

## SNH Guidance Note

### The handling of mitigation in Habitats Regulations Appraisal – the People Over Wind CJEU judgement

**This is an Instruction Note for SNH staff; guidance for others.**

In April 2018 the European Court of Justice issued a judgement that clarifies the stage in a Habitats Regulations Appraisal (HRA) process when mitigation measures can be taken into account when assessing impacts on a European site. This guidance note sets out the implications of this judgement in a Scottish context.

**The approach to handling of potential mitigation measures is the legal responsibility of whoever is the Competent Authority in each individual case. The advice set out in this guidance is SNH’s interpretation of the People over Wind judgement. The Competent Authority may wish to take its own legal advice. It is for the Competent Authority to decide whether to proceed to Appropriate Assessment (AA).**

#### The case

[CJEU C-323/17](#) People Over Wind and Peter Sweetman vs Coillte Teoranta. The High Court of Ireland requested a preliminary ruling<sup>1</sup> from the CJEU on a case linked to a proposed wind farm development which might impact on freshwater pearl mussels which are a qualifying feature of the River Barrow and River Nore SAC. The wind farm had previously been consented with conditions, and the main proceedings of the case concerned laying of a cable to connect the wind farm to the electricity grid. The specific question posed was:

“Whether, or in what circumstances, mitigation measures can be considered when carrying out screening for an appropriate assessment under Article 6(3) of the Habitats Directive?”

The key part of CJEU ruling delivered on 12 April 2018 is 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.”*

#### Analysis of the judgement

The judgement only impacts upon the screening stage of the Habitats Regulations Appraisal (HRA) procedure, it doesn’t change or effect the consideration of plans and projects at the Appropriate Assessment (AA) stage or change the test they must pass in order to gain consent.

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<sup>1</sup> A preliminary ruling from the CJEU is a decision on the interpretation of EU law, and is the final determination of the Union law in question. The final decision on what to do in the specific case is left to the referring court.

The judgement is blunt, and at face value disallows the consideration of any mitigating measures to a plan or project at the screening stage of an HRA that are intended to avoid or reduce likely significant effects (LSEs) on European sites. SNH interprets the judgement as meaning that it is those measures specifically intended to avoid or reduce harmful effects to a European site which cannot be considered at the screening stage<sup>2</sup>. This means there is scope to consider whether an aspect of a plan or project, or an undertaking by a proponent, may be an essential element of the plan or project and not simply concerned with avoiding impacts to European sites.

The CJEU judgement has been made and is legally-binding until such time as it is amended by a subsequent CJEU judgement (or post-EU exit by the Supreme Court).

### **Implications for Scotland**

The implications of the judgement are potentially substantial for Competent Authorities, developers and advisers. Interpreted literally, the judgement appears to mean that plans and projects cannot use any form of mitigation measure to avoid an AA, and consequently a substantially higher proportion of HRAs will need to include an AA.

There are other related implications of the ruling that we need to be aware of:

#### Impacts on EIAs

EIA procedures are more likely to be required where an Annex II project would be likely to have a significant effect on a European site.

#### Impacts on SEAs

Article 2(b) of the SEA Directive requires that an environmental assessment will be carried out for all plans and programmes which, in view of the likely effect on European sites, have been determined to require an assessment pursuant to Article 6 or 7 of the Habitats Directive (i.e. an appropriate assessment).

#### Impacts on permitted development rights (PDR)

Any development which is likely to significantly affect a European site must be subject to an application for authorisation and not begun unless the project proposer receives written notification of the approval of the planning authority.

### **The proposed approach to handling of potential mitigation measures**

The core of the approach is to distinguish early on in the HRA process between those measures within the plan or project intended to avoid or reduce harmful effects on a European site and elements that may incidentally provide some degree of mitigation but which are intrinsic or essential parts of the plan or project itself. These

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<sup>2</sup> The ruling states, “it is not appropriate... to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on that [Natura] site”.

distinctions will not always be easy to make in practice. If in doubt, and for consistency, it will always be best to consult a specialist adviser.<sup>3</sup>

If the plan or project does contain essential or intrinsic elements that could reduce or eliminate its impact on a European site then it would be unreasonable to isolate them from the rest of the proposal when screening for LSE. To do so would mean that we were effectively screening a different plan or project to the one proposed.

Examples of the intrinsic elements of a proposal which would not be considered a 'measure' and could be taken into account in a screening would usually be related to design, location, layout or standard conditions. Cases that would need to be considered at AA would include measures specifically included in the proposal in order to mitigate potential impacts, such as conditions, caveats, strategies or other restrictions related to European sites qualifiers. The golden rule is to avoid introducing measures at, or in the lead up to, the screening stage that are designed specifically to avoid harmful effects on European site features for the purpose of seeking to reach a conclusion of "no LSE".

If a plan or project contains in-built specifications or standard conditions such that there is absolute certainty that it will not be capable of undermining the conservation objectives of any qualifying feature, then it will normally be appropriate to conclude "no LSE" and the case does not proceed to AA. Examples of intrinsic or essential elements are given in Annex 1.

If there is an element of doubt about effects on qualifying features then the correct conclusion will normally be "LSE" with progression to AA.

It is no longer permissible to seek to overtly insert proposed mitigation measures at, or in the lead up to, the screening stage in order to avoid progression of the case to AA. Mitigation measures can be proposed but, regardless of the likely success or otherwise of these measures, the correct conclusion at the screening stage is "LSE" with the effectiveness of the proposed mitigation then being tested during the AA process.

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12/07/19

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<sup>3</sup> For SNH staff this will be a member of the Natura Team in the Protected Areas and Surveillance Activity.

## Annex 1.

### Examples of measures that may or may not be treated as essential or intrinsic components of projects or plans

(Based on material provided by colleagues in Natural Resources Wales)

Be aware that the positions set out in these tables are believed to be likely scenarios. However, they will not apply safely in all cases. Each case needs to be examined on an individual basis using the logic set out in the main body of this paper.

#### Projects

Element or measure	Likely to be essential or intrinsic to the proposal	Comments
Location of the project	YES	Location will normally be a fixed component of a project and as such can be treated as an essential component, even if the location was selected partly or entirely to avoid a European site.
The scale of the proposed activity	YES	For example: - the size of a development (spatial footprint, height of structure); - the extent of the area over which an activity will occur; - the level of emissions anticipated; - the quantity of a resource to be extracted.
Timing of the activity	YES / NO	The call here really does depend of the specific case details. Timing of project activity is often important in avoiding connectivity to, or impact on, a European site. The judgement that needs to be made is whether the timing of the project is clearly integral to the proposal, especially where this is the case for reasons that are not related to impacts on a European site. If it appears likely that the proposed timing has been inserted into the project for reasons related to avoiding impacts on a European site then a precautionary approach is advised with the project being assessed at AA. Where relevant it will normally be wise for a timing condition to be attached to any consent issued to ensure that proposed timings are adhered to.
Any measure that forms part of an application for authorisation and which can reasonably be regarded as 'standard practice' or 'best practice' for projects of that type	YES	This applies to project elements which would be expected to form part of an application even if there was no specific requirement to consider potential impacts on habitats or species. Includes measures that form part of 'standard rules' of permitting frameworks. For these standard practices / rules there must be a high degree of certainty that the proposal will be effective in avoiding connectivity to, or impact on, a European site. Where there is doubt about this it will normally be necessary to closely test the effectiveness in an AA.

Any bespoke measure which has been defined and included specifically in the project in order to mitigate potential impacts on a European site	NO	Such measures will normally need to be tested at AA.
Any undertaking or commitment by a project proponent (or by any other person) that does not form part of the application for authorisation	NO	Whenever and however made or expressed, and regardless of how effective, appropriate and deliverable as a measure it is considered to be.
Any measure which is not sufficiently clearly defined in the application for authorisation	NO	In line with case law, where there is doubt or uncertainty about the likelihood of significant effects, the project should be subject to AA.
Any measure which at the time of application for authorisation, is proposed to be defined at a later date.	NO	Includes commitments or undertakings to define and agree mitigation measures at any point after authorisation or approval is given, rather than the detail being included in the application. For example, a commitment to establish a construction management plan, or a scheme of working to control noise, dust or other emissions, or to develop a monitoring and adaptive management plan under which the effects of the project will be monitored and actions taken in response.
Any measure whose efficacy, reliability or deliverability cannot be established with sufficient certainty at the time of screening the project for LSE	NO	The level of certainty concerning the effectiveness of a mitigating measure must meet the standard set by the ECJ in the Waddensee ruling (c-127/02), namely that a significant effect (in view of the European site's conservation objectives) can be excluded on the basis of objective information.

## Plans

Measure	Likely to be essential or intrinsic to the proposal	Comments
The nature and purpose of the plan (what it is, and what it is for)	YES	Includes where the plan itself aims to have beneficial effects on European site features, since we want to avoid a perverse and presumably unintended consequence of the People over Wind ruling, whereby the fact that a plan's purpose includes reducing or removing an impact, renders it more likely to require appropriate assessment than if that was not part of its purpose.
The geographic area to which the plan relates	YES	Geographic area will normally be a fixed component of a project and as such can be treated as an essential component, even if the area was selected partly or entirely to avoid a European site.
The timescale over which the plan is intended to have effect	YES / NO	The call here really does depend of the specific case details. Timing of plan activity is often important in avoiding connectivity to, or impact on, a European site. The

		judgement that needs to be made is whether the timing of the plan is clearly integral to the proposal, especially where this is the case for reasons that are not related to impacts on a European site. If it appears likely that the proposed timing has been inserted into the plan for reasons related to avoiding impacts on a European site then a precautionary approach is advised with the plan being assessed at AA. Where relevant it will normally be wise for a timing condition to be attached to any consent issued to ensure that proposed timings are adhered to.
Any measure which would clearly be included in the plan in the absence of a need to consider potential impacts on European sites	YES	This includes measures which can reasonably be regarded as 'standard practice' or 'best practice' for plans of that type which are always included for the purposes of wider environmental protection and/or certification. For these standard practices / rules there must be a high degree of certainty that the plan will be effective in avoiding connectivity to, or impact on, a European site. Where there is doubt about this it will normally be necessary to closely test the effectiveness in an AA.
Provisions, policies or statements that any lower tier plans or projects should avoid potential harm to European sites	NO	Unless they are otherwise considered to be integral to the nature and purpose of the plan