Appendix 4: Habitats Regulations Assessment

A4.1. This chapter explains when a DNS should be considered as HRA development under the Conservation of Habitats and Species Regulations 2010 (as amended) (the ‘Habitats Regulations’). It sets out the procedural requirements that apply to DNS which are HRA development, and seeks to:

- briefly describe the legal context and obligations placed on the decision maker and applicant under the Habitats Directive and Habitats Regulations,
- explain how the DNS process aligns with the HRA process,
- highlight the relevant bodies that should be consulted by the applicant throughout the DNS application process, and the suggested timing and level of engagement,
- clarify the information to be provided with a DNS application with respect to the HRA, and
- explain the process that will be carried out by PINS Wales as part of its legal duties in respect of HRA.

Appendix 1 provides an overview of the actions, responsibilities and activities required by different parties during the DNS process, including in relation to HRA.

A4.2. This chapter should be read in conjunction with the Habitats Directive, the Habitats Regulations, the 1990 Act, the 2016 DNS Procedure Order, Planning Policy Wales, Technical Advice Note 5, Circulars and recognised European Commission guidance¹. It is the applicant’s responsibility to ensure that all relevant and current policy, legislation and guidance have been considered.

HRA Regulations – purpose and effect

A4.3. As decision maker the Welsh Ministers are the competent authority for the purposes of the Habitats Directive² and the Habitats Regulations³ in relation to applications for DNS. The Habitats Regulations require the competent authority, before granting consent for a plan or project, to carry out and consult on an appropriate assessment (AA) in circumstances where the plan or project is likely to have a significant effect on a European site or a European Marine site (either alone or in combination with other plans or projects).

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³ The Conservation of Habitats and Species Regulations 2010 (as amended)
Developments of National Significance

A4.4. When preparing applications for DNS, applicants must carefully consider the potential effects of the application on protected habitats at an early stage, in consultation with NRW. If a DNS, when taken alone or with existing and known future plans and projects, is likely to affect a European site, the applicant must provide the competent authority with such information as may reasonably be required for the purposes of the AA\textsuperscript{4}. This information normally takes the form of a **No Significant Effects Report (NSER)** or a **Likely Significant Effect Report (LSER)**. PINS Wales also expects applicants to complete the matrices included in Appendix 11. Where necessary, matrices should be appended to or included in the applicant’s NSER (screening matrices) or LSER (both matrices); but they do not replace the applicant’s NSER or LSER.

A4.5. Where an AA is carried out and results in a negative assessment (in other words, where adverse effects to European site(s) cannot be ruled out, despite any proposed avoidance or mitigation measures\textsuperscript{5}), consent can only be granted if there are **no alternative solutions**, there are **Imperative Reasons of Overriding Public Interest (IROPI)** for the development\textsuperscript{6}, and **compensatory measures** have been secured.

**EU Directives and European Sites**

A4.6. Wales is bound by the terms of the EC Habitats Directive and the Wild Birds Directive\textsuperscript{7}. Wales also has to meet its obligations under relevant international agreements such as the Ramsar Convention\textsuperscript{8}. The aim of the Habitats Directive is to conserve particular natural habitats and wild species across Europe, including by establishing a network of ‘Natura 2000’ sites. The Wild Birds Directive seeks to protect all wild birds and also sites important for the protection of wild birds. The Ramsar convention focuses on wetlands of international importance.

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\textsuperscript{4} Regulation 61(2) of the Habitats Regulations 2010 (as amended), Regulation 25(2) of the Offshore Marine Regulations

\textsuperscript{5} Decision of the ECJ in Waddenzee (C-127/02) – In the light of the precautionary principle, a risk of significant effects exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the conservation objectives of the site concerned; in case of doubt as to the absence of significant effects an appropriate assessment must be carried out. All aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those objectives must be identified in the light of the best scientific knowledge in the field (paragraph 54 of Waddenzee)

\textsuperscript{6} If the site hosts a priority natural habitat type or a priority species further conditions apply in relation to the reasons as explained in this note. “Priority” habitat types and species are particular SAC features for which EC member states have particular responsibility. They are listed in the Annexes to the Habitats Directive and usually also identified on individual SAC designation documents. They are not relevant to SPAs or Ramsar sites.


\textsuperscript{8} The Convention on Wetlands of International Importance especially as Waterfowl Habitat, as amended in 1982 & 1987 (the ‘Ramsar Convention’)

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**Practical matters: Matrices**

Matrices must be submitted in both Microsoft Word and PDF format to allow for editing during the examination and for publication of the matrices as submitted. Additional information on matrices is available in Appendix 11.
A4.7. The protection given by the Habitats Directive and the Wild Birds Directive is transposed into Welsh legislation through the Habitats Regulations. Sites of Community Importance (SCIs), Special Areas of Conservation (SACs), candidate Special Areas of Conservation (cSACs) and Special Protection Areas (SPAs) are protected under Regulation 8 of the Habitats Regulations. TAN 5 paragraphs 5.2.2 and 5.2.3 apply the procedures described below to possible SACs (pSACs), potential SPAs (pSPAs), Ramsar sites and sites identified, or required, as compensatory measures for adverse effects on any of the above sites. For the purposes of this chapter, all these sites are referred to as “European sites”.

Coordinating HRA with the DNS process

Early Engagement with PINS Wales and NRW

A4.8. When considering whether a project has the potential to significantly affect European sites, it is advised that the applicant commences consultation with NRW at the earliest point in the pre-application process. Whilst this is the applicant’s responsibility and decision, in due course the competent authority will need to be satisfied that it agrees with the applicant’s conclusions, having regard to the views of NRW. Applicants should be aware that if insufficient information is submitted with an application, then it may not be accepted as valid. Evidence of the outcome of this consultation with NRW should therefore be appended to the NSER or LSER. This will be key to the decision making process, as under the Habitat Regulations the competent authority must consult NRW and have regard to any representations made by them\(^9\).

Applicants are strongly advised to engage with NRW early on to agree baseline information, methodology, and evidence. Evidence plans, jointly agreed between NRW and the applicant, are useful in establishing a work programme for the pre-application stage. Identifying key milestones early on should ensure that all necessary evidence is gathered well in advance of the examination.

A4.9. The general approach taken to HRA throughout preparation of the DNS application should be iterative to ensure that a robust assessment of potential implications for European Sites is carried out. Consultation on potential implications for European Sites should develop throughout the pre-application stage and as the likely outcomes of the HRA process emerge. An applicant can request pre-application advice from PINS Wales at any time during the DNS process, and this can cover issues relating to HRA. Although not a statutory requirement, we request that applicants give PINS Wales at least ten working days’ notice of a pre-application advice request.

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9 Regulation 61(3) of the Habitats Regulations 2010 (as amended)
Developments of National Significance

A4.10. The approach advocated by this guidance aims to help applicants to submit a robust application, so that as many issues as possible can be resolved prior to the examination.

A4.11. The applicant’s NSER or LSER should provide the reasoning and evidence behind its conclusions. This is likely to be supported by the information presented in the Environmental Statement (ES) for the DNS application. The applicant’s NSER or LSER must show how the information gathered has been applied to the HRA and the tests applicable to the Habitats Directive.

**Formal pre-application consultation**

A4.12. Prior to submitting a DNS application, formal pre-application consultation is required. Applicants are strongly advised to use completed HRA matrices to identify and discuss issues with consultees, particularly NRW, with the aim of resolving issues prior to the examination. At the very least, applicants should ensure that the baseline information, methodology, and evidence gathered are agreed with NRW.

**HRA Stage 1: Screening**

A4.13. The scope of the HRA should be defined and justified. The HRA should include screening for Likely Significant Effects (LSE) (alone or in combination with other plans or projects). If there are no LSE identified for all the European sites considered, then the report is likely to take the form of a No Significant Effects Report (NSER) and HRA stages 2-4 will not be required.

A4.14. The applicant’s HRA Stage 1 screening information to be presented in the NSER or LSER should include:

- a detailed **description of the development**, processes, timings, and method of work proposed as part of the DNS;
- details of the methodology used to determine which European sites should be included within the assessment, plus **definition of and justification for the scope of the assessment**;
- a **plan and description** of the European site(s) potentially affected, including a description of all qualifying features (a copy of the site data sheet is useful to include);
- an appraisal of the potential effects resulting from the construction and operation of the project (e.g. noise) and the **likely significant effect** on the European site(s) and qualifying features (e.g. disturbance to bird species);

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10 It should be noted that screening, in HRA terms, is not a prescribed stage (as it is in relation to EIA). The Supreme Court judgement R (oao) Champion v North Norfolk District Council [2015] (UKSC 52) disapproved of the term, considering instead whether there was a ‘trigger’ for an (appropriate) assessment.
• an outline and interpretation of the baseline data collected to inform the findings;
• an appraisal of the effects of any other plans or projects which, in combination with the proposed development, might be likely to have a significant effect on the European site(s). The scope of that appraisal should be well-defined and agreed with the local authorities and NRW;
• an evaluation of the potential for the scheme to require other consents requiring consideration of LSE by different competent authorities (other than secondary consents which form part of the DNS application);
• a statement which identifies (with reasons) whether significant effects on European sites in other EEA States are considered to be likely; and
• evidence of agreement between the applicant and NRW on the scope, methodologies, interpretation, and conclusions of the screening assessment (such as copies of correspondence, Evidence Plans, or Statements of Common Ground).

A4.15. At Stage 1, in relation to each European site and qualifying feature, the applicant will need to conclude from baseline information and consultation responses received that either:

• There are no LSE on all the European site(s) and qualifying features considered, either alone or in combination with other plans or projects, and therefore no further assessment is required (see later section entitled ‘NSER’), OR
• LSE on any of the European site(s) and qualifying features considered exist, either alone or in combination with other plans or projects, therefore requiring an AA by the competent authority (see later section entitled ‘HRA Stage 2: AA’).

A4.16. During the project’s development, applicants must consider using in-built mitigation to avoid or reduce effects (e.g. by amending the site boundary or modifying aspects of the design). The applicant’s NSER or LSER should provide details of the in-built mitigation measures and demonstrate how these relate to the assessment to reach the conclusion on whether any residual LSE exist, either alone or in combination with other plans or projects. Where mitigation is secured via a planning condition rather than being an integral part of the project, AA will be required, and the LSER should identify how the mitigation measures are to be secured by reference to conditions in the DNS permission.

A4.17. As a general guide, if a large amount of information gathering and data collection is required in order to identify the LSE of the project, these probably exist and an AA is likely to be required (meaning a NSER cannot be produced).

11 Regulation 61(6) of the Habitats Regulations
Developments of National Significance

In combination effect(s) on European site(s)

A4.18. Applicants must conclude whether the project, either alone or in combination with other plans or projects, is likely to have a significant effect on a European site. Some projects may be unlikely to have significant effects on their own but effects in combination with other plans or projects may be significant. The applicant must therefore provide evidence in the NSER or LSER that it has considered effects, both alone and in combination with other plans and projects.

A4.19. Whilst there is no legal definition of what constitutes a plan or project for the purposes of the Habitats Regulations, PINS Wales advises that the following should be considered (please note this list is not exhaustive):

- projects that are under construction;
- permitted application(s) not yet implemented;
- submitted application(s) not yet determined;
- all refusals subject to appeal procedures not yet determined; and
- projects identified in the development plan (recognising that detailed information will be limited).

No significant effects report (NSER)

A4.20. The European Court of Justice (ECJ) in the Waddenzee case considered that the effects of the project should be ‘identified in the light of the best scientific knowledge in the field’\(^{12}\). There should be a continuous evaluation of the assessment findings against thresholds of LSE. If, during the process, the competent authority determines that there is ‘no significant effect (alone or in combination)’ and no reasonable scientific doubt remains, then the assessment can be concluded. The applicant should then summarise the results in an NSER.

A4.21. In considering the NSER’s conclusion that there are no LSE requiring AA, the Inspector will have regard to the decision in the Waddenzee case, in which the ECJ took the view that ‘the competent national authorities, taking account of the conclusions of the appropriate assessment,….are to authorise such activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects’\(^{13}\).

The NSER or LSER should confirm whether or not NRW supports the conclusions of Stage 1. Any views received from NRW should be appended to the report.

A4.22. There is no prescribed format for the NSER or for the reporting of the outcomes of the screening stage. However, applicants are expected to include within the NSER the information requested in this guidance and complete the screening

\(^{12}\) Paragraph 54 of Waddenzee (see footnote 5 for details)

\(^{13}\) Paragraph 59 of the ECJ judgment in Waddenzee (see footnote 5 for details)
Procedural Guidance

matrices set out in Appendix 11. The NSER must be clear, be supported by sufficient information, and provide convincing reasons why the applicant has reached the view that there are no LSE and that an AA will not be required.

Screening outcomes

A4.23. If the applicant has concluded that the project is likely to have a significant effect on any European site, alone or in combination with other projects, the applicant needs to provide information in accordance with the HRA Stage 2: AA of the process (see below).

HRA Stage 2: Appropriate Assessment (AA)

A4.24. If Stage 1 identifies LSE for any of the European sites considered, an assessment of the implications of the project on the site(s)’s conservation objectives\textsuperscript{14} will be required. This will take the form of an LSER and should include sufficient information for the AA.

A4.25. Along with their HRA Stage 2: AA information, the applicant should also clearly state which European site(s) and qualifying features are being taken forward from HRA Stage 1: Screening and which European site(s) and qualifying features have been screened out of further assessment.

A4.26. The HRA Stage 2: AA information should be presented in the applicant’s LSER and should include:

- evidence about the project’s effects on the integrity of protected sites;
- a description of any mitigation measures proposed which avoid or reduce each effect, and any remaining residual effects;
- a schedule indicating the timing of mitigation measures in relation to the progress of the development;
- cross references to the relevant DNS requirements and any other mechanisms proposed to secure mitigation measures, and identification of any factors that might affect the certainty of their implementation;
- a statement as to which (if any) residual effects constitute an adverse effect on the integrity of European sites, either alone or in combination with other plans or projects, and therefore need to be included within the AA; and
- evidence to demonstrate that the applicant has fully consulted and had regard to comments received by NRW during pre-application consultation.

A4.27. The applicant’s LSER is also expected to include the integrity matrices for all of the European sites taken to HRA Stage 2: AA, in order to summarise this part of the assessment (see Appendix 11).

\textsuperscript{14} Regulation 61(5) of the 2010 Habitats Regulations
Developments of National Significance

Negative Appropriate Assessment

A4.28. Unless the applicant’s LSER concludes that no reasonable scientific doubt remains ‘identified in the light of the best scientific knowledge in the field’\(^\text{15}\); and that the project will not adversely affect the integrity of any European site, alone or in combination with other plans or projects, the applicant’s assessment will need to move to HRA Stages 3 and 4 of the process.

**Statements of Common Ground (SoCG)**

The applicant is strongly urged to seek to agree SoCG with relevant organisations, in particular NRW, for submission with the DNS application. The SoCG should clearly identify the extent to which relevant matters are agreed, and areas where disputes remain. This will assist the Inspector in focussing on the main issues to be considered in the examination.

Relevant matters which may be addressed by the SoCG include the scope of the assessment (including the in-combination assessment), the baseline used, methodologies used to collect and analyse data, the interpretation of information, and the conclusions presented. The SoCG could also address whether proposed mitigation and/or compensation measures are agreed.

**HRA Stages 3 & 4: Assessment of Alternatives & Consideration of IROPI**

A4.29. If Stage 2 concludes that the project will adversely affect the integrity of the site(s), or is inconclusive; consideration of alternatives, compensatory measures and whether the project is justified by IROPI will be required. This will also form part of the LSER.

A4.30. The applicant’s assessment of alternative solutions could include a project of a different scale, a different location, and an option of not having the scheme (a ‘do nothing’ option). Details of how these have been identified and considered should be provided in the applicant’s LSER. The applicant’s assessment constitutes information to inform the competent authority’s assessment.

A4.31. Where it can be demonstrated that there are no alternative solutions to the project that would have a lesser effect or avoid an adverse effect on the integrity of the European site(s), the project may still be carried out if the competent authority is satisfied that the scheme must be carried out for IROPI. Where priority natural habitats or species will be affected, the IROPI justification should be provided in the LSER and must relate to either:

- human health, public safety or beneficial consequences of primary importance to the environment; or
having due regard to any opinion from the European Commission, any other imperative reasons of overriding public interest.

Submission and examination

A4.32. Following submission, PINS Wales has 42 days\(^\text{16}\) to determine whether an application is valid. To be considered valid, an application for a DNS must include the particulars or evidence required by the Welsh Ministers under section 62(3) of the 1990 Act\(^\text{17}\). Checks for validity will be mainly procedural, but during this time, PINS Wales will also check that sufficient information is submitted in order to determine the application. This will include information that satisfies the HRA requirements i.e. either a NSER or LSER.

A4.33. Immediately following validation, the PINS Wales will consult interested parties on the submitted documentation. When doing so, we will consult NRW on any NSER or LSER, as required by Regulation 61(3) of the Habitats Regulations.

A4.34. Should new information come to light during the examination, PINS Wales will consult NRW on this information, as required by Regulation 61(3). In such circumstances, a summary report may be produced by PINS Wales which signposts all relevant sources of information and evidence relevant to the HRA process. Where the applicant’s conclusions have been disputed during the examination, the report will include revisions to any HRA matrices submitted. The report, and any related consultation responses and examination material, will form part of the evidence base for the Inspector’s report and recommendation to the Welsh Ministers.

Where required, PINS Wales may appoint a specialist (e.g. an ecologist) to assist with the examination.

The Inspector’s report

A4.35. The Inspector’s report will address the LSE of the project on any European site(s) and qualifying features and, if appropriate, also consider whether the project will have an adverse effect on the integrity of European site(s). The Inspector’s report will have regard to any additional report or information submitted to the examination. Where necessary, the Inspector’s report will assess evidence from the examination relating to the case for no alternatives, IROPI and compensatory measures. Welsh Ministers will then consider all the examination evidence prior to making a determination on the DNS application.

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\(^{16}\) 28 days for non-EIA development.

\(^{17}\) Article 7 of the EIA Regulations