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Gemma Christian
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Welsh Government

20th July 2018

Dear Gemma

Habitats Regulations Assessment of the National Development Framework - Assessment of Preferred Spatial Option: Preliminary HRA Screening Report

Thank you for consulting Natural Resources Wales on the draft Habitats Regulations Assessment (HRA) of the National Development Framework (NDF) - Assessment of Preferred Spatial Option: Preliminary HRA Screening Report. Our comments are made in the context of our role under the Conservation of Habitats and Species Regulations 2017.

We provide our key comments below, and provide more detail on these, together with more specific comments in the attached Appendix.

1. We welcome and support Welsh Government's commitment to the HRA process. We also welcome the informal opportunities we have had to provide comments as the preliminary HRA screening has developed.
2. At this relatively early stage in its the development, the specific policies that the NDF will include remains uncertain. We therefore support the precautionary approach taken by Welsh Government, screening the majority of objectives and strategic policy directions in for further consideration under HRA as the NDF and the HRA develop. We agree that as the NDF moves forward, and specific policies are developed, the potential for them to impact on European sites will be become clearer, and it will then be possible to assess these individual policies in greater detail at that time.
3. We have concerns that strategic policy direction R1 in Table 4 on Pg. 20, which provides a framework to support growth, is being screened out at this stage of the plan's development. Based on the limited information available at this stage of the NDF's development, it appears to us that this could have the potential to impact upon European sites. We do not consider that relying on the future inclusion of

cross-cutting policies to protect European sites would allow this strategic policy direction to conclude no likely significant effects at this stage. It is our view that it should be screened in at this time, allowing assessment of the specific policies that subsequently flow from it as they develop.

4. To ensure a consistent and transparent approach to determining when it is appropriate to 'defer down' the HRA to a lower-tier plan or project level, both the HRA Preliminary Screening Report and the HRA Rules of Thumb document should clearly set out how these decisions will be made.
5. We continue to have some concerns regarding the HRA Rules of Thumb document, which we set out in more detail in Appendix 1 (pts. 8 to 18). In particular, this document should:
 - i. explain how mobile and typical species are defined, and how they will be considered in the HRA; and
 - ii. clarify the wider applicability of the identified buffer distances.

We hope that you find these comments useful. If you would like to discuss any of these points further please do not hesitate to contact Roger Matthews via our Strategic Assessment mailbox at strategic.assessment@cyfoethnaturiolcymru.gov.uk

Yours sincerely



Howard Davies
Head of Governance and Planning

Appendix 1

Habitats Regulations Assessment of the National Development Framework - Assessment of Preferred Spatial Option: Preliminary HRA Screening Report

Specific comments

1 Introduction

6. Pg. 2, 1.1.6 – we suggest that all references to conservation objectives should be directed to Core Management Plans (and their equivalent in England) only, which are up kept up to date on Natural Resources Wales' and its sister agencies websites.

4 Preliminary screening of the NDF preferred spatial option

7. We note references to 'deferring down' HRA to lower tier plan and project level in Table 4. We suggest it would be useful to clearly set out the circumstances when deferring down assessment to a lower level is acceptable and appropriate in both the Preliminary HRA Screening Report and the HRA Rules of Thumb document.

Despite the name often given to this approach ('deferring down the HRA'), this way of ascertaining no adverse effect on site integrity in the higher level plan is not a way of deferring or delaying the assessment process, but a way of securing mitigation measures in a lower level plan or at project level, where they cannot be secured in detail in the higher level plan due to the level of detail available at this stage. In other words, to take this approach the plan-maker must be confident that it is possible for the policy to be delivered in a way that avoids adverse effects on site integrity at the lower tier plan or project level.

The following is adapted from the DTA Publications HRA Handbook. In order to ascertain that there would be no adverse effect on the integrity of a European site, a plan-making body may only rely on mitigation measures in a lower tier plan or at project level (i.e. defer down) if the following three criteria are all met:

- i. The higher-level plan assessment cannot reasonably predict any effect on a European site in a meaningful way; whereas
- ii. The lower tier plan or project level, which will identify more precisely the nature, timing, duration, scale or location of development, and thus its potential effects, will have the necessary flexibility over the exact nature, timing, duration, scale and location of the proposal to enable an adverse effect on site integrity to be avoided; and
- iii. The HRA of the lower tier plan or project is required as a matter of law or Government policy.

There are two key points here:

- i. Firstly, if the HRA of a policy at the NDF level can reasonably predict certain effects on European site(s) in a meaningful way, then it should be undertaken at this level to the extent appropriate to the information available at this stage.
- ii. Secondly, it must be the case that a project level HRA will have the necessary flexibility over the exact nature, timing, duration, scale and

location of the proposal to enable an adverse effect on site integrity to be avoided – if not, then deferring down is not appropriate.

8. Pg. 20, Table 4, R1 – we have concerns that this strategic policy direction, which provides a framework to support growth, is being screened out at this stage of the NDF's development. Based on the limited information available at this stage of the NDF's development, it appears to us that policies that flow from this could have the potential to impact upon European sites. We do not consider that relying on the future inclusion of cross-cutting policies to protect European sites would allow this strategic policy direction to conclude no likely significant effects at this stage. It is our view that it should be screened in at this time, allowing assessment of the specific policies that subsequently flow from it as they develop.

HRA Rules of Thumb

9. Pg. 6, Table 8 – whilst we recognise that the tables in this section are not intended to be comprehensive, this table does appear to understate the non-bird interest of estuarine Ramsar site fauna. In particular, it should include reference to fish (which includes species such as sea trout and eel, not protected under SAC designations).

10. As we have previously identified, the Rules of Thumb document doesn't include explanatory text on mobile or typical species. It would be useful to include this information, together with highlighting the need for their consideration as part of the HRA process. We provide definitions below.

- a. Mobile species – these are species that are interest features of European sites in their own right, but which require consideration beyond European site boundaries because they are migratory, or forage or roost *etc.* 'off-site', or whose populations require movement and mixing across fragmented sites (at a meta-population scale). Species that fall in to this category in Wales include:

- Bats
- Migratory fish – shad, sea lamprey, river lamprey, salmon, sea trout and eel
- Marsh fritillary
- Otter
- Hen harrier
- Wintering birds
- Great crested newt
- Sea mammals
- Seabirds

Therefore, European sites whose qualifying features include mobile species, such as those listed above, which may be affected by the NDF irrespective of the location of the plan's proposals or whether the species would be in or out of the site when they might be affected, may need to be considered through HRA.

- b. Typical species – these are species that are not interest features in their own right, but which are the typical species of a habitat which is an interest feature, and which are often referred to in the conservation objectives. They only require consideration within the European site boundaries. At the high strategic level of plan HRA it is often not possible to consider them in any

detail, but the potential need for them to be considered in future project level HRAs should at least be highlighted here.

11. Pg. 10, 3.2.3 – policies that refer to Developments of National Significance (DNSs) do require HRA consideration at plan level to the extent that it is reasonable and meaningful, before they can be ‘deferred down’ to lower tier plan or project level (see pt. 7 above). A similar example (for a Nationally Significant Infrastructure Project (NSIP)) to this is the tidal lagoon policy in the developing Welsh National Marine Plan (WNMP), in relation to which the WNMP HRA was unable to conclude no adverse effects on site integrity, and which therefore has been taken through to the derogations set out under Article 6(4) of the Habitats Directive, at plan level.
12. Pg. 10 - In relation to several of the NDF Proposals listed under 3.2, direct loss of habitat is also a potential impact due to land take, e.g. under 3.2.6 Housing and 3.2.7 Mineral concessions.
13. Pg. 10, 3.2.9 – this paragraph on natural resource management/ecosystem services should acknowledge that this management itself could have impacts on European sites that would require HRA (as has been acknowledged in the preceding Preliminary HRA Screening Report).
14. Pg. 11, 3.3.3 Impact Pathways to consider – we continue to have some concerns regarding the specific buffers that have been set out in this section, because of the potentially significant influence on the HRA screening that these buffers may subsequently have. There are inevitably many uncertainties about subsequent projects that may come forward and be supported by policies in the NDF, regarding their nature, timing, duration, scale and location, etc., and therefore the potential impacts that they may have on European sites. Therefore, any guidance on the HRA at this plan level needs to take a precautionary approach. It is not clear if all of the buffers provided are based on a precautionary approach, or on specific pieces of project-level casework that may not have wider applicability. We would welcome clarity for all of the buffers set out in the document, on this question.

For example, the document quotes studies for the Morecambe Bay Partnership (Liley *et al.*, 2015) which identified a distance of 3.45 km as being the average distance people will travel for a day trip to a designated site. Based on this it states that if an NDF proposal could lead to large housing developments within 3.5 km of a Natura 2000 site, it should be screened in for consideration under HRA. It is not clear if the Morecombe Bay study figures would also be appropriate for all proposals for large housing developments across Wales. The caveat set out at the foot of pg. 11 (*“These distances are for guidance only, where a potentially significant effect is identified, a thorough assessment of the impact pathways and distance over which an effect could occur would be undertaken on a case by case basis during the full HRA of the NDF”*) does not provide reassurance because it only applies after a proposal has been screened in or out using the information provided in this document.

Note that we have not considered and confirmed each of the specific buffers set out in the document individually.

15. Pg. 11, 3.3.3, Direct habitat loss, 4th bullet pt. – this bullet point refers to *permanent or temporary loss of habitat within an area of land outside the designated site that could be functionally linked to it*. This is a key place where there should be reference to mobile species collectively (as described in pt. 10 above).
16. Pg. 11, 3.3.3, Habitat degradation, 2nd bullet pt. – this bullet point refers to a 3km buffer from European sites for increased sedimentation and pollution entering watercourses. This would appear to be incorrect. It should reflect the other bullet points relating to watercourses (e.g. pg. 12, Effects on water quality or quantity, 1st bullet pt.), where the buffer is 3 km from a watercourse, followed by checking for hydrological links to downstream European sites.
17. Pg. 15, 4.1.2, Rules 3 and 4 – these rules refer to collating qualifying features and conservation objectives, and refer the user to this HRA Rules of Thumb document to source this information. We are concerned that this document does not contain detailed or comprehensive information on either of these areas. We advise that users should refer to Core Management Plans (or their equivalent in England) when seeking this type of information.
18. Pg. 16, Rule 6 – in relation to this Rule, it is worth highlighting the recent *People over Wind* ruling from the Court of Justice of the European Union (CJEU), which states that “...in order to determine whether it is necessary to carry out...an appropriate assessment of the implications, for a site concerned, of a plan or project, it is not appropriate, at the screening stage, to take account of measures intended to avoid or reduce the harmful effects of the plan or project on that site.” CJEU case c-323/17, paragraph 40.
19. Pg. 16, Rule 6 – also in relation to this Rule, the last sentence states ‘...or incorporating appropriate wording to ensure that any future development brought forward under the policy/strategy/proposal is required to undertake HRA prior to permission being granted’ when referring to measures that would avoid or mitigate a potential impact. Whilst we support being clear in this document that HRA will be required at project level, it should be noted that undertaking HRA at a lower tier level does not remove the requirement to undertake HRA at this plan level, as far as is reasonable and meaningful (see pt. 7 above).