

ABACUS PROJECTS LTD – WHITE ROCK, TORBAY

APPROPRIATE ASSESSMENT – BRIXHAM PENINSULA NEIGHBOURHOOD PLAN

HRA REVIEW UPDATE

1. I have been asked to advise further on the implications for the Brixham Peninsula Neighbourhood Plan ("**BPNP**") process of the EU Habitats Directive following recent changes in the legal position.
2. Our advice notes of 1 May and 4 May 2018 (attached to this note for ease of reference) identified issues with the consideration of mitigation measures within the Habitats Regulations Assessment Screening Report submitted with the BPNP following the ECJ decision in *People Over Wind v. Coillte Teoranta C-323/17* ("**POW**") handed down on 12 April 2018. The POW decision confirmed that such measures should not be taken into account during the screening process, which was the approach taken in the BPNP Habitats Regulations Assessment Screening Report.
3. Nicholas Pearson Associates ("**NPA**") have now conducted a review of the existing habitats information provided as part of the BPNP submission and assessed whether that information is sufficient, in respect of each site allocated in the submitted BPNP and in light of the POW decision, for Torbay Council ("**Torbay**") as the plan-making authority to carry out the necessary appropriate assessment
4. NPA's findings are of course specific to each allocated site, however as the summary to NPA's report demonstrates, there are allocated sites for which NPA have concluded that sufficient evidence has not been provided.

BPNP Implications

5. As set out in our previous advice notes, Regulations 105 of the Conservation of Habitats and Species Regulations 2017 requires that the plan-making authority must make an appropriate assessment where a plan is likely to have a significant effect on a European site (either alone or in combination with other plans or projects.) This duty is an EU obligation within the meaning of Paragraph 8(2)(f) of Schedule 4B of the Town and Country Planning Act 1990 and a plan made without regard to this duty would fail to meet the basic conditions prescribed in respect of neighbourhood plans.
6. Where sufficient evidence is not available as part of the BPNP submission as set out in NPA's report, site allocations in the BPNP would necessarily be contrary to the Regulation 105 duty and therefore to the neighbourhood plan basic conditions. Accordingly, it would plainly be irrational for either the independent examiner or Torbay to conclude that the BPNP as submitted could be made with those allocations included. Any such decision would give legitimate grounds for judicial review.
7. I note also that during the Local Plan examination, allocation of the site now subject of the Inglewood application for outline planning permission was specifically rejected due to the evidence base for habitats regulations assessment of the site, and that the subsequent

planning application has only been made following completion of that evidence base. It would therefore be particularly inconsistent for the same requirement not to be made of the allocated sites in the BPNP.

Way Forward

8. NPA's report and our advice notes cumulatively reflect the changed legal position following the POW decision which was handed down after the submission of the BPNP for independent examination. The report and our analysis of it do not include additional evidence and are limited to reconsideration of the submitted evidence in light of this change in position which requires that a different approach be taken to the analysis of that evidence. Accordingly I consider that it is necessary and proper for these findings to be brought to the attention of the independent examiner at the earliest opportunity.
9. NPA's report demonstrates that there are allocated sites in the submitted BPNP for which there is not sufficient evidence to conduct an appropriate assessment. It would not therefore be possible to amend the existing Habitats Regulations Assessment Screening Report so that it ostensibly conducted an appropriate assessment on the basis of the existing evidence. The issues identified by our previous advice notes and in NPA's report are substantive and cannot be properly addressed by cosmetic changes to the BPNP submission.
10. The Planning Inspectorate issued guidance to inspectors on 9 May 2018 (PINS Note 05/2018 attached) on the implications of the POW decision. Paragraph 8 of that guidance sets out the steps to be undertaken where the habitats regulation assessment for a plan under examination relies on mitigation at the screening stage and these should also be brought to the attention of the independent examiner.
11. Our previous advice notes set out Torbay's powers under Regulation 106 and the process envisioned in the NPIERS neighbourhood plan examination guidance for suspension of the examination process to allow the necessary evidence to be acquired and the appropriate assessment undertaken. This continues to be the appropriate mechanism for rectification of the issues identified in our advice notes.

Gareth Aubrey
Solicitor
for DAC Beachcroft LLP
31 May 2018

**People Over Wind v. Coillte Teoranta - Case C-323/17
Judgment of the EU Court of Justice (Seventh Chamber) - 12 April 2018
Implications for Torbay Neighbourhood Plans**

1. I have been asked to advise on the implications of the recent decision of the EU Court of Justice on the case of *People Over Wind v Coillte Teoranta* ("POW") and in particular on whether the case impacts on the neighbourhood plan ("NP") processes that are underway in Torbay. This ECJ decision is applicable to the Habitats Directive 1992 ("Habitats Directive") and the Conservation of Habitats and Species Regulations 2010 ("Habitats Regulations") and the relevant UK law.
2. The principle arising from the POW judgment is that it is not appropriate to take account of measures intended to avoid or reduce the harmful effects of a plan or project (for shorthand I will call these "mitigation measures") when screening a plan or project for whether it requires appropriate assessment under the Habitats Directive.
3. The EU Habitats Directive is now implemented into English law by the Habitats Regulations. Regulations 102 and 102A of the Habitats Regulations provide as follows:

102 Assessment of implications for European sites and European offshore marine sites

(1) *Where a land use plan--*

(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 the site,*

the plan-making authority for that plan must, before the plan is given effect, make an appropriate assessment of the implications for the site in view of that site's conservation objectives.

102A Assessment of implications for European site: neighbourhood development plans

(1) *A qualifying body which submits a proposal for a neighbourhood development plan must provide such information as the competent authority may reasonably require for the purposes of the assessment under regulation 102 or to enable them to determine whether that assessment is required.*

(2) *In this regulation, "qualifying body" means a parish council, or an organisation or body designated as a neighbourhood forum, authorised for the purposes of a neighbourhood development plan to act in relation to a neighbourhood area as a result of section 61F of the TCPA 1990, as applied by section 38C of the 2004 Planning Act.*

(3) *Where the competent authority decide to revoke or modify a neighbourhood development plan after it has been made, they must for that purpose make an appropriate assessment of the*

implications for any European site likely to be significantly affected in view of that site's conservation objectives; and regulation 102 and this regulation apply with the appropriate modifications in relation to such a revocation or modification.

4. The process then in relation to NPs is that where a plan is likely to have a significant effect on a European site the local planning authority (being the plan-making authority) must conduct an appropriate assessment ("AA"). The screening process is the process by which it is determined whether a plan is likely to have a significant effect on a European site in the first place.
5. The POW case stipulates that it is not appropriate at the screening stage to take account of mitigation measures that are proposed (or assumed) will be put in place.
6. The appropriate time for taking mitigation measures into consideration is in the course of the AA process itself, the aim of which is to determine whether the plan will adversely affect the integrity of the European site in question. It is only if it is ascertained that adoption and implementation of the plan will not adversely affect the integrity of the European site that the plan may be adopted (save where there are imperative reasons of overriding public interest which as far as I am aware are not in play here).

Situation in Torbay

7. There are currently three proposed NPs within Torbay each of which are currently at the examination stage. The Brixham Peninsula Neighbourhood Plan ("BPNP") and the Torquay Neighbourhood Plan ("TNP") are each accompanied by a specific Habitat Regulations Assessment Screening Report while Paignton Neighbourhood Plan ("PNP") is accompanied by a document entitled Sustainability Appraisal Habitat Regulations Assessment Screening & Non Technical Summary. From my reading, each of these documents refer to taking mitigation measures into consideration at some point and in some form.
8. The TNP in particular has an Appendix C which presents a table entitled "Matrix of Housing Sites". In that table they set out mitigation and avoidance measures in the second column from the right, which are then taken into consideration in assessing whether AA is required as set out in the final right hand column, answering 'no' to each of them.
9. The PNP places reliance on protective policies in the Local Plan to screen out the need for appropriate assessment of the PNP. It states at paragraph 4.22 that *"the package of measures and mitigations that resulted from the Local Plan HRA have provided the necessary safeguards in the Local Plan (as finally adopted) that make it unnecessary and disproportionate for a Stage 2*

“Appropriate Assessment” of the Neighbourhood Plan to be undertaken.” The reference here to mitigations suggests that this has influenced their assessment to screen out AA of the plan.

10. The BPNP also refers to mitigation measures being taken into consideration. On page 30 under the heading "Castor Road" it states: *"Appropriate design and mitigation should be put in place, including limiting light spill to no greater than 0.5 lux outside the boundaries of the new development"*. Similarly under "St.Mary's/Old Dairy" it states: *"There should be no light spill greater than 0.5 lux outside the boundaries of any new development, and effective mitigation measures would have to be provided to ensure no additional light spill, no loss of boundary features and retention of as much of the eastern part of the site as is necessary"*.
11. The format of the BPNP screening report goes through an initial screening assessment followed by a more detailed assessment in relation to two sites. It is not clear in my mind whether this is still part of their screening assessment or if they have in fact moved on effectively to conduct a form of AA – albeit that the AA in legal terms needs to be conducted by the competent plan-making authority, i.e. the Council.
12. To the extent therefore that each of these draft plans takes mitigation measures into account in screening out the need for AA in relation to any policy or site allocation, or the plan as a whole, then the POW case says that this is inappropriate and challengeable. Any such screening should be carried out at face value without taking any mitigation measures into consideration and the plan should proceed to an AA if, from that screening, it seems likely that there may be significant effects on a European site. It should be noted that the AA itself is then conducted by the competent authority, not by the qualifying body.
13. It is only in the course of the AA itself that mitigation measures can be taken into consideration. During the course of that AA the Council as competent authority may require the qualifying body to provide whatever information it may reasonably require for the purposes of that assessment (per regulation 102A of the Habitats Regulations).

HRA Assessment and In Combination Effects

14. Each of the documents accompanying the NPs are titled as a 'Screening' report and I can see no evidence on the Council's website that they (as competent authority) have gone on to conduct an AA on each or indeed any of them. It is also important to note that the requirement on the plan-making authority is to ensure that each plan is not likely to have a significant effect on a European site ***either alone or in combination with other plans or projects***¹ (my emphasis). **It is**

¹ Habitats Regulations 2010, regulation 102(1)(a)

important that the Council as competent authority is satisfied therefore not only that the NPs have been assessed individually but cumulatively as well.

15. While each of the draft NPs' HRA screening reports present an in combination assessment of the NP with other relevant local plan documents, I cannot see that any of them conduct any kind of assessment of the impacts of their neighbourhood plan in combination with the other two neighbourhood plans that are being proposed. As the competent plan-making authority, the Council does need to carry out that exercise.
16. To assist the Council in conducting its assessments it is entitled to ask the relevant qualifying body to provide such information as it reasonably requires. The obligation is then on the qualifying body to provide such information. The duty on them to do so is in regulation 102A(1) of the Habitats Regulations 2010.
17. To the extent that this process has not been complied with, Torbay Council should consider rectifying this as soon as possible.
18. In any event it would appear that the NPs have each taken mitigation measures into consideration in some shape or form in screening their plans, contrary to the dictum in the POW case.
19. Certainly under the NPIERS Guidance² there is scope for the local authority to request that the examinations be suspended to enable the AA (including cumulative AA of the effect of the three NPs in combination) to be conducted. In my opinion not to do so would open the plan-making process up to challenge in respect of all three NPs.

I trust that the above is clear but if you would like to discuss anything or require any clarification please contact me on the details below.

01 May 2018

Anne Harrison
Legal Director (Barrister)

T: [REDACTED]
E: [REDACTED]

² See in particular paragraphs 2.13.7 to 2.13.10

**Appropriate Assessment and Basic Conditions Test
Implications for Torbay Neighbourhood Plans**

1. I have been asked to advise further on the implications on the Torbay Neighbourhood Plans process of the EU Habitats Directive requirements for appropriate assessment.
2. Following my Advice Note of 1 May 2018, I understand that Torbay Council, further to their regulation 16 representations, continue to be of the view that the survey data and information provided in support of the NPs and in particular the Brixham Peninsula Neighbourhood Plan ("BPNP") is insufficient to allow a conclusion to be made that there can be no potential effect on the South Hams SAC. My attention has been drawn to an email dated 11 April 2018 that has recently been published on the Council's web portal for the BPNP (at <http://www.torbay.gov.uk/media/11189/bpnptorbaycouncilfurtherlate.pdf>) and which states that the Council's ecologist remains of the view that she "*would contest the conclusion of no potential effect on GHB...*" and that she recommends that the site be reassessed.
3. For ease of reference I restate the terms of regulation 102A:

102A Assessment of implications for European site: neighbourhood development plans

*(1) A qualifying body which submits a proposal for a neighbourhood development plan **must provide** such information as the competent authority may reasonably require for the purposes of the assessment under regulation 102 or to enable them to determine whether that assessment is required. [my bold emphasis]*

4. It seems to me that if the further survey data referred to in the 11 April 2018 email is not provided then there are two options:
 - a. Either the Council should make a formal request to the neighbourhood forum under regulation 102A of the Habitats Regulations which the forum would be under a duty to provide. If this route is taken then the examination of the neighbourhood plan would need to be suspended (as allowed for under paragraphs 2.13.7 to 2.13.10 of the NPIERS Guidance) to allow the relevant surveys to take place.
 - b. Alternatively, if the assessment is left at the current position where the Council as competent authority is clearly not satisfied that sufficient information has been provided to show that there will be no significant effects on the SAC, then the logical conclusion must be that the proposed neighbourhood plan does not meet the requirement of paragraph

8(2)(f) of Schedule 4A of the 1990 Act and therefore does not meet the basic conditions test and should be rejected.

I trust that the above is clear but if you would like to discuss anything or require any clarification please do not hesitate to contact me.

04 May 2018

Anne Harrison
Legal Director (Barrister)



The Planning Inspectorate
Yr Arolygiaeth Gynllunio

PINS NOTE 05/2018

To: All Inspectors, HoSs Planning, Enforcement & Specialist Casework, Major Applications and Plans (England and Wales)

Relevancy: Planning casework, Enforcement & Specialist Casework, NSIP casework and Local Plan examinations

Date of Issue: 09 May 2018

Review Date: 09 November 2018

Consideration of avoidance and reduction measures in Habitats Regulations Assessment: *People over Wind, Peter Sweetman v Coillte Teoranta*¹

Action

1. Inspectors should be aware that on 12 April 2018, the Court of Justice of the European Union (CJEU) [issued a judgment](#)¹ which ruled that Article 6(3) of the Habitats Directive² must be interpreted as meaning that mitigation measures (referred to in the judgment as measures which are intended to avoid or reduce effects) should be assessed within the framework of an appropriate assessment (AA)³ and that it is not permissible to take account of measures intended to avoid or reduce the harmful effects of the plan or project on a European site⁴ at the screening stage⁵.
2. Prior to this judgment, case law⁶ in England and Wales had established that avoidance or reduction measures that form part of a proposal could be taken into account when considering whether the plan or project would be likely to have a significant effect on a European site. If the risk of a significant effect could be excluded on the basis of objective information, there was no need to undertake an AA.
3. This Note provides guidance to Inspectors on the proposed approach to be taken where the proposed plan or project is subject to Habitats Regulation Assessment (HRA), and where the HRA relies on avoidance or reduction measures to conclude there would be no likely significant effects on European site(s). It should be noted that avoidance and

reduction measures can still be taken into account in the AA when the effects on site integrity are being assessed.

4. The CJEU reasoned that: *"Taking account of such measures at the screening stage would be liable to compromise the practical effect of the Habitats Directive in general, and the assessment stage in particular, as the latter stage would be deprived of its purpose and there would be a risk of circumvention of that stage, which constitutes, however, an essential safeguard provided for by the directive."* (paragraph 37 of the judgment).
5. The implication of the CJEU judgment is that **competent authorities cannot take account of any integrated or additional avoidance or reduction measures when considering at the HRA screening stage whether the plan or project is likely to have an adverse effect on a European Site.**
6. The screening stage must be undertaken on a precautionary basis without regard to any proposed integrated or additional avoidance or reduction measures. Where the likelihood of significant effects cannot be excluded, on the basis of objective information the competent authority must proceed to carry out an AA to establish whether the plan or project will affect the integrity of the European site, which can include at that stage consideration of the effectiveness of the proposed avoidance or reduction measures.

Implications for Local Plans

7. In Local Plan examinations, the Local Planning Authority (LPA) will be the competent authority throughout the local plan process. However, in determining soundness of the plan the examining Inspector will need to carefully consider whether the requirements of the [Habitats Regulations](#) have been met.
8. For local plan examinations which are ongoing or for which examining Inspectors have not yet issued their recommendations by 12 April 2018 (the date of the CJEU judgment), the HRA report for the plan should be reviewed:
 - If the HRA report⁷ identifies that the plan is likely to have significant effects on European site(s) and their designated features and an appropriate assessment of the plan has been carried out then **no further action is required.**
 - If the HRA report includes information that concludes that there are no pathways for the policies/allocations in the plan to cause significant effects on European site(s) and their designated features then **no further action is required.**
 - If the HRA report includes information that identifies likely significant effects on European site(s) and their designated features but concludes that they can be mitigated through avoidance or reduction measures (and does not go on to the AA stage) **then examining Inspectors should:**

- Ask the he LPA to confirm the extent to which they consider their HRA report is legally compliant in light of the judgment and ask them to re-visit the screening assessment in doing so.
 - If the revised screening assessment concludes that an AA is required this should be carried out.
 - Consider whether the AA necessitates any main modifications (MM) to the plan. The extent to which MM are likely will decrease where adequate avoidance and reduction measures were already identified and secured. If the avoidance and reduction measures are adequate to exclude adverse effects on European site(s) integrity, the approach required is primarily a procedural one ensuring that the AA has been undertaken where required.
9. Further consultation may be required on any revised screening assessment or AA. The Habitats Regulations require the competent authority (the LPA in this instance) to consult the appropriate statutory nature conservation body (SNCB) and have regard to any representations made by that body.
10. When reviewing the HRA report it is important to remember that more than one European site could be affected by the allocations/policies in a plan. The local authority may therefore have screened out some European sites (or designated features of a site) on the grounds that there was no pathway for effects, screened out others because of avoidance/reduction measures and finally taken only one or two European sites to full AA. It is only where likely significant effects have been screened out on the grounds of avoidance or reduction measures that further action needs to be taken.
11. It should be noted that there is no authoritative definition of what constitutes an integrated or additional avoidance or reduction measure and this should be considered on a case by case basis. If a measure is being introduced to avoid or reduce an effect on a European site then it can be viewed as mitigation. It may be helpful to consider whether a proposal could be considered integral to a plan or whether it is a measure to avoid harm. For instance, the HRA report could identify European sites whose designated features are vulnerable to disturbance caused by people visiting the site. If evidence presented in the HRA report and during the examination demonstrates that the housing allocation is too far from the European site to lead to increased visitor numbers then it could be concluded that there is no pathway for likely significant effects to occur. However if the HRA report determines that the housing allocation would be likely to increase visitor use of the European site and relies on measures which reduce visitor pressure (such as securing land to provide a buffer to the European site or ensuring footpaths and car parks are located away from the site) to avoid or reduce likely significant effects an AA will be required to assess whether the plan will affect the integrity of the European site.

Appropriate Assessment (AA) and Paragraph 119 of the NPPF

12. Inspectors should be aware that in accordance with paragraph 119 of the National Planning Policy Framework (NPPF) the presumption in favour of sustainable development (paragraph 14) does not apply where development requiring AA under the Birds or Habitats Directives is being considered, planned or determined.

Implications for Planning Casework/Enforcement/Non-planning Casework

13. For on-going casework, and for any decisions or recommendations to be issued after 12 April 2018 where there is a risk that the proposed development may have a significant effect on a European site (either individually or in combination with other plans or projects), Inspectors must review the position regarding HRA in light of this CJEU judgment.
14. There are three possible outcomes from any review for each European site covered by the HRA:
 - A conclusion that likely significant effects can be excluded because there are no pathways that could lead to such effects. **If so, no further action is required.**
 - A conclusion that likely significant effects cannot be excluded and therefore an AA is required to consider the implications of the proposed development for the conservation objectives⁸ of the European site. If so, and an AA has been undertaken, **no further action is required.**
 - A conclusion that likely significant effects have been screened out on the basis of avoidance or reduction measures. **Consider whether the conclusions of the screening are valid and if it is concluded that likely significant effects have been screened out on the basis of avoidance or reduction measures then either undertake an AA or ensure that the competent authority has the necessary evidence available to them to undertake an AA.**
15. If the Inspector is the competent authority for HRA or is making a recommendation to the Secretary of State as the competent authority, the Inspector must ensure that the relevant steps have been considered, before concluding / recommending whether an AA should be undertaken. Consideration should be undertaken on a precautionary basis. If the information necessary to inform the HRA is not present, then it must be requested of the appellant and / or relevant parties such as the SNCB.
16. Where the proposed development has the potential to affect a European site, the Inspector must determine on a case-by-case basis whether further action (such as referring back to the parties for comment) needs to be undertaken. Where an AA is undertaken the Inspector must ensure that they have consulted the relevant SNCB and had regard to any representations made by those bodies.

17. [As noted above](#), there is no definition of what constitutes avoidance and reduction measures and what could be viewed as an integral part of a works or development proposal. If a measure is being introduced to avoid or reduce an effect on a European site then it can be viewed as mitigation. This includes measures outlined in SPDs such as the provision of Sustainable Alternative Natural Greenspace and Strategic Access Management and Monitoring as in the Thames Basin Heaths approach. However it can also include 'embedded mitigation' such as a commitment within a development proposal to employing standard methods to prevent run-off from vehicles contaminating watercourses.

Contacts for further information

18. Please contact [Knowledge Centre](#) on x45885 if you have any general queries on this Note.
19. If you have a case involving a potentially affected European site and are unclear how to proceed, please seek advice from the [Environmental Services Team](#).
20. Non-salaried Inspectors should approach the [NSI Contract Management Unit](#) with any queries in the first instance, on which the NSI CMU will liaise with Knowledge Centre.

¹ [Case C-323/17](#)

² [Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora](#).

³ Assessment of whether the plan or project will affect the integrity of a European Site; a competent authority can only agree to a plan or project where it has been ascertained that that it will not adversely affect the integrity of the European site unless the plan or project falls into the Article 6(4) exception.

⁴ 'European Sites' are: candidate Special Areas of Conservation (cSACs), Special Areas of Conservation (SACs) and Sites of Community Importance (SCIs) designated pursuant to the [Habitats Directive](#); and Special Protection Areas (SPAs) designated pursuant to the [Birds Directive](#). The requirements of the Habitats and Birds Directives have been transposed into domestic legislation by [The Conservation of Habitats and Species Regulations 2017](#) ('the Habitats Regulations'). Paragraph 118 of the National Planning Policy Framework also requires proposed SPAs, possible SACs, listed or proposed Ramsar sites, and sites required to provide compensatory measures to be treated as European sites in England. In Wales, TAN5 requires proposed SPAs and listed Ramsar sites to be treated as European sites.


⁵ Consideration whether the proposal is likely to have a significant effect on the internationally important features of the site, alone or in combination with other plans or projects. If the risk or possibility of significant effects cannot be excluded, appropriate assessment must be undertaken.

⁶ [Hart DC v SSCLG, Luckmore Limited & Barratt Homes Limited \[2008\] EWHC 1204 \(Admin\)](#)

⁷ The HRA report is a collective term used to refer to the information which has been provided to support determination of the plan/project in accordance with the HRA Regulations. The HRA report will include the screening level information which is particularly relevant to the CJEU judgment.

⁸ Natural England has made the [Conservation Objectives for European \[terrestrial\] Sites](#) and [Conservation Advice for European Marine Sites](#) available electronically. Natural Resources Wales also make [Conservation Objectives for](#)

[European Marine Sites](#) available. Conservation Objectives for terrestrial sites can be [searched for through this page](#) of the NRW website. Ramsar sites do not have formal conservation objectives so NE or NRW should be contacted for advice on the appropriate objectives to be used.

PINS Note PDF downloaded from www.bakerconsultants.co.uk 

Brixham Peninsula Neighbourhood Plan

**Habitats Regulations Assessment (HRA) Review
and impact of the ECJ decision in People over
Wind v Coillte Teoranta C-323/17**

On behalf of Abacus Projects / Deeley Freed Estates

May 2018

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SUMMARY

This document reviews the Habitat Regulations Assessment of the Brixham Peninsula Neighbourhood Plan (AECOM, August 2017) in the light of the recent 'People over Wind' (PoW) Judgement of the Court of Justice of the European Union.

The judgement ruled that Article 6(3) of the Habitats Directive must be interpreted as meaning that mitigation measures (referred to in the judgment as measures which are intended to avoid or reduce effects) should be assessed within the framework of an appropriate assessment (AA) and that it is not permissible to take account of measures intended to avoid or reduce the harmful effects of the plan or project on a European site at the screening stage.

The logic behind the ruling is that a more detailed examination of the effectiveness of mitigation measures is needed (*n.b.* since the "test" at the appropriate assessment stage is more stringent, being "beyond reasonable scientific doubt" rather than the screening stage test "on the basis of objective information"), and by considering mitigation at the screening stage a higher level of scrutiny may otherwise be circumvented under an appropriate assessment.

As such, as well as a procedural change required to the HRA, the competent authority need to review if adequate evidence has been provided to pass the more stringent AA test. This review highlights a number of sites for which there is a lack of such evidence/certainty.

It is considered that this lack of certainty arises due to a lack or deficiency of survey effort (which often has just focused on the potential for onsite buildings to support horseshoe bats and not considered the impacts to potential foraging habitat on and adjacent to the allocated sites) and/or sufficient demonstration that the required mitigation measures would be achievable (e.g. can flyways be kept below 0.5 Lux?) for the following sites:

- St Mary's/Old Dairy;
- St. Kilda;
- Northcliff Hotel;
- Torbay Industrial Estate (Paint Factory);
- Brixham Police Station;
- Castor Road;
- Waterside Quarry; and
- Knapman's Yard.

1.0 INTRODUCTION

- 1.1. This document has been prepared by Nicholas Pearson Associates (NPA) on behalf of Abacus Projects/Deeley Freed Estates Ltd, the joint applicant for the proposed Inglewood development on land west of Brixham Road contained within the Brixham Peninsula Neighbourhood Plan (BPNP) area (ref. P/2017/1133). It reviews the Habitat Regulations Assessment (HRA) of the BPNP (AECOM, August 2017) in the light of the recent 'People over Wind' (PoW) Judgement of the Court of Justice of the European Union (CJEU).
- 1.2. The judgement ruled that Article 6(3) of the Habitats Directive must be interpreted as meaning that mitigation measures (referred to in the judgment as measures which are intended to avoid or reduce effects) should be assessed within the framework of an appropriate assessment (AA) and that it is not permissible to take account of measures intended to avoid or reduce the harmful effects of the plan or project on a European site at the screening stage.
- 1.3. The CJEU reasoned that: "*Taking account of such measures at the screening stage would be liable to compromise the practical effect of the Habitats Directive in general, and the assessment stage in particular, as the latter stage would be deprived of its purpose and there would be a risk of circumvention of that stage, which constitutes, however, an essential safeguard provided for by the directive.*" (paragraph 37 of the judgment).
- 1.4. The logic behind the ruling is that a more detailed examination of the effectiveness of mitigation measures is needed (*n.b.* since the "test" at the appropriate assessment stage is more stringent, being "beyond reasonable scientific doubt" rather than the screening stage test "on the basis of objective information"¹), and by considering mitigation at the screening stage a higher level of scrutiny may otherwise be circumvented under an appropriate assessment.
- 1.5. The AECOM HRA identifies likely significant effects on European Sites but concludes that they can/could be mitigated through avoidance or reduction measures without going on to the AA stage. The PoW judgement says this approach is now inappropriate.
- 1.6. As such, at plan stage, as well as a procedural change required to the HRA, the competent authority need to review if adequate evidence has been provided to pass the more stringent AA test. This review highlights a number of areas/ sites for which there is a lack of such evidence/certainty.

¹ <https://www.cieem.net/news/475/cieem-comment-on-recent-ecj-ruling>

- I.7. Such evidence should include the ability to demonstrate that mitigation measures in accordance with policy SDB1 of the Torbay Local Plan are deliverable.

Policy SDB1 Brixham Peninsula

Brixham is expected to provide sufficient land to enable delivery of at least 2,700 square metres of employment floorspace and 660 new homes over the Plan period.

Such development will only be acceptable if it can be accommodated without prejudicing the integrity of the Area of Outstanding Natural Beauty and Special Areas of Conservation, and provided that the interests of priority species, such as the Greater Horseshoe Bat and Cirl Buntlings, can be safeguarded. Greater Horseshoe Bat mitigation measures will be required as recommended by the HRA Site Appraisal Report of Torbay Local Plan Strategic Delivery Areas (Proposed Submission Plan) 2014.

Mitigation measures for the wider SDB1 strategic delivery area include:

- 1) protection and management of existing trees;
- 2) retention of former hedge lines, managed as part of the development;
- 3) no increase in lighting in bat flyways to greater than 0.5 lux; and
- 4) reduction of the impact of additional recreational pressure on the SAC.

- I.8. The above policy would appear to apply to all employment and housing sites. This would suggest that all of the sites identified in the BPNP need to incorporate this mitigation.
- I.9. Each of the allocated sites, therefore, needs to consider whether applying this mitigation would alter the employment area/housing number allocation or affect deliverability.
- I.10. Each of the allocated sites would need to consider whether there are any 'bat flyways' on or adjacent to the site where light levels would need to be limited to an increase less than 0.5 Lux.
- I.11. The Greena Ecological Reports often focuses solely on the potential of the on-site buildings to support roosting horseshoe bats, and not for habitat on or adjacent to site to provide 'flyways'. It does not appear that survey for potential commuting routes was undertaken at most of the sites. Activity surveys were, however, undertaken at Waterside Quarry.
- I.12. If the presence of 'flyways' is unknown, then on a precautionary basis the allocation should assume they are present and demonstrate that the proposal could come forward with the appropriate mitigation measures incorporated (including those stated in Policy SDB1).
- I.13. The site based review below has identified that the following site has a 'flyway'. It is not clear whether the implications of this have been taken into account in the site allocation:
- St Mary's/Old Dairy;

-
- I.14. The potential for flyways to be present on or adjacent to other sites needs to be established for all sites, although the following sites have been identified as requiring particular consideration:
- St. Kilda;
 - Northcliff Hotel;
 - Torbay Industrial Estate (Paint Factory);
 - Brixham Police Station;
 - Castor Road;
 - Waterside Quarry; and
 - Knapman's Yard.
- I.15. Given the uncertainty of the presence of a flyway in the above sites, it is considered that either further activity surveys should be undertaken or they should be assumed to be present and the proposals demonstrate that they could come forward with the appropriate mitigation measures incorporated. Such surveys should be undertaken in accordance with best practice guidance.
- I.16. Given the importance of understanding the presence of Greater Horseshoe Bat (GHS) roosts on or in close proximity to Site, it is considered that in accordance with best practice that records should be requested from the local biological record centre to inform the AA, rather than relying on the a search of the National Biodiversity Network database (which will hold less information about known GHS roosts) as appears to be the case in the HRA.
- I.17. The HRA notes the potential presence of GHS roosts on or adjacent to Site at Northcliffe, Oxen Cove and Freshwater, Waterside Quarry and Knapman's Yard. Given the importance of identifying roosts on or adjacent to site it is considered further survey should be undertaken at these sites (rather than just noting the potential for them) prior to them being allocated in the neighbourhood plan.

Torbay Local Plan HRA

- I.18. The Local Plan HRA states that:

5.2.1 Impacts on the integrity of South Hams SAC are primarily related to loss and disturbance of foraging and commuting habitats used by the greater horseshoe bat population. The detailed design and layout of specific development proposed in the Local Pan is not yet known because much of this detail will emerge through the three Neighbourhood Plans for Torquay, Paignton and Brixham. However, it is clear that certain development could affect sustenance zones and commuting routes of greater horseshoe bats across the SAC. Reduction in the sustenance zone and removal of linear

features used by commuting bats, through development associated with the Local Plan and other plans, could have a significant negative impact on the bat population.

1.19. It further states that:

9.1.6 The Local Plan should make it clear that its policies and proposals do not provide support to any proposal which would have an adverse effect on the integrity of any European site. It is therefore recommended that the Local Plan HRA outcomes feed into Neighbourhood Plans.

1.20. It is clear from the Local Plan HRA that further detail regarding allocated sites was supposed to emerge as part of the Neighbourhood Plan process. This additional detail does not generally appear to have, however, emerged.

1.21. In a number of cases, the justification for the allocation (and conclusion of no significant adverse effect on the SAC) relies on the application of Local Plan policy, without providing justification that the policy can be met.

2.0 SITE BASED REVIEWS

2.1 The following sections contain a review of each of the sites' currently discussed within the HRA, with the exception of Brixham Car Park and the Former Jewson sites for which it is agreed there are unlikely to be any implications for GHS.

2.2 St Mary's/Old Dairy

Context

2.2.1 The Site is in an identified strategic flyway (South Hams SAC's – Greater Horseshoe Bat Consultation Zone Map) and surveys undertaken by Kestrel ecology (as referenced in Table 3 of HRA) recorded GHS commuting through the site. The HRA recognises that subject to detailed design this allocation has the potential to affect foraging or commuting habitat for GHS.

2.2.2 Page 30 of the HRA suggests that activity surveys from April to October inclusive, in accordance with the Natural England guidance for South Hams SAC *might* have been undertaken in 2015. It also states that *“Kestrel Wildlife also recommends that all existing mature trees and hedge lines are retained and protected to provide commuting habitat features, and this is the expectation of the Parish Council; indeed the site presents opportunities for these features to be strengthened. There should be no light spill greater than 0.5 lux outside the boundaries of any new development, and effective mitigation measures would have to be provided to ensure no additional light spill, no loss of boundary features and retention of as much of the eastern part of the site as is necessary.”*

Comment

2.2.3 On the basis of the information provided it is unclear if the allocation for 25 houses could be provided whilst also incorporating the mitigation measures required (e.g. can the adjacent strategic flyways be kept below 0.5 Lux?). As such there appears to be a lack of evidence to pass the more stringent AA test now required by the PoW judgement.

2.3 St. Kilda's

Context

2.3.1 Whilst section 5.2 of the Addendum Ecological Survey Report (Greena July 2017) states:

“St. Kilda's site was assessed as low bat roosting potential; negligible bat roosting potential for bats of the horseshoe family. The light levels on site appear to be high, there is an abundance of overlooking residential buildings with external lighting and good street light provision. This creates no obvious dark corridors to be used for bat commuting in proximity of the existing building.”

2.3.2 Section 5.2 also states:

“The Higher Brixham Watercourse runs in the northern part of the site. The stream may provide a more sheltered and darker potential commuting corridor for bats and further surveys to determine its usage by bats will be required at the planning stage.”

2.3.3 The HRA appears not take account of the Higher Brixham Watercourse / potential flyway.

Comment

2.3.4 It is considered that the AA, now required due to the PoW judgement, needs to take account of the potential flyway and should clearly demonstrate how it would not be affected e.g. kept below 0.5 Lux or undertake activity surveys in accordance with best practice guidance to ascertain its usage and appropriate mitigation.

2.4 Northcliff Hotel

Context

- 2.4.1 Table 3 of the HRA has judged this site to be unsuitable for bats. However the Ecological Survey Report (Greena November 2016) notes that the Kestrel Habitat Regulation Assessment in November 2014 states this allocation has the potential to impact the South Hams SAC, as the site was in close proximity to a confirmed flight path ('strategic flyway' and 'sustenance zone') of Greater Horseshoe bats roosting within the SAC.

Comment

- 2.4.2 The AECOM HRA does not appear to recognise the habitat context of the site (which was recognised by the Kestrel HRA) and the potential affect it could have on it. The site is also adjacent to suitable flyways and foraging habitat for GHS e.g. allotments and the Battery Ground OSWI.
- 2.4.3 In 2015 the Oxen Cove and Freshwater site was excluded from the housing allocation in part for being within the GHB sustenance zone and adjacent to the Battery Ground OSWI.
- 2.4.4 Without consideration of the adjacent habitat or clear presentation/assessment of the mitigation measures that would be incorporated, it is unclear at this stage why the allocation would not be detrimental to GHS/the Souths Hams SAC. As such there appears to be a lack of evidence to pass the more stringent AA test now required by the PoW judgement.

2.5 Torbay Trading Estate (Paint Factory)

Context

- 2.5.1 Table 3 of the HRA has judged this site to be unsuitable for bats. However the Greena Ecology survey method only focused on the suitability of structures. The SEA (August 2017) in table 3.15 recognises that the site contains a large area of woodland, a Biodiversity Action Plan (BAP) Priority Habitat.

Comment

- 2.5.2 The Ecology Survey Report and the HRA do not consider the habitat on/adjacent to site. Without survey information to determine if the woodland is a GHS flyway and/or further information on how the allocation can come forward with appropriate mitigation measures e.g. woodland edge kept below 0.5 Lux, it is unclear at this stage why the allocation would not be detrimental to GHS/the Souths Hams SAC. As such there appears to be a lack of evidence to pass the more stringent AA test now required by the PoW judgement.

2.6 Oxen Cove and Freshwater

Context

- 2.6.1 On 25 November 2015 these sites were rejected from being allocated for housing in part because Oxen Cove car park was within the GHB sustenance zone and adjacent to the Battery Ground OSWI [<http://www.brixhamtowncouncil.gov.uk/data/uploads/633.pdf>].
- 2.6.2 Table 2 of the HRA recognises that the site *“Lies within the sustenance zone for greater horseshoe bats. Consists of car parks. The surrounding habitat of steep rock-face covered in ruderal vegetation provides foraging opportunities as well as potential shelter and night roost for low numbers of bats. Further survey works recommended to identify how bats are utilising adjacent habitats.”*
- 2.6.3 The constraints section (4) of the Addendum Ecological Survey Report (Greena July 2017) states *“the surrounding habitat, namely the steep rock-face covered in vegetation, forms potentially important point for bat navigation or occasional night roosting. No further surveys were conducted on this site.”*
- 2.6.4 Natural England also recommended *“that a series of bat surveys are undertaken at sites with the potential to effect sustenance areas or strategic flyways to determine their use by greater horseshoe bats, and the potential effects a development may have”*, with the HRA stating that *“Although the policy precedent set by the Torbay Local Plan defers these detailed studies to individual planning applications, surveys were undertaken by Greena Ecological Consultancy in 2016 and 2017”*.
- 2.6.5 Table 3 of the HRA states that:
“Further survey works have been recommended to assess the surrounding habitat for usage by bats but given the nature of the site delivery of development would be possible without compromising these boundary features.”

Comment

- 2.6.6 Given that these sites were rejected from being allocated for housing in part because Oxen Cove car park was within the sustenance zone and adjacent to the Battery Ground OSWI, it is not clear why this allocation is still being considered.

2.6.7 In the absence of any activity surveys to determine the presence of a flyway on/adjacent to site or emergence surveys to determine the presence of GHS roots within the adjacent cliff face it is considered there is currently insufficient information to understand why the allocation would not be detrimental to GHS/the Souths Hams SAC e.g. if the cliff did support a flyway and/or GHS roots how would they be kept below 0.5 Lux with connectivity to the roost(s) unaffected? As such there appears to be a lack of evidence to pass the more stringent AA test now required by the PoW judgement.

2.7 Brixham Police Station

Context

2.7.1 Table 3 of the HRA states the site is unsuitable for bats, with the Ecological Survey Report (Greena November 2016) stating that *“The Police Station due to its modern construction and location in a highly illuminated urban area is both, unsuitable and with no potential roosting provision for Horseshoe bats.”*

Comment

2.7.2 Whilst the building may be unsuitable for horseshoe bats, the vegetation on and adjacent to site appears suitable for foraging/commuting GHS especially as it appears to link to the SAC which is only approximately 500m away. As such it is considered insufficient evidence is currently presented, either in the form of survey information or mitigation principles, to determine why the allocation would not be detrimental to GHS/the Souths Hams SAC. There therefore appears to be a lack of evidence to pass the more stringent AA test now required by the PoW judgement.

2.8 Castor Road

Context

- 2.8.1 Page 30 of the HRA states that “*Appropriate design and mitigation should be put in place, including limiting light spill to no greater than 0.5 lux outside the boundaries of the new development.*”

Comment

- 2.8.2 A review of aerial photography shows dense vegetation is present at the southern boundary of the development, which is linked to the SAC roost (approximately 1 km away) via a network of green infrastructure. Based on the evidence presented (*i.e.* no activity survey information or parameter plans) it is unclear how the allocation would not light the boundary at the southern extent of the development which could act a GHS flyway/foraging habitat. As such there appears to be a lack of evidence to pass the more stringent AA test now required by the PoW judgement.

2.9 Waterside Quarry

Context

- 2.9.1 Table 3 of the HRA states:
“Habitat subject to week-long monitoring in 2015 where no greater horseshoe bats were recorded. It is recognised that this does not meet the survey standards set out for South Hams SAC for a project application, but is included purely for information. The site has since been cleared (according to the Greena Ecological Consultancy report from November 2016) and is thus no longer suitable for greater horseshoe bats. The site was however resurveyed over a 3 month period from April – June 2017 and no horseshoe bats were recorded on site.”
- 2.9.2 Section 5.2 of the Addendum Ecological Survey Report (Greena July 2017) states: *“Further surveys will continue between July and September inclusive in order to provide the full picture of bat activity on site throughout the bat active season.”*

2.9.3 Section 3.2.2 of the Addendum Ecological Survey Report (Greena July 2017) states that static bat detectors were deployed in 2017 on “suitable features for bat foraging activity and/or commuting”.

2.9.4 Section 4 of the Jacobs Review of Waterside Quarry (19th December 2017) states:
“The survey work completed by Greena Ecology at the Waterside Quarry site was not completed in accordance with the guidance set out by Natural England (Natural England 2010). The 2017 report by Greena Ecology included reference to the GHB records on the adjacent site (presumed to be the Green Ecology work), therefore it is considered that this information was available at the time the HRA was completed by AECOM.”

Comment

2.9.5 It is unclear how the site can be considered unsuitable for GHS if bat detectors were deployed on “suitable features for bat foraging activity and/or commuting”.

2.9.6 It is unclear why the site was cleared and what habitat is now regenerating.

2.9.7 The activity surveys assessed in the HRA appear to be incomplete and consist of deployment of automated detectors on foraging features. This method would not provide evidence of any continued presence of roosts or flyways to or from it across the proposed allocation i.e. they fall well below the standards required by best practice.

2.9.8 Given the records of a GHS roost adjacent to site and the lack survey and mitigation measures currently presented it is unclear how any proposed development would not affect flyways to the roost and/or foraging habitat. As such there appears to be a lack of evidence to pass the more stringent AA test now required by the PoW judgement.

2.10 Knapman's Yard

Context

2.10.1 Table 3 of the HRA states:

“Structures considered suitable for roosting; however no evidence of bats was found following a detailed internal and external inspection in June 2016. There are mature areas of trees and vegetation around the site that would need to be preserved.”

Comment

2.10.2 A one off daytime internal inspection falls well below the survey effort required to determine the absence of roosts. It is considered that further survey work in accordance with best practice should be undertaken to determine the presence of any roost(s) to be able to allow an AA to determine if the allocation would or wouldn't be detrimental to GHS/the South Hams SAC.

2.10.3 In addition it is currently unclear in the absence of activity surveys if the mature areas of trees and vegetation around the site are not flyways and if so how they would be maintained (e.g. kept below 0.5 Lux). As such there appears to be a lack of evidence to pass the more stringent AA test now required by the PoW judgement.