

The Planning Series

16 – Habitats Regulations Assessment

August 2022



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Introduction

This Quick Guide provides an overview of Habitats Regulations Assessment (HRA). HRA was introduced to afford strict protection to sites designated as EU Natura 2000 sites and continues to apply to such sites which now fall under UK protected designation. They aim to maintain the integrity of the species and habitats for which they were designated. This guide outlines what HRAs are, when they are required, what is involved during the stages of an HRA and how they can be challenged.

What is a Habitats Regulations Assessment?

HRA aims to avoid any new “plan” or “project” proposal having a significant effect on certain protected sites. Protected sites in this context are those which previously formed part of the **EU Natura 2000** network of sites. They are now collectively referred to as “European Sites” or part of the UK “national site network”.

Examples of a “plan” requiring an HRA include a Local Development Plan or flood risk plan, while examples of “projects” might include highways maintenance, a tidal energy scheme or an application for planning permission.

The process helps to maintain the integrity of the internationally important habitats and species for which the sites were designated. While HRAs provide strict protection, they are not a prohibition on new development or activities. Instead they involve a case-by-case examination of the implications for each site, its qualifying features and its conservation objectives.

The regulatory context

The HRA process was introduced by the EU Nature Directives: **EU Directive 92/43/EEC (the Habitats Directive)** and **EU Directive 2009/147/EC (the Birds Directive)**. *The latest regulations to implement these in the UK are the **Conservation of Habitats and Species Regulations 2017** (the 2017 Regulations) and the **Conservation of Offshore Marine Habitats and Species Regulations 2017**.*

Leaving the EU meant the 2017 Regulations had to be amended to ensure they operate effectively. The **Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019** mainly involve transferring functions from the European Commission to the appropriate authorities in Wales and England.

Under the amended Regulations, Special Areas of Conservation (SACs) and Special Protection Areas (SPAs) in the UK no longer form part of the Natura 2000 network. Instead, a national site network on land and at sea, including both the inshore and offshore marine areas in the UK has been created. It includes:

- existing SACs and SPAs; and
- new SACs and SPAs designated under these Regulations.

All other processes or terms in the 2017 Regulations remain unchanged and the **Guidance for Habitats Regulations Assessment** which applies to Wales and England has been updated to reflect the changes. While sites formerly referred to as being part of the “Natura 2000” network are now referred to as part of “the national site network”, the term “European Sites” has been retained for regulatory purposes.

HRA also applies to **Ramsar wetland sites**, designated under the 1971 Ramsar Convention for their internationally important wetlands.

When is an HRA required?

A plan or project not directly connected with or necessary to the management of the protected site, but likely to have a significant effect on it, is subject to assessment (see **Regulation 63**). It must be applied to marine and terrestrial projects that could adversely affect the integrity of the species and habitats for which the sites were designated. Such impact could be on the site, near the site or some distance away, for example by causing air, water or noise pollution or affecting a feeding area used by one of the site’s designated species.

HRAs also apply to planning processes including Local Development Plans and **Developments of National Significance**.

The decision-making body

The decision-maker under the HRA requirements can include local authorities, harbour authorities, and other public bodies. They determine whether or not an appropriate assessment is required, whether proposals would have an adverse

effect and, if necessary, whether or not derogation tests are met.

The assessment must be undertaken by the most relevant “competent authority”. Under the latest guidance, the competent authority is either:

- a public body that decides to give a licence, permit, consent or other permission for work to happen, adopt a plan or carry out work for itself, such as a local planning authority;
- a statutory undertaker carrying out its work, like a water company or an energy provider;
- a minister or department of government, for example, that makes national policy or decides an appeal against another competent authority’s decision; or
- anyone holding public office, such as a planning inspector, ombudsman or commissioner.

In Wales, Natural Resources Wales (NRW) is the statutory nature conservation body (SNCB) and must be consulted by the competent authority during an HRA to provide advice and assistance on some decisions. Public consultation is at the discretion of the competent authority (see **2017 Regulation 63(4)**).

Under the HRA requirements, the competent authority must inform the “appropriate authority” before it consents to a plan or project on grounds of the derogation tests being met (explained below) where it would have adverse effects on the integrity of a protected site. The “appropriate authority” in Wales is the Welsh Ministers.

What is the process for undertaking a HRA?

Part 6 (Assessment of Plans and Projects) of the 2017 Regulations sets out the procedural requirements for undertaking an HRA

This process is further explained in the **Guidance for Habitats Regulations Assessment**. The process can have up to three stages, depending on what is decided at each stage.

1. Screening

This initial stage checks if the proposal is likely to have a significant effect on the site’s conservation objectives. If not, it does not need to go through the appropriate assessment or derogation stages.

The competent authority must consider whether it is a plan or project proposal and if so, that it is **not** directly connected with the running of the site. If this is found to be the case, the screening should consider the proposal's integral design features or characteristics, such as its layout, timing and location.

Determining whether the proposal has the potential to have a significant impact in relation to the site's conservation objectives should also take into account any other proposals, e.g. planning applications that could, in combination with this proposal, have the potential to cause harm.

At this stage it should not consider any mitigating measures being proposed.

2. Appropriate assessment

Assessment must be undertaken where there is likely to be a significant risk to the site or where it is not possible to rule out a risk with the evidence provided. Where it is determined that an assessment is necessary, this stage assesses the likely significant effects of the proposal in more detail and identifies ways to avoid or minimise any effects.

The **guidance provides examples of how the site could be adversely affected:**

- destroying, damaging or significantly changing all or part of a designated habitat;
- disturbing the population of a designated species;
- harming the site's ecological connectivity with the wider landscape;
- harming the site's ecological function, or its ability to survive damage;
- changing the site's physical environment;
- restricting access to resources outside the site that are important to a designated species; or
- preventing or disrupting restoration work, or the potential for future restoration, if it undermines the site's conservation objectives.

The body undertaking the assessment must be able to "rule out all reasonable scientific doubt" that the proposal would not have an adverse effect on the integrity of the site before allowing the proposal to go ahead.

The assessment should consider measures that have been included as part of the proposal to remove or reduce potential adverse effects. The assessor or the proposer can get advice on mitigation measures from NRW or an ecological adviser. If mitigation measures are needed to avoid adverse effects, conditions should

be attached to make sure the measures are carried out. These can be flexible, for example, they could be removed if it's clear from monitoring that the risk of negative effects is lower than first thought.

3. Derogation

If the proposal fails the assessment (or “integrity test”) because adverse effect on the site cannot be ruled out, the proposal must be rejected in its current form. This means permission is not granted. The work cannot go ahead or the plan cannot be adopted unless it can pass three legal tests and be granted an exception, known as a “derogation”.

Proposers should be notified as soon as possible if derogation is to be considered. Consulting an ecologist or NRW can help with the decision making process.

The three legal tests are:

1. there are no feasible alternative solutions that would be less damaging or avoid damage to the site;
2. the proposal needs to be carried out for imperative reasons of overriding public interest; and
3. the necessary compensatory measures can be secured.

All findings must be recorded, including a failed test.

If the proposal passes all three tests, it can be granted permission to proceed under an HRA derogation. The Welsh Government or the Secretary of State for the relevant UK Government department must be notified before the permission is granted or any work is carried out. They should be sent:

- a summary of the proposal;
- details about the European Sites affected;
- the HRA that shows the decision that the proposal will or could have an adverse effect on the integrity of the sites;
- evidence to show that there are no alternative solutions;
- evidence to show that there are imperative reasons of overriding public interest for the proposal to go ahead;
- details of the compensatory measures and evidence to show that they will work; and

- advice received from NRW (as the SNCB) and other stakeholders, and how it was considered.

An HRA derogation notice form should be used to submit this information. The assessing body should get a response within 21 calendar days. If not received in that time, then it can carry out, approve or adopt the proposal. If the Welsh Government is not satisfied that the proposal has met one or more of the three tests, it may instruct the assessing body to reject or delay approval. This may be because it's not clear how the proposer will carry out compensatory measures.

Can an HRA decision be challenged?

If a citizen wishes to challenge a decision made relating to an HRA, they may wish to pursue judicial review of the decision. However, making a claim for judicial review would require specialist legal advice, must be made within six weeks of the decision and can be very expensive. If the judicial review was unsuccessful the citizen could consider whether to request permission to appeal to the Court of Appeal. If the appeal is also unsuccessful, further appeals might be possible to the UK Supreme Court.

Key sources

Welsh Government

- **Planning Policy Wales** (Edition 11), published in 2021
- **Habitats regulations assessments: protecting a European site** , published in 2021
- **Technical Advice Note (TAN) 5: Nature Conservation and Planning** , published in 2009

Key legislation

- **EU Directive 92/43/EEC** (the Habitats Directive)
- **EU Directive 2009/147/EC** (the Birds Directive)
- **Conservation of Habitats and Species Regulations 2017** (the 2017 Regulations)
- **Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019** (the 2019 Amendment)

Planning inspectorate

Advice note ten: Habitats Regulations Assessment relevant to nationally significant infrastructure projects (2012)

Senedd Research

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