

Appendix A: Approach to Habitats Regulation Assessment and Marine Conservation Zone Risk Assessment Process

1. Habitats Regulation Assessment (HRA)

Stage 1 - Screening

The screening stage examines the likely effects of a project either alone, or in combination with other projects and plans on a Natura 2000 site, and seeks to answer the question “*can it be concluded that no likely significant effect will occur?*”

To determine if the activities in question are likely to have any significant effects on the designated site the following issues have been considered:

- Could the proposals affect the qualifying interest and are they sensitive/vulnerable to the effect;
- The probability of the effect happening;
- The likely consequences for the site’s Conservation Objectives if the effect occurred; and
- The magnitude, duration and reversibility of the effect.

The screening stage has therefore sought to conclude one of the following three outcomes:

1. No likely significant effect;
2. A likely significant effect; and
3. It cannot be concluded that there will be no likely significant effect.

Where the assessment concludes outcomes 2 or 3, then the need for an AA is triggered.

‘Likely significant effect’ in this context is any effect that may reasonably be predicted as a consequence of the project that may significantly affect the conservation or management objectives of the features for which a site was designated, but excluding trivial or inconsequential effects (English Nature, 1999).

It is also important to note that screening for likely significant effects has to be compliant with the recent Court of Justice of the European Union (CJEU) caselaw ‘*People Over Wind & Sweetman* (Case C-323/17)’. The CJEU’s ruling in *People Over Wind* states that it is not appropriate at the screening stage of HRA to take account of measures to avoid or reduce harmful effects on a European site.

Therefore, screening for likely significant effects has to be based solely upon the presence / absence of a spatial interaction between pressure envelopes / footprints (from activity / sub-activities associated with plan or project) and the boundary of any designated site. It cannot consider measures to mitigate any effects. Mitigation measures can now only be considered during the Stage 2 AA.

In effect the Stage 1 Screening process is an exercise that identifies a list of European sites or European marine sites that may be affected by the proposed plan or project and assesses if any likely significant effects can be ruled out (for each site). Where no likely significant effects can be determined then those European marine sites are screened out of any further requirement for assessment.

Where likely significant effects are predicted, or where no likely significant effects cannot be ruled out, then those sites are carried forward for detailed assessment as part of the Stage 2 AA process.

Stage 2 - Appropriate Assessment (AA)

An AA is an assessment carried out under Article 6(3) of the Habitats Directive or under Regulation 61 or Regulation 63 of the 2010 Habitats Regulations. The aim is to assess whether the proposals will have any adverse effects on the integrity of the European site, or European marine site. Site integrity is defined as:

“...the coherence of its structure and function across its whole area that enables it to sustain the habitat, complex of habitats and/or the levels of populations of the species for which it was classified” – (EC, 2000).

The aim of an AA is to answer the question *“...can it be demonstrated that the proposals will not adversely affect the integrity of the site?”* In accordance with the Waddenzee judgment (ECJ Case 127/02), the European Court of Justice ruled that a plan or project may be authorised only if a competent authority has made certain that the plan or project will not adversely affect the integrity of the site. *“That is the case where no reasonable scientific doubt remains as to the absence of such effects”*. In terms of what is reasonable, guidance from Scottish Natural Heritage (SNH, 2001) states *“to identify the potential risks, so far as they may be reasonably foreseeable in the light of such information as can be reasonably obtained.”*

Within the UK Habitats Regulations or the EU Directive, there is no legal definition of the term ‘integrity’. ‘Managing Natura 2000’ (EC, 2000) delivers a definition of the term ‘integrity of the site’:

“...the coherence of the site’s ecological structure and function, across its whole area, or the habitats, complex of habitats and/or populations of species for which the site is or will be classified.”

The guidance document Managing Natura 2000 (EC, 2000) emphasises the conservation objectives of a site as the basis for defining adverse effect:

“The integrity of the site involves its ecological functions. The decision as to whether it is adversely affected should focus on and be limited to the site’s conservation objectives.”

The decision on whether the integrity of the site could be adversely affected by the proposals should focus on, and be limited to, the site’s Conservation Objectives.

The conservation objectives set out what needs to be achieved for the European marine site to make the appropriate contribution to the conservation status of the features for which the site is designated, and thus deliver the aims of the Habitats and Birds Directives i.e. favourable conservation status for the Natura 2000 network as described under Article 17 of the Habitats Directive.

The assessment also takes into account any avoidance or mitigation measures which will be implemented to avoid or reduce the level of impact from the activity. The competent authority may also consider the use of further / additional conditions or restrictions to help avoid adverse effects on site integrity.

If the AA concludes that the proposals will not adversely affect the integrity of the European marine site, then permission may be granted. However, if the AA concludes that there will be an adverse effect on the integrity of the European marine site, or that there is uncertainty and a precautionary approach is taken, then consent can only be granted if there are no alternative solutions, and there are imperative reasons of overriding public interest (IROPI) and compensatory measures have been secured.

Stage 3 – Assessment of Alternative Solutions

All feasible alternatives have to be analysed to ensure that there are none which “...better respect the integrity of the site in question” and its contribution to the overall coherence of the Natura 2000 network (EC, 2007). Alternatives could include the location of the site, its scale and design, and the way in which it is constructed and operated. The do-nothing option also has to be considered.

The comparisons of alternatives should not allow other assessment criteria (e.g. economics) to overrule ecological criteria (EC, 2007). However, the same guidance also refers to the opinion for the case C-239/04, where the opinion of the Advocate General was that:

“...the choice does not inevitably have to be determined by which alternative least adversely affects the site concerned. Instead, the choice requires a balance to be struck between the adverse effect on the integrity of the SPA and the relevant reasons of overriding public interest.”

Stage 4 – Imperative Reasons of Overriding Public Interest (IROPI) and Compensation Measures

Where a development has an adverse effect on the integrity of a European marine site, and there are no alternative solutions, consent can only be granted in one of the following ways as described in Regulation 62 of the 2010 Habitats Regulations (as amended):

- If the site hosts a priority habitat or species which is affected, proposals can only be consented if:
 - The site does not host a priority habitat or species then IROPI must be demonstrated, and the reasons can include those of a social or economic nature;
 - Any other reasons which are considered by the Competent Authority to be IROPI taking account of the opinion of the EC; and / or
 - There are implications for human health, public safety or beneficial consequences of primary importance to the environment.

If the importance of the proposed development is deemed to outweigh the effects which will result to the European marine site, and there are no alternatives, compensatory measures must be secured before consent is granted. Compensatory measures are independent of the project and intended to offset the adverse effects of a project. The compensation measures must ensure that

the overall coherence of the Natura 2000 network is maintained. Article 6(3) describes Natura 2000 as:

“a coherent European ecological network of special areas of conservation that shall enable the natural habitat types and species’ habitats concerned to be maintained, or where appropriate, restored at a favourable conservation status in their natural range” (EC, 2007).

To be acceptable compensatory measures should:

- Take account of the comparable proportions of habitats and species which are adversely affected;
- Be within the same bio-geographical range within which the European site is located;
- Provide functions which are comparable to those which justified the selection of the of the original site; and
- Have clearly defined implementation and management objectives so the measures can achieve the aim of maintaining the overall coherence of the network.

2. Marine Conservation Zone Risk Assessment Process

Under Section 126 of the MCAA (2009), duties are placed on the MMO in relation to marine licence decision making and the consideration of MCZs.

The Royal Sovereign Lighthouse pre-dates the establishment of MCZs and the MCAA (2009), therefore the marine licence would not have taken into account these designations.

As part of the current marine licence decision-making process the MMO must advise on developments where:

“...the act is capable of affecting (other than insignificantly)—

- (i) the protected features of an MCZ;*
- (ii) any ecological or geomorphological process on which the conservation of any protected feature of an MCZ is (wholly or in part) dependent.”*

The MMO will use a risk-based approach when determining the ‘nearness’ of an activity with respect to MCZs (MMO, 2013a). This will include applying an appropriate buffer zone to the MCZ features under consideration as well as a consideration of risks which lie in activities further removed from features.

The MMO has introduced a new MCZ risk assessment process in order to consider the impacts on MCZs, as required under its marine licensing function. This process has three sequential stages, detailed below.

Screening

1. It is determined that s.126 of MCAA (2009) applies if:
 - a. the licensable activity is taking place within or near an area being put forward or already designated as an MCZ; and

- b. the activity is capable of affecting (other than insignificantly) either (i) the protected features of an MCZ; or (ii) any ecological or geomorphological process on which the conservation of any protected feature of an MCZ is (wholly or in part) dependant;
2. Where it has been determined through screening that s.126 should apply to the licence, application, the MMO will assess the application further to determine which subsections of s.126 should apply to the application. This will be done in two stages; Stage 1 assessment and Stage 2 assessment.

Stage 1 Assessment

The Stage 1 assessment considers the extent of the potential impact of the plan or project on the MCZ in more detail. The Stage 1 assessment looks at whether the plan or project could potentially affect the conservation objectives for the site, that is, impact the site so that the features are no longer in favourable condition, or prevent the features from recovering to a favourable condition. If mitigation to reduce identified impacts cannot be secured, and there are no other alternative locations, then the project will proceed to be considered under Stage 2 of the assessment process.

Stage 2 Assessment

The Stage 2 assessment considers the socio-economic impact of the plan or project together with the risk of environmental damage. There are two parts to the Stage 2 assessment process:

- Does the public benefit in proceeding with the project clearly outweigh the risk of damage to the environment that will be created by proceeding with it? If so,
- Can the applicant satisfy that they can secure, or undertake arrangements to secure, measures of equivalent environmental benefit for the damage the project will have on the MCZ features?