

Note of Advice

Emerging Allerdale Local Plan Part 2 – Site Allocations

Failure to comply with the Conservation of Habitats and Species Regulations 2017

1. There are fundamental flaws in the Council's proposed approach to assessing the potential impacts of the emerging Allerdale Local Plan Site Allocations on European Protected Sites.
2. The most recent document, 'Habitats Regulations Assessment FINAL – 27 September 2018' ("the 2018 HRA "), is seriously flawed and does not comply with Regulation 63 of the Conservation of Habitats and Species Regulations 2017 ("the Regulations").
3. Regulation 63 of the Regulations states as follows (emphasis added):

"63.— Assessment of implications for European sites and European offshore marine sites

 - (1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—
 - (a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and
 - (b) is not directly connected with or necessary to the management of that site, must make an appropriate assessment of the implications of the plan or project for that site in view of that site's conservation objectives.
 - (2) A person applying for any such consent, permission or other authorisation must provide such information as the competent authority may reasonably require for the purposes of the assessment or to enable it to determine whether an appropriate assessment is required.
 - (3) The competent authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority specifies.
 - (4) It must also, if it considers it appropriate, take the opinion of the general public, and if it does so, it must take such steps for that purpose as it considers appropriate.
 - (5) In the light of the conclusions of the assessment, and subject to regulation 64, the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be).
 - (6) In considering whether a plan or project will adversely affect the integrity of the site, the competent authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which it proposes that the consent, permission or other authorisation should be given."
4. It is quite clear that, if a plan or project is likely to have a significant effect on a European Protected Site, the competent authority must proceed to carry out an 'appropriate assessment' (AA). This is a mandatory requirement.
5. The HRA July 2018 concludes unequivocally that several proposed allocations are likely to have a significant effect on a European Protected Site. This conclusion appears to have been reached applying the relatively recent decision of the European Court of Justice in People Over Wind.
6. However, despite this clear conclusion, the HRA 2018 fails to carry out an adequate or complete AA to properly understand the potential implications of the emerging Allerdale Local Plan for the European Protected Sites which are likely to be affected. This is a clear breach of the Regulations.

7. The detailed requirements of an AA have most recently been considered by the ECJ in the Halohan¹ case, which makes clear that (amongst other matters) an AA must:
 - a. Not have lacunae and must contain complete, precise and definitive conclusions capable of dispelling all reasonable scientific doubt as to the effects of the proposed works on the protected areas concerned²;
 - b. Catalogue all of the habitats and species for which the site is protected, "A failure, in that assessment to identify the entirety of the habitats and species for which the site has been listed would be to disregard the above mentioned requirements and...would not be sufficient to dispel all reasonable scientific doubt as to the absence of adverse effects on the integrity of the protected site"³;
 - c. "identify and examine both the implications of the proposed project for the species present on that site, and for which that site has not been listed, and the implications for habitat types and species to be found outside the boundaries of that site, provided that those implications are liable to affect the conservation objectives of the site"⁴.
8. The HRA 2018 fails to comply with all of these criteria from the Halohan case, indeed it does not engage on any level with, or even mention, the Halohan decision.
9. Furthermore, the HRA 2018 seeks to rely on assessments carried out in 2013, without any proper scrutiny or update being carried out. The absence of up to date, evidence based assessment work is an obvious lacunae in the HRA 2018.
10. This is a serious oversight; no attempt has been made to undertake an AA which would be compliant with the principles established in Halohan.
11. The failure to carry out an AA to understand the implications of the emerging Allerdale Local Plan for European Protected Sites is a serious omission. The Local Planning Authority is clearly prohibited from adopting the Local Plan prior to a full AA being carried out.
12. It is unlawful for the Local Planning Authority to fail to carry out an AA prior to adopting the emerging plan; this is a mandatory and essential requirement that is necessary to understand the full range of potential implications of the plan for European Protected Sites.
13. The requirement to carry out a proper and comprehensive AA cannot be avoided by simply seeking to rely on a 'condition or restriction' referred to in Regulation 63(6). Such an approach does not absolve the competent authority from its duty to carry out an AA before it proceeds to ascertain whether the emerging Plan would adversely affect the integrity of any European Protected Sites.
14. When dealing with the question of leaving certain parameters to be determined at a later stage, by way of conditions imposed at an earlier stage, the competent authority may only proceed on that basis, "if that authority is *certain* that the...conditions are strict enough to guarantee that those parameters will not adversely affect the integrity of the site"⁵.
15. Furthermore, given that there is no proper understanding of how proposed site allocations or wider spatial policies might affect European Protected Species, it is simply impossible to

¹ Case C-461/17

² Paragraph 34, Halohan

³ Paragraph 37, Halohan

⁴ Paragraph 40, Halohan

⁵ Paragraph 47, Halohan

understand whether the level of development and/or overall spatial strategy proposed in the emerging Plan is realistically deliverable. This issue stems from the failure of the Local Planning Authority to carry out a proper, comprehensive AA in respect of all of the policies which are likely to have a significant effect on European Protected Sites, as identified in the HRA 2018. Without a proper understanding of the impacts, and any steps that can be taken to remove such impacts, there can be no certainty that any conditions or restrictions will be effective in preventing adverse harm, without fundamentally undermining the strategy being pursued.

16. In light of the above, the local planning authority should take immediate action to address the substantive failings identified.
17. This of course has implications for the progression of the draft Allerdale Local Plan, which should be held in abeyance until the further detailed work required to carry out a proper and comprehensive AA has been undertaken.

WALKER MORRIS LLP
22 May 2019