



# Habitat Regulations Assessment

## Advice note ten: Habitat Regulations Assessment relevant to nationally significant infrastructure projects

### Introduction

When preparing an application for nationally significant infrastructure projects (NSIPs) under the Planning Act 2008, developers should consider the potential effects on protected habitats. If an NSIP is likely to affect a European site and/or a European marine site<sup>1</sup> (hereafter European site) the developer must provide a report with the application showing the European site that may be affected together with sufficient information to enable the decision maker to make an appropriate assessment, if required.

The purpose of this advice note is to:

- provide a brief description of the legislative framework and obligations placed on both the decision maker and developer under the Habitats Directive<sup>2</sup> and the Conservation of Habitats and Species Regulations 2010 (as amended), hereafter the 2010 Habitats Regulations (as amended)<sup>3</sup>
- explain the interface between the process under the Planning Act 2008 and the process under the Habitats Directive (known as the Habitats Regulations Assessment (HRA)) which must be followed to ensure compliance with the legal requirements
- clarify the information to be provided with a development consent order (DCO) application as prescribed in the Infrastructure Planning (Applications: Prescribed Forms and Procedures) Regulations 2009 (the APFP Regulations), and
- highlight the relevant bodies that should be consulted throughout the DCO application process, the suggested timing of engagement and recommended level of interface required.

\* All footnotes can be found on the last page of this advice note



This advice note makes reference to the requirements laid down in the 2010 Habitats Regulations (as amended), the Planning Act 2008 and other related legislation. However, the advice note should not be seen as interpreting or overriding the existing legislative framework and the developer should seek its own legal advice where it is considered necessary. This advice note should also be read in conjunction with the Habitats Directive, the 2010 Habitats Regulations (as amended), relevant Government Planning Policy<sup>4</sup>, Government Circulars<sup>5</sup>, and recognised European guidance<sup>6</sup>. Specific documents are itemised in the endnote to assist developers, but it is the developer's responsibility to ensure that all relevant policy, legislation and guidance has been considered.

## Background and legal context

### EC Directive

The UK is bound by the terms of the EC Habitats Directive (and EC Birds Directive and the Ramsar Convention). The aim of the Habitats Directive is to conserve natural habitats and wild species across Europe by establishing a network of sites known as Natura 2000 sites (for the purpose of this advice note, and as defined under the 2010 Habitats Regulations, these are referred to as European site(s)).

Under Article 6(3) of the Habitats Directive, an appropriate assessment is required where a plan or project (in this case an NSIP proposal) is likely to have a significant effect upon a European site, either individually or in combination with other projects.

*“Any plan or project not directly connected with or necessary to the management of*

*the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives” Article 6(3)*

This Article has been interpreted as meaning that any project is to be subject to an appropriate assessment if it cannot be proven, beyond reasonable scientific doubt, that there is no significant effect on that site (a precautionary approach), either alone or in combination with other plans or projects<sup>7</sup>.

Further to this, Article 6(4) states that where an appropriate assessment has been carried out and results in a negative assessment (in other words, any proposed avoidance or mitigation measures anticipated are unable to reduce the potential impact so it is no longer significant) or if uncertainty remains over the significant effect, consent will only be granted if there are no alternative solutions, and there are imperative reasons of over-riding public interest (IROPI) for the development<sup>8</sup> and compensatory measures have been secured.

*If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted. Article 6(4)*



## HRA processes

HRA is a recognised step by step process which helps determine likely significant effect and (where appropriate) assess adverse impacts on the integrity of a European site, examines alternative solutions, and provides justification for IROPI.

European guidance<sup>9</sup> describes a four stage process to HRA and is summarised in Table 1 below and at Figure 1.

The HRA process, as applied to NSIPs, is illustrated in Figure 2 (page 11) and at Table 2 (page 21):

**Table 1: Four stage process to the HRA**

<b>Stage 1:</b>	Screening	The process to identify the likely impacts of a project upon a European site, either alone or in combination with other plans and projects, and consider whether the impacts are likely to be significant.
<b>Stage 2:</b>	Appropriate assessment	The consideration of the impacts on the integrity of the European site <sup>10</sup> , either alone or in combination with other plans and projects, with regard to the site's structure and function and its conservation objectives. Where there are adverse impacts, an assessment of mitigation options is carried out to determine adverse effect on the integrity of the site. If these mitigation options cannot avoid adverse effects then development consent can only be given if stages 3 and 4 are followed.
<b>Stage 3:</b>	Assessment of alternative solutions	Examining alternative ways of achieving the objectives of the project to establish whether there are solutions that would avoid or have a lesser effect on European sites.
<b>Stage 4:</b>	IROPI	This is the assessment where no alternative solution exists and where adverse impacts remain. The process to assess whether the development is necessary for IROPI and, if so, the potential compensatory measures needed to maintain the overall coherence of the site or integrity of the European site network.



The protection given by the Habitats Directive is transposed into UK legislation through the 2010 Habitats Regulations (as amended).

The 2010 Habitats Regulations (as amended) require the competent authority<sup>11 12</sup>, before deciding to authorise a project which is likely to have a significant effect on a European site “to make an appropriate assessment of the implications for that site in view of that site’s conservation objectives”<sup>13</sup>.

In accordance with the 2010 Habitats Regulations (as amended) 61(2) anyone applying for development consent for an NSIP **must** provide the competent authority with such information as may reasonably be required “for the purposes of the assessment” or “to enable them to determine whether an appropriate assessment is required”<sup>14</sup>.

Note - the APFP Regulations carry forward the requirements of the 2010 Habitats Regulations (as amended) into the application process for NSIPs by requiring sufficient information to be provided within the application to enable an appropriate assessment to be carried out, if required.<sup>15</sup>

Sites afforded protection under the 2010 Habitats Regulations (as amended) are designated in the UK as Special Areas of Conservation (SACs), candidate Special

Areas of Conservation and Special Protection Areas (SPAs). As a matter of policy the Government also applies the procedures described below to Ramsar sites and potential SPAs. These sites are generally referred to as European sites.

Developers should be aware that if insufficient information i.e. about HRA, as required by the APFP Regulations, is submitted with the application, the IPC may refuse to accept the application. Developers are therefore strongly advised to use the pre-application consultation process to seek assurances from the relevant statutory bodies that all potential impacts have been properly addressed in sufficient detail before the application is submitted.



### **Aligning the NSIP process with statutory requirements of the 2010 Habitats Regulations (as amended)**

The developer should carry out the necessary preparatory work during pre-application to a level of detail that will enable the competent authority to meet its duty under the 2010 Habitats Regulations (as amended). This work should result in information which will show beyond reasonable doubt whether any European sites are likely to be affected by the NSIP proposal, either alone or in combination with other plans or projects, describe the likely impacts on the conservation objectives of the European sites (which may be direct or indirect, temporary or permanent, or a combination of these) and describe whether the impacts are likely to be significantly adverse.

The preparatory work, as suggested, is required to ensure that the procedural requirements of the APFP Regulations<sup>16</sup> can be met as well as allowing the competent authority to meet its duty under the 2010 Habitats Regulations (as amended).

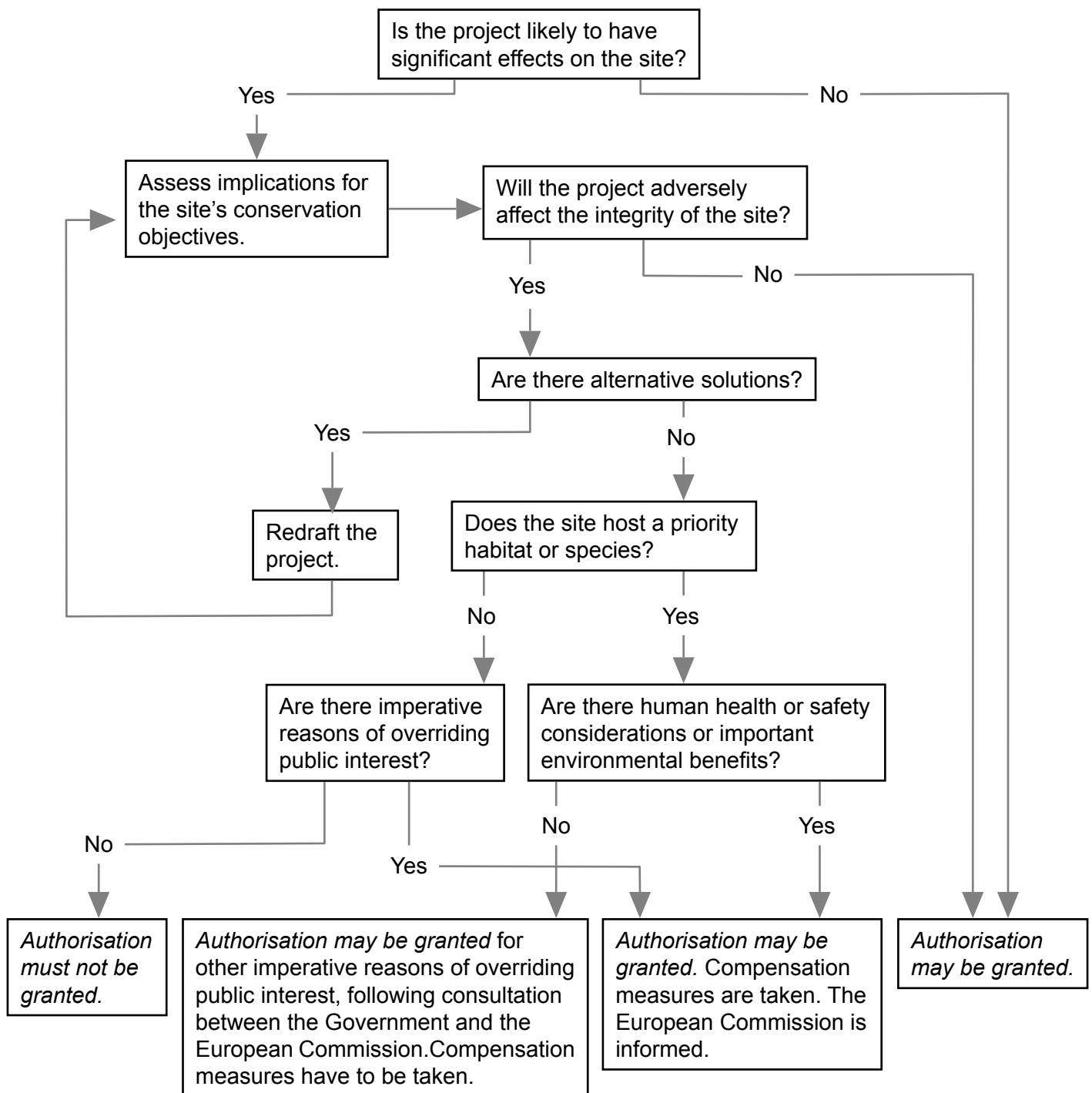
Therefore, consideration of the likely significant effects on European sites should commence

at an early stage of the pre-application process in consultation with the appropriate nature conservation bodies<sup>17</sup> (i.e. at EIA scoping, statutory s47 and s42 consultation, or sooner<sup>18</sup>) because:

- if an application does not provide sufficient information to enable an appropriate assessment to be carried out (if required) the IPC may be unable to accept the application, and
- the competent authority cannot make a determination that a project is likely to have a significant effect on a European site and if necessary carry out appropriate assessment until after an application is submitted. The strict timetable<sup>19</sup> for examination of applications means that if insufficient assessment work has been done at the pre-application stage there may not be enough time during the examination to carry out any additional surveys or commission detailed technical analysis at this stage to support the appropriate assessment. In the absence of such information, the examining authority's findings and conclusions may be that the competent authority should refuse to authorise the project.



Figure 1: Consideration of projects affecting European sites<sup>20</sup>





## Roles and responsibilities

### The competent authority

Although the 2010 Habitats Regulations (as amended) (and Offshore Marine Regulations) do not specify the methodology for carrying out the HRA they do specify the obligations of the competent authority and the developer.

The role of the competent authority is to determine if there are likely significant effects and carry out the appropriate assessment<sup>21</sup>, if required, before a decision is made. They are also required to consult with the relevant nature conservation bodies (and the public, if considered appropriate) before deciding to authorise the NSIP, and where adverse effects remain they must undertake further assessments on alternatives and prepare a justification statement for IROPI (see later sections on this).

### Responsibility of the IPC

If there is no relevant national policy statement in relation to the application, the IPC will not itself be the competent authority but will nevertheless ensure that sufficient information is provided to enable the Secretary of State (SoS) to meet his/her statutory duties as the competent authority under the 2010 Habitats Regulations (as amended). Information provided within the DCO application will enable the IPC to undertake a 'shadow' assessment for the SoS to consider.

### Responsibilities of the developer

It is the responsibility of the developer to include 'sufficient information' with the DCO application at acceptance to identify the European sites and to enable the appropriate assessment to be made if required<sup>22</sup> (please refer to later section 'Acceptance of application').

Therefore, it is the responsibility of the developer to carry out the necessary preparatory work and assemble evidence in support of the DCO application to enable the competent authority to carry out its duties. The IPC strongly advises developers to shadow the HRA process at the pre-application stage so that the developer is able to compile all the information necessary for the competent authority to make a determination during the examination.

There is no specific point or statutory requirement during pre-application that requires developers to initiate the HRA process. It is for the developer to consider how best to meet pre-application requirements and give careful consideration to the point when the results of the developer's own HRA report could be usefully presented for consultation i.e. on likely significant effects, mitigation solutions, reasonable alternatives, and potential compensatory measures.



The developer may wish to take the nature conservation body and local planning authority's advice about how to incorporate HRA consultation into the published SoCC so that everyone is aware of their opportunity to make comments.

It is likely to be in the developer's best interests to undertake both formal and informal consultation with the statutory nature conservation organisations at an early stage of the pre-application process. Further guidance on pre-application requirements is provided in the IPC's statutory guidance note 1 and advice note seven: EIA screening and scoping.

Careful consideration should be given to any specific surveys and investigations necessary as there may be little time to obtain further information during examination (see 'Requiring further information'). Developers may wish to make use of the consultation report or a statement of common ground to identify matters which have been agreed with the nature conservation bodies and to flag areas which remain in dispute. This would help the Examining authority, if the application is accepted, to assess the issues and to decide how to carry out the examination.

### **Responsibilities of the statutory nature conservation bodies**

The formal input of the nature conservation bodies (or prescribed consultees) during pre-application would be in response to the developer's s42 consultation and the IPC's EIA scoping opinion process, if one is requested<sup>23</sup>. The IPC nonetheless recommends that dialogue takes place between the developer and the nature conservation bodies about HRA issues throughout the pre-application stage and as early as possible. Informal discussions with the developer may include advising on likely significant effects and mitigation proposals.

Developers should discuss and agree working arrangements with the relevant nature conservation bodies i.e. Natural England (schemes solely within England), Countryside Council for Wales (schemes solely within Wales), and the Joint Nature Conservation Committee (JNCC) (schemes beyond 12 nautical miles).

The developer is also advised to agree with the relevant organisations who should act as the lead nature conservation body where the proposal falls within the responsibilities of two or more nature conservation bodies.





### Relationship with environmental impact assessment (EIA)

The majority of NSIP proposals will require an EIA and a HRA. Although the HRA and EIA are separate and distinct elements of the DCO application process both are integral to the decision making process. Amongst other impacts which the EIA will assess, it must include information about significant effects on flora and fauna<sup>24</sup>; information which is likely to support the developer's HRA assessment.

However, the EIA and HRA have different approaches to decision-making:

- the Environmental Statement (ES) informs the decision (its findings must be 'taken into consideration'<sup>25</sup>), whereas
- the DCO can only be made if the decision maker has followed the stages prescribed by the 2010 Habitats Regulations (as amended) (See Figure 1).

It is likely that the designated features of a European site potentially impacted by the proposed development will be identified during pre-application consultation i.e. during site selection and scoping of the proposed options. Although there is no

requirement to do so, the developer may wish to formally consult on its own HRA screening assessment through the EIA scoping report, using formal scoping consultation by the IPC<sup>26</sup> to communicate its approach on screening of European sites e.g. the developer could include information about its own HRA surveys and approach in the scoping report.

If requested to do so, the IPC will consult on the developer's scoping report with the relevant consultation bodies to determine the information to be included in the ES. This formal element of EIA scoping consultation may help developers identify the potential issues and much of the baseline data needed to satisfy the HRA requirements, help write the HRA screening assessment and ensure any issues are identified at this stage. If this approach to HRA screening is followed, the developer may wish to set out its screening approach as a separate annex within the EIA scoping report, which the IPC will consult on.

Consideration should be given to the timing of an EIA scoping request and consultation required to support the developer's HRA assessment as this may impact on the pre-application programme.



### Co-ordinating parallel consents and other appropriate assessments

NSIPs, by virtue of their scale and complexity, are likely to require separate licences or permits under other regulatory regimes. Activities requiring consent not included or capable of being included in an application for development consent under the Planning Act 2008, may also have a significant effect on a European site and may also require appropriate assessment by a different decision maker (or competent authority) under other regulatory regimes before it can be authorised. Developers are encouraged to consult other competent authorities about the level of information they will require to undertake their appropriate assessment, if required, or to enable them to adopt the reasoning or conclusions of the appropriate assessment carried out by the competent authority under the Planning Act 2008.

It should be clear that any likely significant effects of the proposed development, which may be regulated by other competent authorities, should have been properly taken into account in the developer's HRA for the DCO application<sup>27</sup>.

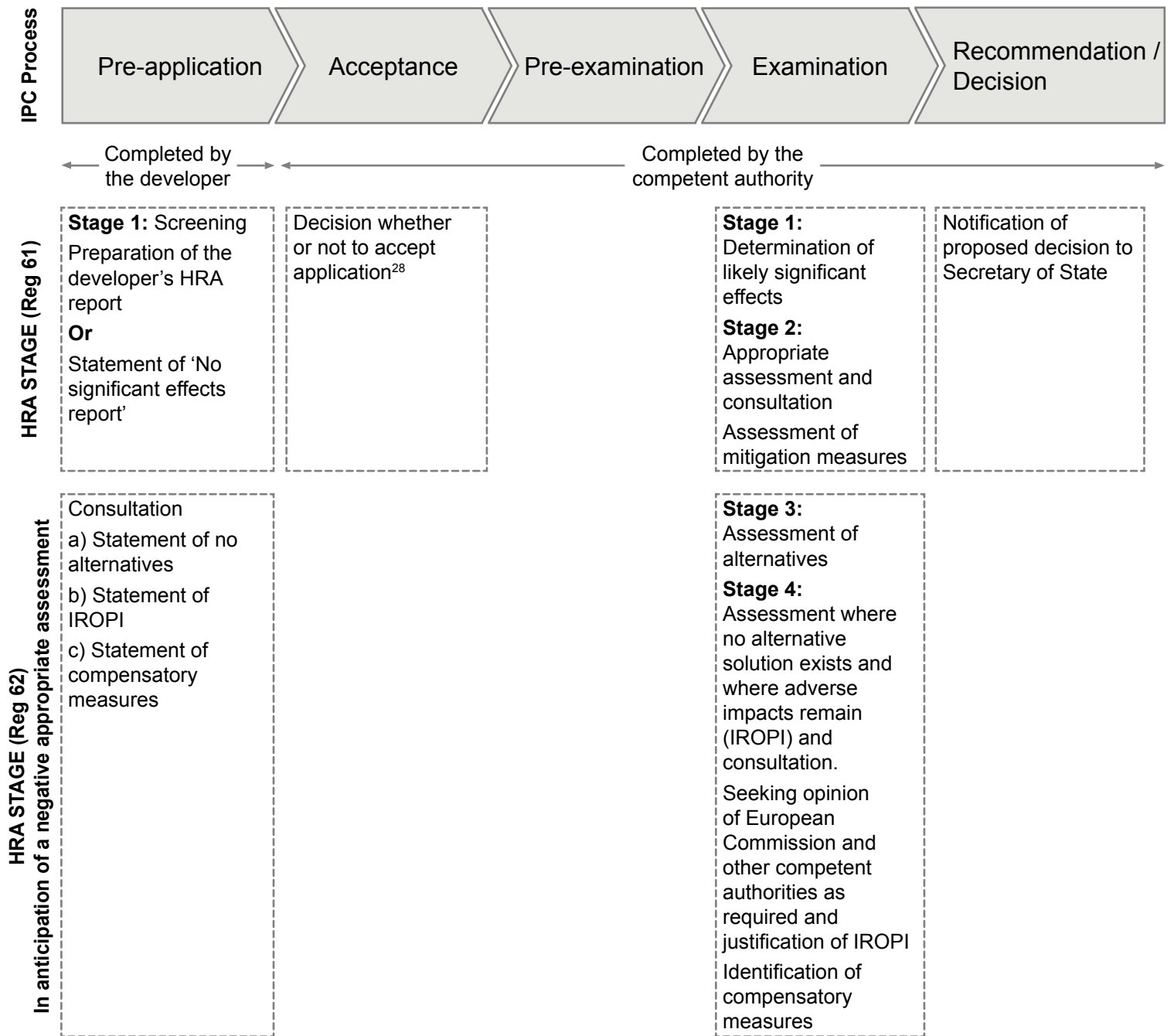
If the developer decides to apply for consents under other regulatory regimes which themselves require an appropriate assessment, consideration should be given to the likelihood of the other licence consent being authorised. The developer should also consider the timing of the relevant authority's decision, and the impact this may have on the examination of the DCO application and the preparation of its appropriate assessment, and to any 'in combination' effects.

As the competent authority must seek the views of other competent authorities before making a decision it is recommended that developers submit with the application, if possible, relevant comments/views of other competent authorities obtained during pre-application consultation.

Table 2 summarises the key stages of the DCO application process and the points at which there is interface with the HRA process. Further advice is provided below on how the HRA fits with each stage of the IPC process, and the steps the developer is recommended to consider when shadowing the HRA process.



**Figure 2: Flow chart illustrating the relationship between DCO applications and HRA processes**





## Pre-application (no prescribed timeframe)

### Screening for significant effect(s) on European site(s)

When considering whether a proposal has the potential to significantly affect European sites it is advised that the developer does this in consultation with the relevant nature conservation body at the earliest point in the pre-application process. This is the developer's responsibility but in due course the competent authority will need to be satisfied that it agrees with the developer's conclusion.

Issues for the developer to consider and include within their HRA screening assessment may include:

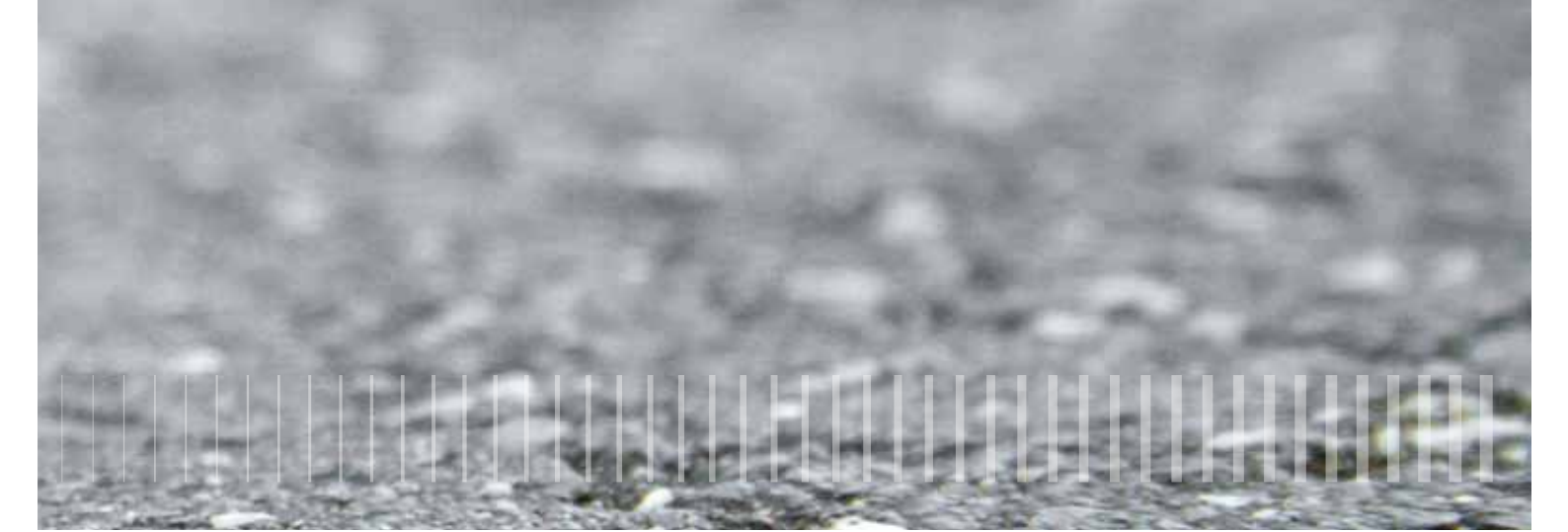
- A detailed description of the development, processes and method of work proposed as part of the NSIP
- A description of the European site and its qualifying features potentially affected with reference to the site's conservation objectives
- An outline and interpretation of baseline data, proportionate to the development
- An appraisal of any other plans or projects likely to have a significant effect, in combination with the proposed development<sup>29</sup>
- An evaluation of the potential for the scheme to require two or more appropriate assessments by different competent authorities, and
- A statement which specifies where the site boundaries of the scheme overlap into devolved assemblies or other European member states.

The IPC recommends that developers refer to the HRA screening checklist provided in [Appendix 1](#) (link opens Appendices as Word document) as a guide when determining the relevant elements needed to support this stage of the process. The developer's own screening matrix should be included with the developer's HRA report (and HRA screening checklist), submitted as part of the DCO application.

The general approach taken to HRA throughout preparation of the DCO application should be iterative to ensure a robust assessment of the likely significant impacts is carried out. There should be a continuous evaluation of the assessment findings against thresholds of likely significant effect. If at any time the HRA assessment determines 'no significant impact (alone or in-combination)' beyond reasonable doubt then the assessment can be concluded. The developer should then provide the results of their HRA with the DCO application in the form of a 'No significant effects report' (see later for details).

### Pre-application consultation

In general, developers are strongly advised to take advantage of pre-application consultation to agree and negotiate issues with consultees and to minimise the number of issues that might otherwise need to be considered during examination.



Consultation on significant impacts should evolve throughout pre-application. This may include consultation with statutory consultees prescribed under Schedule 1 of the APFP Regulations, other prescribed bodies and persons under section 42 of the Planning Act, community wide consultation under section 47 of the Planning Act 2008, and/or the developer's non-statutory EIA scoping consultation.

The developer is advised to utilise all pre-application consultation opportunities to engage with the appropriate nature conservation body which when consulted will be able to give advice about the relevant screening and appropriate assessment matters in relation to the proposed DCO application.

The nature conservation bodies, if requested, may also provide advice on compensatory measures and their effects, where appropriate.

The developer will need to conclude from baseline information and consultation responses received that:

1. There is no potential likely significant effect on European sites, either alone or in combination with other plans or projects and therefore no further assessment is required (see note on 'No significant effects report'), or
2. An anticipated potential significant effect on European sites exists, alone or in combination with other plans or projects, therefore requiring an appropriate assessment by the competent authority.

### **1 - No significant effects report**

If, as a result of the HRA screening, the developer concludes there is no likely significant effect on a European site sufficient information must be provided with the DCO application to allow the competent authority to assess and review the information and make its own determination that there are no likely effects, and be satisfied there is no residual effect.

It must be made clear that the developer has reached the view that there are no significant effects. The developer should provide reasons why it is considered that an appropriate assessment will not be required and provide confirmation from the nature conservation body that this conclusion is supported. This HRA conclusion should be explained in a 'No significant effects report' (see later relevant section for further explanation).

The 'No significant effects report' should be appended to the report which is required by Regulation 5 (2)(g) of the APFP (which must identify any European sites potentially affected by the proposed development). Although the 'No significant effects report' must, as a minimum provide, the details set out at paragraph 30 of IPC guidance note 2 there is no prescribed format. A checklist indicating the level of detail which the IPC recommends should be provided by the developer is set out in [Appendices 1 and 2](#) (link opens Appendices as Word document).

It would be helpful if the 'No significant effects report' were also cross referenced at Box 16 of the application form.



## **2 - Anticipated potential likely significant effect(s) on the European site**

If the developer has concluded that the proposal is likely to significantly affect European sites, alone or in combination, developers will need to give careful consideration to avoidance of impacts e.g through timing of the construction period or where appropriate even to re-locating the proposal to an alternative site. The developer's HRA report will also need to address mitigation measures<sup>30</sup> to demonstrate how impacts have been reduced. These mitigation measures must seek to counter-act the effects of the proposal (not provide compensation). The developer will also need to consider the effectiveness of the mitigation measures and any residual effect, alone or in combination with other schemes.

The developer should append to the report, which is required by Regulation 5(2)(g) of the APFP, sufficient information to enable the competent authority to carry out the appropriate assessment. If the developer's HRA report does not substantially provide the recommended details<sup>31</sup> the Commissioner appointed to decide whether or not to accept the application may reasonably conclude that insufficient information has been provided and that the developer has therefore failed to comply with the requirement in Regulation 5(2)(g).

## **Anticipated adverse effect on integrity of the European site(s)**

Where a proposal significantly affects a European site the developer will also need to consider whether it adversely affects the integrity of the European site<sup>32</sup>.

For example, integrity may be affected if mitigation measures are unable to reduce the impact of the development to the point where they no longer have an adverse effect on the site's integrity, or if uncertainty remains over the significant effect i.e. it cannot be ruled out that there are no adverse effects on the basis of objective evidence.

Therefore, development consent would only be granted under certain circumstances<sup>33</sup>:

- There are no alternative solutions, and if appropriate
- There are imperative reasons of over-riding public interest (IROPI) for which development should go ahead (limited reasons for IROPI are set out in Regulation 62(2) of the 2010 Habitats Regulations (as amended)), and
- Following consultation on the proposed decision and any compensatory measures, during the decision stage

The IPC encourages developers to submit draft HRA reports and any supporting documents whilst they carry out consultation and work up detailed proposals in order that quality issues can be identified, and take a view on the level of resources required to carry out its duty during examination, before the application is submitted to the IPC.



## Acceptance of the application (28 Days)

### Submitting the DCO application

Developers should either submit a 'No significant effects report' or a report which provides sufficient information to enable the competent authority to carry out an appropriate assessment<sup>34</sup>. Although it is the competent authority's responsibility both to determine whether there are likely significant effects and to carry out the appropriate assessment, developers should ensure that sufficient information is provided to enable these statutory duties to be met.

It is recommended that in addition and as a minimum the developer's HRA report (as required by Regulation 5(2)(g) of the APFP) should:

- Identify on a plan and describe any European site, or any Ramsar site which may be affected by the proposed development
- Provide evidence about the project's impacts on the integrity of European sites
- Provide evidence to demonstrate the developer has fully consulted and had regard to comments received by the relevant nature conservation bodies (statutory authorities) at pre-application consultation in order to allow judgement by the IPC on whether sufficient information has been provided
- Identify mitigation measures which avoid or reduce each impact, shows the effectiveness of the impacts and any residual effect
- Identify any residual effects and whether these constitute an adverse impact on the integrity of European sites, if appropriate
- Provide a schedule indicating the timing of mitigation measures in relation to the progress of the development, and
- Identify by cross reference to the relevant DCO requirements and development consent obligations the measures that will be secured to avoid and mitigate impacts on the integrity of European sites, and their likely degree of certainty of implementation.



It is important that the information submitted with the DCO application is in a format that will allow the IPC to understand which information is pertinent to the HRA.

Although the developer's HRA report must as a minimum provide the details set out at paragraph 30 of IPC guidance note 2 there is no prescribed format. Checklists that indicate the level of detail which the IPC recommends should be provided by the developer is set out in the [Appendices](#) (link opens Appendices as Word document). This approach is based on IPC guidance note 2, European guidance and follows good practice. When an application is submitted, which includes the developer's HRA report, the IPC will review it against the recommended information in the IPCs section 55 Acceptance checklist in order to decide whether the developer has complied with procedural requirements to submit "sufficient" information to enable appropriate assessment to be carried out.<sup>35</sup>

The IPC will not be able to request further information at the acceptance stage to supplement or clarify information provided in the developer's HRA report and failure to provide sufficient information may result in the DCO application not being accepted. Developers may wish to seek assurances from the relevant nature conservation body that all potential impacts have been properly addressed in sufficient detail and document this in their application.

If the conclusion of the appropriate assessment is that adverse effects on integrity cannot be avoided then the developer's HRA report must also include statements to enable the competent authority to give full consideration to alternative solutions, imperative reasons of overriding public interest and compensatory measures.

Therefore, in this circumstance the HRA report submitted must also provide, where appropriate:

- An assessment of alternative solutions, and if appropriate
- A justification for IROPI statement i.e. allowing development to go ahead in the event the proposal is considered to adversely affect the integrity of the identified designated sites and there are no alternative solutions, and
- A compensatory measures assessment report, having consulted with the relevant nature conservation bodies.





### **Pre-examination (approx. 3 months)**

After an application is accepted an Examining authority (ExA) will be appointed<sup>36</sup>. Pre-examination provides the opportunity for the ExA to carry out an initial assessment of the developers' findings as provided in their HRA report<sup>37</sup> to determine whether there is sufficient evidence to meet its duties within the examination timeframe, if required to do so.

The ExA will carry out its initial assessment of the principal issues arising from the application and will then hold a preliminary meeting to hear views about how the application is to be examined. Prescribed bodies (including nature conservation bodies) and anyone who has made a relevant representation<sup>38</sup> (including the general public) will be invited to make representations to the ExA<sup>39</sup> about the examination procedure prior to the preliminary meeting.

It is recommended that any representations, about how the habitats issues should be examined, are made to the ExA before the preliminary meeting so that the ExA can decide how to structure the examination and consider whether any further written information may be required during the examination.

The procedural decision (which will be made by the ExA at or after the preliminary meeting) will set out the timetable for receipt of any further written information about the HRA required and, where relevant, dates and venues for hearings.

### **Examination (up to 6 months)**

#### **Consulting the relevant nature conservation bodies and general public where applicable**

The competent authority for the purposes of the appropriate assessment must consult the statutory nature conservation bodies and have regard to their representations within a reasonable timeframe before making a determination on the DCO application<sup>40</sup>. The examination provides an opportunity to consult the nature conservation bodies to inform the appropriate assessment and the ExA will set the timeframe for seeking further representations from them if required in the procedural decision.

The ExA may ask the Chair of the IPC to appoint an expert assessor<sup>41</sup>, where there is considered to be uncertainty surrounding particular issues to provide a technical view which can inform the appropriate assessment.

The ExA will also, in addition to receiving views from the public during pre-examination, seek the general public's opinion specifically on matters of relevance to the appropriate assessment as part of the examination, if considered appropriate<sup>42</sup>. The way in which views will be collected as part of the examination will be set out in the ExA's procedural decision and may take the form of requesting written representations or holding a hearing, if considered necessary.



### **Requiring further information**

Either before or after consulting with the appropriate nature conservation bodies, the ExA may require the developer to provide further information reasonably required for the competent authority to make an assessment<sup>43</sup>. The information may relate to additional environmental information, or further clarification about the proposal, including:

- New information from surveys that need to be carried out, or
- Interpretation or analysis of existing data.

If information, which is reasonably required to carry out the appropriate assessment, cannot be produced and consulted on within the examination period, the ExA will have to consider either seeking an extension to the timetable or the decision-maker may need to consider refusing consent.

If the further information sought is also information which the ExA thinks should be included in the ES, the ExA must suspend the examination until the information is provided.<sup>44</sup>

Therefore, it is important that there is agreement at the pre-application stage between all parties that sufficient information has been provided in the application documents. Where agreement has been reached between the developer and others about HRA matters, it is recommended that this is appropriately set out in a statement of common ground.

### **Hearings**

Unless a hearing<sup>45</sup> is considered necessary to allow oral representations about HRA issues and consider any likely significant effects, the examination of HRA matters will take the form of written representations.

Cross examination can take place if the ExA considers it necessary either to adequately test any representations or to allow an interested party a fair chance to put the case forward. In all cases, cross examination on evidence about HRA issues will be at the discretion of the ExA.

### **Carrying out the appropriate assessment**

Having taken account of advice from the appropriate nature conservation bodies, considered the developer's HRA report, ES, and any other relevant information otherwise available, the competent authority must be satisfied in carrying out its appropriate assessment that it can:

- Identify the likely significant effects i.e. what the effects of the proposal are likely to be, either alone or in combination with other plans or projects, and how these affect the European site's conservation objectives<sup>46</sup>
- Consider how to avoid and then mitigate the effects i.e. if the proposal adversely affects the integrity of the site, the competent authority must consider how the scheme has been modified or the conditions proposed avoids the effects<sup>47</sup>
- Determine adverse effect on integrity of



the site, either alone or in combination with other plans or projects<sup>48</sup>

- Decide whether the project would adversely affect the integrity in view of the site's conservation objectives
- Consider whether there are any alternative solutions to the project proposal
- If there are no alternative solutions, consider whether there are imperative reasons of overriding public interest<sup>49</sup> for the proposal to go ahead, and
- Consider the compensatory measures put forward in the DCO application and consult the Secretary of State.

#### **Assessment of alternative solutions**

Alternative solutions can include a proposal of a different scale, a different location, and an option of not having the scheme at all – the 'do nothing' approach. The ExA's consideration of the proposal (for the purposes of the HRA) can only move to the IROPI and compensatory measures stage after it is shown that there are no alternatives to the proposal.

#### **Imperative reasons of overriding public interest (IROPI)**

Where it has been demonstrated that there are no alternative solutions to the proposal that would have a lesser effect or avoid an adverse effect on the integrity of the site, the project may still be carried out if the competent authority is satisfied the scheme must be carried out for imperative reasons of overriding public interest (which may be of a social or economic nature)<sup>50</sup>.

In cases where there are priority natural habitats or species<sup>51</sup> affected by the development, the IROPI justification must relate to either:

- human health, public safety<sup>52</sup> or beneficial consequences of primary importance to the environment, or
- any other imperative reasons of overriding public interest, having sought a prior opinion from the European Commission<sup>53</sup>.

#### **Justification of IROPI**

##### *a) Consultation with the European Commission*

The competent authority may wish to consult the European Commission on their opinion of the developer's justification for IROPI i.e. are they considered imperative reasons of overriding public interest? Where applicable, the Secretary of State is required to coordinate any request for an opinion.

##### *b) Consultation with other competent authorities*

The competent authority carrying out the IROPI assessment must also, before deciding whether to make the DCO, consult and have regard to the views of other authorities who may be taking decisions in relation to the parallel consents which may also be subject to appropriate assessment<sup>54</sup>.

Consultation with other competent authorities to inform the appropriate assessment will take place as part of the examination. Therefore to ensure an efficient and timely examination, developers are advised to ascertain at an early stage whether consent or permission is required from more than one competent



authority<sup>55</sup> and to engage with them in relation to the HRA during the pre-application process so that their views can be addressed (in accordance with the duty under s49 of the Planning Act 2008) and any issues are resolved before the application proceeds to examination.

### **Decision / Recommendation (three months)**

The competent authority will make a decision in the light of the appropriate assessment.

#### **Consultation with the Secretary of State**

##### *(i) IROPI case*

If the IPC proposes to grant development consent it must not do so until it has notified the Secretary of State within the prescribed timeframe (21 day notification period)<sup>56</sup>, and must have regard to any direction given<sup>57</sup>.

##### *(ii) Compensatory measures*

The Secretary of State also has a duty to secure the necessary compensatory measures<sup>58</sup> and will therefore need to be satisfied that the relevant provisions, requirements of the DCO, or any development consent obligations secure these compensatory measures.

The developer would need to make its case on both IROPI and compensatory measures and document this in the HRA report submitted with the DCO application, having received comments back from statutory bodies about alternatives, mitigation, IROPI and compensatory measures.

All relevant supporting statements (assessment of alternative solutions, written justification of IROPI and a compensatory measures assessment) will be assessed by the ExA and will inform the decision.

**Table 2: Summary of the relationship between DCO applications for NSIPs and the HRA process**

IPC process stages (relative to the HRA process) <sup>59</sup>	HRA stages (EU Guidance) <sup>60</sup>	Activity
<p><b>Pre-application</b> (in no particular order)</p> <p>IP (EIA) Regulations 2009, paragraph 8(6) – IPC consultation with prescribed bodies</p> <p>s42 Consultation by developer with prescribed bodies</p> <p>s47 Community consultation by the developer</p> <p>s46 Developer notifies IPC of proposed development</p> <p>s48 Duty to publicise</p>	<p><b>Stage 1:</b> Screening</p> <p>Provision of information to support Stages 2-4</p>	<p>Developer to determine likely significant effect on European sites as a result of the proposed development.</p> <p>Developer may consult with statutory consultees (including nature conservation bodies), both informally and formally at s42, s47, of the Planning Act 2008 and EIA scoping consultation (EIA Regulations 2009, Regulation 6(1)(b)).</p> <p>The developer will need to anticipate and provide with DCO application a report (as required under Regulation 5(2)(g) of the APFP Regulations) which includes one of the following:</p> <p>A 'No significant effects report', or</p> <p>Sufficient information to enable an appropriate assessment. This may include no alternatives assessment, statement of IROPI, and compensatory measures that will inform the competent authority's consideration.</p> <p>If significant adverse effect is likely then information should be compiled to support the HRA, including carrying out any surveys required. In anticipation of a negative assessment, the developer should enter into discussions with the nature conservation bodies and landowners, to establish what compensatory measures may be required and how these could be achieved.</p>
<p><b>Acceptance</b></p> <p>S55 of the Planning Act 2008</p> <p>IP (APFP) Regulations 2009, paragraph 5(2)(g)</p>		<p>IPC determines, amongst other things, whether sufficient information has been provided and either accepts or refuses to accept the application.</p>

Table continues on the next page

**Table 2: Summary of the relationship between DCO applications for NSIPs and the HRA process (continued from page 21)**

IPC process stages (relative to the HRA process) <sup>59</sup>	HRA stages (EU Guidance) <sup>60</sup>	Activity
<p><b>Pre-examination</b></p> <p>s56 Developer must give notice of application</p> <p>s88 initial assessment of issues and preliminary meeting</p>	<p><b>Stage 2:</b> Appropriate assessment (part 1)</p>	<p>Initial assessment by the competent authority of the principal issues arising on the application documents (including the developer's HRA report).</p> <p>Developer advertises accepted application and invites interested parties (including nature conservation bodies) to submit representations to the IPC, setting deadline for submission. There is no consultation prescribed under the Planning Act 2008 at this point with the nature conservation bodies. However, as statutory consultees they will be asked by the developer to submit representations and will be notified by the IPC of the preliminary meeting as interested parties.</p> <p>Procedural decision sets out if / when / how the HRA issues will be examined, and state when the nature conservation bodies will be consulted, and requested to provide written representations, if required.</p>
<p><b>Examination</b></p> <p>s90 written representations</p> <p>s91, 92, 93 type of hearings, if required</p>	<p><b>Stage 2:</b> Appropriate assessment (part 2)</p>	<p>Competent authority (if also the ExA) carries out HRA to determine whether the proposal has a likely significant effect, alone or in combination with other plans or projects, and adversely affects the integrity of the site.</p> <p>The competent authority (if also the ExA) is required to consult with the nature conservation bodies.</p>
<p><b>The following stages only apply in light of a negative appropriate assessment</b></p>		
	<p><b>Stage 3:</b> Assessment of alternatives</p>	<p>Competent authority considers the 'no alternatives assessment' submitted by the developer to identify whether or not alternative solutions would meet the project's overall objective without significantly affecting the integrity of European sites.</p>
	<p><b>Stage 4:</b> Assessment where no alternative solution exists and where adverse impacts remain</p>	<p>Competent authority to consider presence of priority habitats and species.</p> <p>Justification for IROPI and consultation with relevant bodies.</p> <p>The competent authority must have regard to comments from other competent authorities prior to making a decision.</p>
<p><b>Decision</b></p> <p>s.114 (1)</p>		<p>The competent authority will make a decision in the light of the appropriate assessment.</p> <p>The competent authority, in light of a negative assessment, must consult the Secretary of State on its proposed decision (21 day notification period). The Secretary of State must be satisfied the necessary compensatory measures are secured.</p>



## List of references

- 1 The 2010 Habitats Regulations (as amended) – Reg 8 – A European site (or European marine site) is any classified SPA (Birds Directive 2009/147/EC – formally 79/409/EEC), any SAC (Habitats Directive 92/43/EEC), site listed as a site of community importance, or sites hosting priority habitats or species. Appropriate assessment is also required for potential SPAs, candidate SACs and listed Ramsar Sites (as expressed in Planning Policy Statement 9: Biodiversity and Geological Conservation, paragraph 6).
- 2 Habitats Directive (92/43/EEC)
- 3 And the Offshore Marine Conservation (Natural Habitats, &c) Regulations 2007 as amended (Offshore Marine Regulations) will apply beyond UK territorial waters - 12 nautical miles. These regulations, relevant regulation numbers may differ, are relevant when an application is submitted for an energy project in a renewable energy zone (except any part in relation to which the Scottish Ministers have functions).
- 4 Planning Policy Statement 9 (PPS 9): Biodiversity and Geological Conservation, and Technical Advice Note 5 (TAN 5): Nature Conservation and Planning (2009)
- 5 ODPM Circular 06/2005
- 6 European Commission (2001), Assessment of plans and projects significantly affecting Natura 2000 sites. Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC.
- 7 Decision of the ECJ in Waddenzee (C-127/02) – determined that in light of Article 6(3) of the Habitats Directive, a probable risk of significant effect of a plan or project exists (in particular, in view of the precautionary principle) if such a risk cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned.
- 8 If the European site hosts a priority natural habitat type or a priority species further conditions apply in relation to the reasons as explained in this advice.
- 9 European Commission (2001). Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC.
- 10 If not directly connected with/necessary to management of a European site.
- 11 “Competent authority” is defined in the 2010 Habitats Regulations (as amended) Regulation 7(1) - the IPC will not itself be the competent authority when in recommending mode but will ensure that sufficient information is provided to enable the SoS to meet his/her statutory duties under the 2010 Habitats Regulations.
- 12 Planning Act s103/s104/s105 - Under the Planning Act 2008 the decision maker - otherwise known as the “competent authority” - will be the IPC where a national policy statement has effect or the Secretary of State.
- 13 Regulation 61 of the 2010 Habitats Regulations (as amended) and Regulation 25 of the Offshore Marine Regulations.
- 14 Regulation 61(2) of the 2010 Habitats Regulations, Regulation 25(2) of the Offshore Marine Regulations, and the IP (Applications: Prescribed Forms and Procedure) Regulations 2009 (APFP) paragraph 5(2)(g).
- 15 Regulation 81 of the 2010 Habitats Regulations (as amended) applies the appropriate assessment provisions to the making of an order granting development consent (DCO) under the Planning Act and the decision maker under the Planning Act must exercise its functions so as to secure compliance with the Habitats Directive (Regulation 9 of the 2010 Habitats Regulations).
- 16 APFP 5(2)(g)
- 17 As defined in Regulation 5 of the 2010 Habitats Regulations
- 18 Further information relating to the developer’s statutory pre-application consultation responsibilities can be found in the “IPC guidance note 1 on pre-application stages (Chapter 2 of the Planning Act 2008)”.
- 19 Section 98 of the Planning Act imposes on the examining authority a duty to complete examination of the application by the end of the period of 6 months beginning with the day after the start day, being the day on which the preliminary meeting is held
- 20 European Commission (2001), Assessment of plans and projects significantly affecting Natura 2000 sites
- 21 The 2010 Habitats Regulations (as amended) 61 (1)
- 22 The 2010 Habitats Regulations (as amended) 61(2) and the IP (Applications: Prescribed Forms and Procedure) Regulations 2009 (APFP) paragraph 5(2)(g)
- 23 Regulation 8(6) of the Infrastructure Planning (EIA) Regulations 2009
- 24 As defined in the EIA Regulations 2009, Schedule 4 Part 1, paragraph 19 ‘A description of the aspects of the environment likely to be significantly affected by the development, in particular...fauna, flora’.
- 25 Regulation 3(2) of the EIA Regulations 2009
- 26 Infrastructure Planning (EIA) Regulations 2009, paragraph 8(6)
- 27 The 2010 Habitats Regulations (as amended) 65(2)
- 28 The IPC must be satisfied amongst other things that the developer has provided information required by Regulation 5(2)(g) of the APFP in relation to HRA
- 29 An NSIP can have impacts on European sites that are some distance away. For instance a power station could affect air quality at a sensitive heathland SAC, or a wastewater treatment works could affect water quality on a downstream SPA used by feeding birds, both dozens of kilometres away.
- 30 61(6) of the 2010 Habitats Regulations (as amended) and 25(6) of the OMR
- 31 Sufficient information to assess significant effect is outlined in the IPCs guidance note 2 on preparation of application documents under s37 of the Planning Act 2008



## List of references (continued from page 23)

- 32 61(5) of the 2010 Habitats Regulations (as amended) and 25(4) of the OMR
- 33 61(5), 62(1) and 66 of the 2010 Habitats Regulations (as amended)
- 34 The developer's attention is drawn to the IPCs statutory guidance with regard to the habitats assessment process. This is located within the pre-application IPC guidance note 2 available via the IPCs website. The application should give reasons for each respect in which IPC guidance has not been followed – section 55(3)(d) of the Planning Act 2008
- 35 Section 55(3)(b), section 37(3) of the Planning Act 2008 and Regulation 5(2)(g) of the APRP.
- 36 Appointment will be by the Chair of the IPC.
- 37 For example that there are no significant effects or no adverse effects on the integrity of European sites. This initial assessment will take place after the developer's publication of the accepted application.
- 38 As defined in section 102 (4) of the Planning Act 2008.
- 39 And also to attend the preliminary meeting.
- 40 The 2010 Habitats Regulations, 61 (3)
- 41 100(2) of the PA 2008
- 42 The 2010 Habitats Regulations (as amended) 61 (4)
- 43 The 2010 Habitats Regulations (as amended) 61(2)
- 44 Regulation 17(1)(c) of the Infrastructure Planning (EIA) Regulations 2009
- 45 There are three types of hearing, namely hearings about specific issues, compulsory acquisition hearings, and open-floor hearings. See s91 (issue specific hearing) or s93 (open floor hearing)
- 46 The 2010 Habitats Regulations (as amended) 61(1a)
- 47 The 2010 Habitats Regulations (as amended) 61(6)
- 48 The 2010 Habitats Regulations (as amended) 61(5)
- 49 The 2010 Habitats Regulations (as amended) 62(5)
- 50 The 2010 Habitats Regulations (as amended) 62 (1)
- 51 The 2010 Habitats Regulations (as amended) 3 - Interpretations
- 52 For example, ECJ February 28 1991, Case C-57/89, Commission v Germany ('Leybucht Dykes') held that that the danger of flooding and the protection of the coast constituted sufficiently serious reasons to justify the dyke works over the SPA
- 53 The 2010 Habitats Regulations (as amended) 62 (2b)
- 54 The 2010 Habitats Regulations (as amended) 65(5)
- 55 The 2010 Habitats Regulations (as amended) 65 (1)
- 56 The 2010 Habitats Regulations (as amended) 62 (5)(b)
- 57 The 2010 Habitats Regulations (as amended) 62 (6)
- 58 The 2010 Habitats Regulations (as amended) 66
- 59 Relevant sections of the Planning Act further guidance on the pre-application process is provided within IPC guidance note 1 on pre-application stages (Chapter 2 of the Planning Act 2008)
- 60 As defined in European Commission (2001), Assessment of plans and projects significantly affecting Natura 2000 sites. Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC.

## Further information

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