

# Habitats Regulations Assessment Review

## Working Group summary of findings

### Introduction

In the [Secretary of State's Delamere speech](#) in May 2021, he announced his intentions to re-focus the Habitats Regulations to ensure that the legislation adequately supports government ambition for nature recovery and to establish a working group to consider changes that might be appropriate.

This paper sets out recommendations from the Habitats Regulations Assessment (HRA) review working group, based on evaluation of the evidence from HRA experts and the expertise of working group members.

Our recommendations focus on developing a single new assessment process which complements a more coherent and simplified approach to protected sites (Special Areas of Conservation (SACs), Special Protection Areas (SPAs), Ramsar sites, Sites of Special Scientific Interest (SSSIs) and potentially Marine Conservation Zones (MCZs)) as set out in the Nature Recovery Green Paper: Protected Sites and Species (hereafter the 'Nature Recovery Green Paper').

### What the Working Group has done

The HRA Working Group agreed terms of reference and a set of principles to guide the review. The principles are:

- maintain or enhance protections
- outcome focussed
- front loading and no surprises
- easier for users
- speeding up and simplifying
- more engaging and intuitive for business

The first principle is a requirement of provisions in the Environment Act 2021 and the first 2 set the HRA review in the context of government ambitions to conserve biodiversity. The remaining principles inform the practical detail of how the HRA process could be improved. Department for Levelling Up, and Communities (DLUHC) has indicated close alignment with the principles for planning reform.

The Working Group heard and received evidence from a balanced range of HRA experts, within the following interest groups for both marine and terrestrial sites:

- competent authorities and statutory advisers
- local planning authorities
- developers
- consultants
- land manager representative bodies
- environmental non-governmental organisations (NGOs)

We received evidence specific to Part 6 of the Habitats Regulations and on other related matters where experts saw a link, including provisions for the protection of SSSIs, species and offshore marine sites largely governed by different legislation.

We evaluated the contributions of experts as a coherent whole and in the context of the proposals for reform of site designations and management. Proposals for protected sites are set out in the Nature Recovery Green Paper.

Looking at the 'HRA problem' in the context of a reformed future for nature facilitated a shift in framing the problem from the EU legacy issues to a forward-looking consideration of options for a future assessment policy within a fundamentally reformed and streamlined protected sites approach.

## **What HRA experts have told us about the HRA and associated processes**

### **Improving the current system**

Experts indicated there are 2 main themes for consideration for delivering better outcomes for the environment and sustainable development:

- improve the existing process
- take a more strategic approach

### **Improving the existing process**

Experts highlighted the need for greater certainty and clarity throughout the HRA process, key points being:

- clarification of legal terminology and processes
- a need to make existing data readily available and user friendly
- specific site advice accessible in one place
- basing scientific judgements on a clearer framework of evidence (screening and assessment)
- earlier consideration of avoidance or mitigation measures

- earlier expert engagement to increase Local Planning Authority confidence in scientific evidence

## **Strategic approaches**

Expert evidence highlighted the following important areas for further exploration:

- use of strategic mitigation solutions to secure better outcomes from the assessment process
- a more strategic approach to 'environmental compensation' to support nature recovery

## **Lessons from current practice**

We heard from experts about their experience of innovative solutions that could be developed further in any new assessment process including recent experience from ongoing developments in the marine environment. Solutions include:

### **Improving existing processes**

#### **Dredge protocol**

Port Authorities, Defra and Natural England developed a protocol for dredging in harbours which streamlines the screening of essential dredging operations. Dredging operations can proceed without the need for an appropriate assessment where the dredging is conducted within the defined parameters of the protocol.

#### **Supporting 'In combination' tests**

The Humber Nature Partnership developed a database of planning applications relevant to the Humber Estuary which developers can use as a 'one stop shop' to quickly identify activities which they need to include in HRA 'in combination' assessments.

#### **The Coastal Concordat**

Sets out how regulatory bodies can co-ordinate the separate processes for coastal development consents in England. It provides applicants with a single point of contact and clarity about the processes required to gain consent.

## **Strategic approaches**

### **Strategic approach to protecting great crested newts**

A strategic approach for great crested newt licensing is being used to address regulatory hurdles for development whilst enhancing habitat for newts. The requirement for bespoke surveys has been eliminated where compensatory habitat is delivered strategically, thereby providing developers with greater certainty and cost and time savings.

## **Suitable Alternative Natural Spaces (SANGs)**

Local Authorities and other organisations put in place a strategic approach to offset recreational pressure on protected sites. Developers can deliver their own SANGs after Natural England approval or developers pay financial contributions towards enhancement of open space land which is owned or managed by the council to SANG status and long-term management.

## **The proposed solution**

The evidence provided by HRA experts has informed our thinking on reforms which address the 2 main concerns raised such as, improving the current process and taking a more strategic approach.

Importantly, we have then developed this further to better integrate with the potential for protected sites reform outlined in the Nature Recovery Green Paper, which provides the opportunity to achieve a fundamentally reformed approach.

As a group, the solutions outlined aim to make significant improvements for business and nature whilst being flexible to whichever legislative vehicles become available. They are necessarily high level as further policy development will be required alongside formal legal advice.

In addition, a clear theme relating to capability, confidence and clarity emerged throughout the review. Competent authorities need to allocate ecological capability to interpret technical evidence from a range of sources and understand how to navigate the HRA process.

Whilst it is a straightforward process in some respects, the amount and type of specialist evidence required coupled with the perceived risk of legal action, creates an elevated level of caution around decision making. Addressing this issue is intrinsic to a reformed process and we heard that the option of accrediting professionals and requiring developers to use accredited advisers may be useful.

## **Proposals for solutions**

There are 3 possible solutions, which are not mutually exclusive.

### **Solution 1 – A single new assessment process**

Consolidating existing site designations into a much simpler set of designations with clarity over the importance of these sites, nationally and internationally, is proposed in the Nature Recovery Green Paper.

This would allow for a single coherent assessment to be applied for site protection. This would remove some of the complexities derived from having a number of assessment regimes on SSSIs and European sites and allow a clearer single assessment framework

to be applied to each site. The single process should aim to provide the certainty and consistency highlighted as important by a range of experts.

This solution would require primary legislation to remove the current HRA process, with its roots in EU legislation, and all other relevant consenting processes.

This fundamental change may be a longer-term objective rather than a 'quick fix' but would provide an opportunity to develop one protection process for protected sites (SACs, SPAs, Ramsar sites, SSSIs and potentially MCZs) replacing HRA and SSSI authorisation processes. It would effect a fundamental change to a simple, clear approach to protecting important sites.

As the framework for protected site designations developed, consideration would need to be given to the designations and operations to which the new assessment process should apply, including offsite activities which could impact designated sites. It would not replace species licensing provisions which apply wherever these species occur.

That would significantly expand the scope of the assessment process. Species licensing is dealt with separately in the Nature Recovery Green Paper. Potential benefits of reform include:

- replacing existing provisions for site protection including HRA, consenting procedures for operations on SSSIs and possibly other provisions for protected sites such as MCZs
- the opportunity to move away from the current HRA process and its attendant terminology and caselaw
- facilitating site protection and sustainable development in the context of potential new reasons for site designation including climate change mitigation and the collective services they provide

A single process would go a long way to addressing a range of concerns about the complexity of different assessment processes for activities affecting different types of protected sites, for example, SACs or SPAs, SSSIs and MCZs.

## **Solution 2 – A clearer decision-making framework**

This solution aims to address the 'process' issues raised by HRA experts including the application of the precautionary principle.

The collective impact of the measures in this solution is to put in place a clear assessment framework that gives greater certainty and predictability for the exercise of professional judgement by:

- creating more reasonable and clearer expectations of the required evidence base
- allowing consideration of the mitigation hierarchy earlier in the assessment process
- being able to apply the precautionary principle to aid confident decision making where evidence is lacking in line with the Environmental Principles Policy Statement

- making clearer the circumstances for derogation use (Imperative Reasons of Overriding Public Interest (IROPI)) to maintain the coherence of the site network and support nature recovery

Evidence provision is a critical element of assessment processes and we have heard that this is at the heart of some issues with the HRA process. The evidence on which assessments are based should be easily accessible, specific and proportionate to each situation.

This could be achieved by:

- requiring that data collected to inform assessments is made accessible to future assessments, reducing duplication of effort and associated costs. This is particularly pertinent to comparable permissions
- setting out in one place the factors and impacts of known operations for each site. This would provide a clear framework within which professional judgement could be used with confidence at screening and assessment stages. It would provide greater clarity about activities which are, or not, likely to impact on each site. Ideally this would be up to date information provided electronically, combining the relevant components of advice on conservation objectives, SSSI operations and Site Improvement Plans
- making mandatory the use of conservation advice and screening tools, for example impact risk zones or sensitivity grid (see table 1). Table 1 is a simplified version of a grid that could be developed to identify the impacts of operations at each site and make screening simpler for competent authorities

**Table 1: Example sensitivity matrix for operations on a protected site (theoretical)**

Activity	Protected habitats or species		
	<b>Lowland raised mire</b>	<b>Lowland heath</b>	<b>Nightjar</b>
<b>Surface drainage</b>	Highly sensitive	Sensitive	Not sensitive
<b>Tree planting</b>	Sensitive	Sensitive	Sensitive
<b>Visitor pressure</b>	Not sensitive	Sensitive	Sensitive in breeding season

Whilst HRA experts recognise the importance of the precautionary principle in protecting our special sites, evidence was also presented relating to the problems it can cause for decision makers.

The precautionary principle should assist decision making where there is uncertainty or insufficient evidence. We recommend that:

- a practical interpretation of the precautionary principle is reinforced through guidance written specifically for the assessment process. This would need to be consistent with the Environmental Principles Policy Statement. The Environment Act makes it mandatory, from February 2023, to apply the environmental principles to new policies and legislation
- a requirement for Evidence Plans, which agree the standard of evidence required to conclude an assessment. This would make the standard of evidence required clearer from the outset and reduce the number of cases where competent authorities or statutory advisors request additional evidence

These changes would ideally be implemented through primary legislation although most could be implemented using the Environment Act power to amend Part 6 of the Habitats Regulations supplemented with guidance.

Secondary legislation would have limited ability to replace EU legacy legislation and its attendant case law.

### **Solution 3 – Use of strategic approaches**

The third solution provides a more strategic approach to protections and mitigation. It complements solutions 1 and 2 and is required because:

- a) strategic solutions can be more efficient
- b) the condition of many sites is already impacted by historic activities and requires a range of partners to take action to recover sites

In the future there is an expectation that for appropriate sites, Protected Site Strategies (PSS) will bring interested parties together to design a bespoke solution for a whole site. The 'SANGs' example in section 3.2 shows how this type of innovative solution can operate, through developer contributions which provide funds for strategic solutions for the whole site.

They should help improve the condition of the protected sites for which they are developed, whilst allowing sustainable development to progress.

The recommendation here is that the assessment reinforces the goals of existing PSSs, and where it does not, requires as a minimum the development of a project based strategic mitigation solution.

To provide the flexibility necessary to respond to climate change, the ecological connectivity and coherence of protected sites may be better supported by strategic approaches, including through increased use of habitat compensation designed to maintain habitats and species strategically across the protected sites network.

We should explore through protected sites reform the importance of ecosystem functions provided by protected sites rather than features determined at EU level.

## Conclusion

In order to address the problems with the current HRA system we have identified 3 areas for change, all of which can work together to bring about substantial reform. Improvements to the current process offer the potential for significant progress and with the right resourcing can be advanced without delay.

These can then, should wider legislative reform on protected sites allow, be integrated into a single assessment that is used on protected sites in order to secure one uniform approach.

In parallel, there is the potential to introduce more strategic solutions that look at nature recovery outcomes that reach beyond a specific site and thus enable greater flexibility, for example by compensating for a lost habitat elsewhere.

Whilst all elements of reform are possible, a single assessment across all protected sites will need new primary legislation, as would some more strategic solutions such as, requiring mitigation schemes where they don't already exist.

We should not underestimate the challenge of reforming the current HRA process, not least the interoperability of a new system with devolved administrations' processes and the offshore marine environment. Where there are proposals to require new evidence or guidance, we will need to identify areas where such requirements can be removed.

It will take sufficient time and resource to get right and a strong understanding of what is needed to deliver well on the ground.

### **Habitats Regulations Assessment Advisory Working Group membership**

- Lord Benyon
- Minister Pow
- Tony Juniper, Chair of Natural England
- Christopher Katkowski, QC