



GCC Note for the Inspector on the Habitats Regulations Assessment (HRA) of the Gloucestershire Minerals Local Plan (MLP)

On the recent the CJEU Judgement (People over Wind Case C-323/17) and why it is acceptable that the Gloucestershire Minerals Local Plan HRA has been screened by a detailed HRA as not having likely significant effects for any European Site

Summary

The HRA Handbook (DTA Publications <https://www.dtapublications.co.uk/>) – has been updated after 'People Over Wind' and now states in section 6.1:

One of the key reasons for making these checks and changes early in the process is because some of the changes will become essential features and characteristics of the plan; so the plan-making body will be able to take them into account in the formal screening decision (F.7). Other changes to the plan may constitute 'measures intended to avoid or reduce harmful effects on a European site'. These will be regarded as 'mitigation measures' which cannot be taken into account in the formal screening decision (section F.7). However, if included in the plan, the mitigation measures will be available for the stage 2 'appropriate assessment' so that in most cases the plan will pass the 'integrity test' (sections F.9 and F.10).

The first sentence reflects what has happened with HRA for the Gloucestershire MLP. The features and characteristics in the MLP relevant to HRA screening were identified as being for overall environmental benefit not targeted to any particular European Site. All policies and allocations were easily screened out from HRA Stage 1 process because no likely significant effect could occur with these integral aspects built into the MLP [at quite an early stage]. This is why AA (Stage 2 HRA) has not been triggered for the Gloucestershire MLP.

In Detail

Gloucestershire County Council (GCC) as competent authority under the Habitats Regulations/Directive has the following observations.

1. The People over Wind judgement (12th April 2018) reasoned that there was a risk of circumventing the Appropriate Assessment (AA) stage which was stated as an essential safeguard of the Habitats Directive (as quoted at paragraph 4 of the PINS note 05/2018). It was considered that screening (HRA Stage 1) should not take account of avoidance or reduction (mitigation) measures designed to confirm no likely significant effect on any European Site. What is meant by such measures is not made clear, e.g. does this include choosing allocations that have no prospect of adversely affecting European Sites?

2. The Gloucestershire Minerals Local Plan (MLP) has been assessed by a detailed and long running HRA process to have no likely significant effect on any European Site (HRA Main Report, March 2018). At no point were significant effects deemed to be likely but taking a very precautionary approach the HRA sought to identify any potential for adverse effects on European Sites but these have proved to be via full analysis to be very unlikely or inconceivable. Natural England agreed with the final HRA conclusions in March 2018 and there was no debate that the Appropriate Assessment stage needed to be triggered not least because there were no facets that could or should be considered in any further detail than had already been carried out as part of the screening process. It is crucial to remember that the implementation of the MLP does not facilitate the granting of minerals development (or projects) that would be contrary to the Habitats Regulations/Directive. The MLP spells out clearly the stages of HRA that would additionally operate at the development project stage (Table 3, page 104 of the MLP Publication Plan). No minerals project having a likely significant effect could be granted consent without undergoing detailed assessment specific to the proposals actually submitted to the Mineral Planning Authority.
3. The HRA for the MLP has followed best practice agreed with Natural England (and the Environment Agency) and commenced at the earliest stage of the MLP process. It has informed and continually scrutinised proposed content alongside the separate but linked SA/SEA. This has been a long journey over several years. After the issues and options stage was completed (2007) and from the preferred options stage (2008) onwards no policies or allocations being proposed were considered to be likely to have a significant effect on any European Sites (i.e. would trigger Appropriate Assessment). Minerals policy, allocation sites and development requirements have been drawn up as an integral part of the Local Plan and embedded within these are measures for general environmental protection and enhancement (European Sites being a small part of this). There are no 'add on' measures targeted solely at reducing or avoiding an identified likely significant effect on European Sites. Integrated avoidance measures relating to European Sites are embedded, e.g. within Policy DM06 and in the development requirements for allocated sites. These are expansive facets that have been drawn up for overall environmental benefit including for biodiversity wherever it could arise as a matter. Embedded measures have been an integral part of the plan for some time now and are related to the plan's vision, objectives and strategy. Conservation of the natural environment through providing for minerals supply is a key part of the MLP and is not just there to avoid or reduce effects on designated sites for nature conservation.
4. At the publication stage of the MLP only one allocation (no other aspects) was looked at in the latter stages of HRA screening (HRA Main Report, March 2018). This was Allocation 01: Land East of Stowe Hill Quarry (part of Policy MA01) where GCC took a very precautionary approach and screened the allocation in every way possible in some considerable detail (Table 12, paras 5.4.13 to 5.4.19, Table 13, 5.4.22 to 5.4.31, Table 14 and Table 15). GCC looked at the Stowe Hill allocation with other policies in the MLP, other plans and other projects (including planning applications within/next to the allocation). A final step was to look at other measures in the MLP that were already being applied to make sure that there really could be no likely

significant effect on any European Site. In many ways this amounted to as detailed an assessment as would be done under any AA¹. The ‘simple additional measures’ listed and discussed in Table 15 were already embedded aspects of the MLP and not purely drawn up as ‘avoidance or reduction measures’ to negate an identified likely significant effect on a European Site. These measures were there also to mostly protect and enhance biodiversity as a whole including national and locally designated sites, priority habitats, priority and legally protected species. The PINS note does not seem to rule out embedded measures especially ones that would benefit the environment as a whole and not just European Sites (paragraphs 11 & 17).

5. There are a range of documents looking at the implications for the HRAs of Local Plans since the People over Wind judgement was issued (April 2018). Many determine that it conflicts with other Case Law covering HRA procedures but also the procedures for EIA and SEA which are often carried out alongside HRA (DTA Publications, HRA Journal June 2018). The PINS note 05/2018 takes a very precautionary stance in dealing with the People over Wind CJEU judgement and does not take proper full account of other Case Law such as the important and influential rulings of Waddenzee (C-127/02 September 2004) and Sweetman (C-258/11 November 2012)). The People over Wind CJEU judgement also does not say that either of these judgements is flawed so they must still be taken into account especially given so much HRA guidance and procedure depends upon them.

In the Waddenzee ruling paragraph 43 reads: ‘*It follows that the first sentence of Article 6(3) subordinates the requirement for an appropriate assessment of the implications of a plan or project to the condition that there be a probability or a risk that the latter will have significant effects on the site concerned.*’ (emphasis added). The MLP has been screened as it has gradually evolved as a whole and it is considered that it could not lead to any significant effects on any European Site and in fact creates policy to provide beneficial opportunities to enhance such sites (e.g. Stowe Hill for horseshoe bats). Paragraph 45 of the Waddenzee ruling goes on to say: ‘*.....the first sentence of Article 6(3) must be interpreted as meaning that any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site’s conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site either individually or in combination with other plans or projects.*’ (emphasis added). The MLP cannot have significant effects on any European Site and so can be excluded from Appropriate Assessment which would in any case serve no useful purpose.

There is further backing that the HRA for the MLP is complete in the Sweetman ruling

¹ If it were deemed to be imperative to go to the AA stage then Allocation 01 of Policy would require no additional considerations to those that have already been carried out during screening. Screening Step 5 of the HRA beginning at paragraph 5.4.29 and including Table 15 could just be transferred into the greyed out AA part of the report instead (Section 6). Paragraph 5.4.31 would merely be edited to say “*The HRA is now in a position to conclude that Policy MA01 – Aggregate working within site allocations – Allocation 01: Land East of Stowe Hill Quarry as part of an adopted MLP would not cause an adverse effect on the integrity of the Wye Valley & Forest of Dean Bat Sites SAC or Wye Valley Woodlands SAC or the River Wye SAC.*”

where the Advocate General said:

'48. The requirement that the effect in question be 'significant' exists in order to lay down a de minimis threshold. Plans or projects that have no appreciable effect on the site are thereby excluded. If all plans and projects capable of having any effect whatsoever on the site were to be caught by Article 6 (3), activities on or near the site would risk being impossible by reason of legislative overkill.'

In any case it is only at the minerals planning application authorisation stage that any prospect of adverse effects on the integrity of European Sites could emerge when full details of proposed developments would be known. MLP policy, the National Planning Policy Framework and safeguards in law would guard against damaging adverse effects on European Sites happening. This was a key matter of consideration in the case of Feeney vs. Oxford City Council CO/3797/2011 and at the examination of the Gloucestershire Waste Core Strategy that was finally adopted in 2012. Counsel Mr Anthony Crean QC at the time indicated to the inspector (which was accepted) that "*the most it (the waste plan) can do is provide a framework within which the latter applications will be approved only if it meets the requirements of the Habitats Directive (and waste plan policy). Any other solution would bring an end to forward planning. The judge in Feeney dealt with this point in this way.*"

GCC's conclusion as competent authority is that the HRA is sound and the MLP is legally compliant under the Habitats Regulations/Directive not least because it cannot be harmful to any European Site. The MLP does not authorise or facilitate action that could lead to effects that would undermine the conservation objectives of any European Site. The MLP provides policy and requirements for development coming forward later so that it can have no prospect of significantly affecting any European Site and importantly is aimed at protecting biodiversity overall. The MLP also promotes opportunities to enhance biodiversity in association with minerals proposals including in particular for the benefit of local horseshoe bat populations at Stowe Hill.

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