

Cornwall Councils Response to Correspondence from Ocean Reach (F.38)

09th January 2019

As requested, the Council's Legal Team has considered the recent case law that was brought to the attention of the Inspectors through Mr Martin Pollard's correspondence of 20 December on behalf of Ocean Reach, in which he highlighted three recent decisions on the issue of Habitats Regulations Assessments and subsequently questioned the legal compliance of the Habitats Regulations Assessment Report.

The first case is *Grace v An An Bord Pleanala* (Case C-164/17) (25 July 2018). Earlier in 2018, in another challenge under the Habitats Directive 1992, the ECJ confirmed that mitigation measures should not be considered at the screening stage, when determining whether it was necessary to carry out an appropriate assessment of the impact of a proposed plan or project on a protected site (*People Over Wind and another v Coillte Teoranta* (Case C-323/17) EU:C:2018:244 (12 April 2018)). Cornwall Council previously prepared an updated Habitats Regulations Assessment (HRA) Report in response to the implications of this judgment.

In the case, the court confirmed again that each step in the process must include only the considerations that are proper to that particular step. Other considerations must not bleed into earlier steps in the process. This is the same approach as taken in *People over Wind* and, before that, in *Orleans v Vlaams Gewest* (Case C-387/15) EU:C:2016:583. This is emphasised in the court's comments that:

"the effectiveness of the protective measures provided for in Article 6 of the Habitats Directive is intended to avoid a situation where decision-makers allow so-called "mitigating measures" – which are in reality compensatory measures – in order to circumvent the specific procedures laid down in Article 6(3) of the directive and authorise projects which adversely affect the integrity of the site concerned."

The court also confirmed its previous guidance on what type of measures can be taken into account at the Article 6(3) appropriate assessment stage: measures can only be taken into account if it is "sufficiently certain that a measure will make an effective contribution to avoiding harm, guaranteeing beyond all reasonable doubt that the project will not adversely affect the integrity of the area."

In *Holohan and others v An Bord Pleanala* [2018] (Case C-461/17) (7 August 2018) the ECJ clarified that, while the relevant authority may grant consent for a plan or project with conditions that leave the developer free to determine subsequently certain parameters relating to the construction phase (such as location of construction compounds and haul routes), it must be certain that the conditions are strict enough to guarantee that those parameters would not adversely affect the integrity of the site.

Cornwall's HRA already considers mitigation for site-specific impacts, such as Construction Environment Management Plans to reduce dust and noise and the adoption of Sustainable Drainage Systems to promote the management of flood risk and water quality.

Cooperatie Mobilisation for the Environment UA [2018] (Case C-293/17) (7 November 2018) concerned authorisations for schemes for agricultural activities in sites protected by the Habitats Directive and where nitrogen deposition levels already exceeded the critical loads. It will not affect Cornwall's HRA.

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In conclusion, the Council considers that the three cases are dealing with issues that are either not relevant to the Allocations DPD HRA; are dealt with by the HRA Update report (ref. F.37); or is dealing with a level of detail that would not have a demonstrable impact on any of the conclusions of the HRA (including the update report) or the policy recommendations as agreed with Natural England.

The Council cannot reasonably be expected to maintain a position whereby it has to review and update its HRA following the determination of each and every case that may arise. Nonetheless, in the context of a proportional evidence base, given the timescales for the preparation of the updated HRA report for the Allocations DPD and that the Council considers the three cases would not impact on any wider policy recommendations within the DPD, it is felt that the updated HRA remains fit for purpose.

Matthew Brown on behalf of Cornwall Council