that the proposed development/plan will not cause pollutant deposition to a level that would prevent the conservation objectives being delivered?
9. Does NE agree that adverse effects on the integrity of the site can be excluded?

If the answer to any of the questions from 5-9 above is 'No' then it should be concluded that the proposed development/plan may adversely affect the integrity of the site. The Inspector should consider if there is an appropriate route to addressing the questions above and ensuring that the outcome to each question is 'Yes'. This may include for example, making further restrictions to the proposed development/plan in effort to exclude adverse effects to integrity.

If it is not possible to answer each question from 5-9 above 'Yes' (and there is no additional restriction that can be applied) then consent can only be granted if certain other tests are met. The tests are as follows:

- there are no alternative solutions to the proposed development/plan;
- there are Imperative Reasons of Overriding Public Interest (IROPI) for the proposed development/plan; and
- there are suitable compensatory measures (usually replacement habitat) secured.

If a proposed development/plan is likely to adversely affect the integrity of the site, and these tests cannot be met then Inspectors should refuse or recommend refusal of the proposed development/plan.



In any event where a proposed development/plan is likely to adversely affect the integrity of the site Inspectors should seek assistance from XXXX in the first instance. Requests for PINS legal support should be made through your Group Manager or XXXX.