

Technical note:

London Borough of Tower Hamlets: Examination in Public (Habitats Regulations Assessment)

Matter 1: General Matters and Legal requirements

Issue 1 – Is the Local Plan legally compliant?

1. Background and Purpose of this Note

- 1.1.1 The London Borough of Tower Hamlets (LBTH) is in the final stages of preparing a new Local Plan (the LBTH Plan) to guide development in the borough over the next fifteen years.
- 1.1.2 Wood Environment & Infrastructure UK Ltd (Wood), formerly Amec Foster Wheeler Environment & Infrastructure Ltd, prepared the Habitats Regulations Assessment (HRA) for the Local Plan as part of an Integrated Impact Assessment (SD6).
- 1.1.3 The LBTH Plan is now subject to Examination in Public (EiP). The Inspector has raised a number of main matters for further discussion at the EiP.
- 1.1.4 As part of the main matters stage of the examination, the inspector asked the following question: “*In light of the Judgement of the Court of Justice for the European Union of 12 April 2018 (People Over Wind and Sweetman v Coillte Teoranta Case C-C323/17: Consideration of avoidance and reduction measures in Habitat Regulations Assessment). Does the Council consider the HRA to be legally compliant, and if not, what further work would be required in light of the judgement?*”
- 1.1.5 This note has been prepared by Wood in response to a request from the London Borough of Tower Hamlets (LBTH) to consider and respond to the question.
- 1.1.6 The remainder of this note is structured as follows:
- Section 2 of this note considers the findings of the ‘People over Wind’ Case and the implications for the Local Plan and accompanying Habitats Regulations Assessment (HRA);
 - Section 3 of this note reviews the findings of the HRA (hereafter referred to as the HRA Report) and whether any avoidance or mitigation measures were taken into account when undertaking the screening assessment. It also considers whether any further changes are required to plan policies in light of the ruling;
 - Section 4 considers a formal response from Natural England on whether or not the HRA has been carried out in accordance with the judgement (the letter is included at **Appendix A**);
 - Section 5 provides conclusions.

2. The 'People over Wind; Case

- 2.1.1 The judgement in *The People over Wind and Sweetman v Coillte Teoranta* case 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.
- 2.1.2 The Planning Inspectorate has produced a note¹ on the implications of the ruling. The PINS note highlights that the implication of the judgement in relation to Local Plans is that competent authorities cannot take account of any integrated or additional avoidance or reduction measures when considering at the HRA screening stage whether or not the plan or project is likely to have an adverse effect on a European Site.
- 2.1.3 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 Appropriate Assessment (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.
- 2.1.4 The PINS note advises that, for local plan examinations which are ongoing or for which examining Inspectors have not yet issued their recommendations by 12th April 2018 (the date of the judgment), the HRA report for the plan should be reviewed:
- if the HRA report 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 LPA to confirm the extent to which they consider their HRA report is legally compliant in light of the judgement 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 to the plan. The extent to which Main Modifications are likely will decrease where adequate avoidance and reduction measures were already identified and secured. If the avoidance and reduction measures 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.

¹ Planning Inspectorate (2018), PINS Note 05/2018 Consideration of avoidance and reduction measures in Habitats Regulations Assessment: *People over Wind, Peter Sweetman v Coillte Teoranta*

- 2.1.5 As the EIP of the LBTH Plan is on-going the PINS note has relevance and has informed the content of this Technical Note.

3. Findings of the HRA for the Tower Hamlets Local Plan

- 3.1.1 Section 3 of the HRA Report sets out the methodology for the work and the scope of the assessment. Section 4 of the HRA Report sets out relevant issues and their applicability to identified European sites.
- 3.1.2 The HRA for the Local Plan considered the potential for significant effects on a number of European sites and the rationale for these. Relevant European sites and issues identified are summarised in **Table 2.1** below.

Table 2.1 Summary of Issues and European Sites

Issue	Sites
Public Access / Urbanisation Pressures	Epping Forest SAC, Lee Valley SPA / Ramsar
Atmospheric Pollution	Epping Forest SAC, Wimbledon Common SAC, Lee Valley Spa/Ramsar
Water Resources and Flow Regulation	Lea Valley SPA and Lea Valley Ramsar
Water quality	Thames Estuary and Marshes SPA and Thames Estuary and Marshes Ramsar.
Flooding and Water Level Management	No specific sites identified
Effects on Critical Habitats Outside of European Sites	Epping Forest SAC, Richmond Park SAC and Wimbledon Common SAC), and Lee Valley SPA / Lee Valley Ramsar

- 3.1.3 Conclusions from the HRA under each of these issues is summarised below. The findings of the HRA in relation to in-combination effects are then reviewed.

Public Access and Urbanisation Pressures

- 3.1.4 The HRA Report (page 20) notes that Natural England adopts a '75% rule' to determine significance in relation to recreational access, i.e. recreational buffers are based on the distance within which 75% of the visits to the site originate (taking account of the frequency of visits as well as the distance travelled).
- 3.1.5 Public access and disturbance at **Epping Forest SAC** is discussed in Table 4.4 of the HRA. The closest point of Epping Forest SAC is around 4.2km from the LBTH area, although the majority of the site is over 10km away (Table 3.2 of the HRA Report refers). The HRA concludes that, whilst residents from LBTH will periodically use the Forest it would appear unlikely that the distance within which 75% of visits originate would be over 4km, particularly in the southern areas of the site where local populations are greater. On this basis, it is considered that the LBTH plan will not have a significant effect on Epping Forest SAC due to increases in visitor pressure. The HRA did indicate that it would be beneficial for the plan to include policies that might encourage informal recreation to take place locally (e.g. maximising opportunities for traffic-free paths and routes), although this was not considered a necessary 'mitigation' or 'avoidance measure' to prevent significant effects occurring, see Section 3.2 below.

- 3.1.6 Public access and disturbance at the **Lee Valley SPA/Ramsar** site is discussed in Table 4.5 of the HRA. The Lee Valley SPA is approximately 3.5km from the LBTH area at its closest point (Walthamstow Reservoirs) although the majority of the site is over 15km from the LBTH boundary (Table 3.2 of the HRA Report refers). The HRA notes that no relevant visitor survey data is available, but assumes it is likely that survey results would demonstrate similar patterns (most visitors living in close proximity to the site) although the nature of the recreational opportunities at the reservoirs (bird-watching, angling) is likely to increase the distance over which users will travel. The HRA concluded that the LBTH plan is likely to have little effect on visitor numbers to the SPA as a whole (or even to the closest units) and as visitor pressure is not currently identified as a significant pressure at the site in the Site Improvement Plan² it is considered that the LBTH plan is unlikely to have significant effects on this site, alone or in combination. The HRA did indicate that it would be beneficial for the plan to include policies that might encourage informal recreation to take place locally (e.g. maximising opportunities for traffic-free paths and routes), although this was not considered necessary 'mitigation' or 'avoidance measure' to prevent significant effects occurring, see Section 3.2 below. The HRA also noted that Walthamstow Reservoirs (the nearest units of the SPA to the LBTH plan area) are also being promoted for recreational use³ (Table 4.5 of the HRA refers).
- 3.1.7 The HRA did not therefore identify the potential for significant effects in relation to public access and urban pressures, nor did it rely on avoidance / mitigation measures being applied in coming to this conclusion.

Atmospheric Pollution

- 3.1.8 In relation to **Epping Forest SAC**, the HRA concludes at Table 4.4 that the LBTH plan does not include proposals for developments that are likely to have significant point-source emissions, and that traffic on roads within LBTH is not likely to directly affect the woodland (as, guidance suggests that "*beyond 200m, the contribution of vehicle emissions from the roadside to local pollution levels is not significant*"). Policy 7.14 of the London Plan requires development to be air quality neutral; this requirement is replicated by Policy D.ES2 of the Local Plan.
- 3.1.9 The HRA concludes at page 28 that as **Wimbledon Common SAC** is around 10km from the LBTH and, given the distance and location of the site (to the south-west of LBTH and so behind the prevailing wind), it is considered that the LBTH plan will not contribute to atmospheric pollution in relation to Wimbledon Common SAC, and so there will be no effects (and hence no 'in combination' effects) on this site.
- 3.1.10 In relation to the **Lee Valley SPA/Ramsar** - Table 4.5 – of the HRA concludes that the LBTH plan does not include proposals for developments that are likely to have significant point-source emissions, and that traffic on roads within LBTH is not likely directly affect the site (as noted, guidance suggests that "*beyond 200m, the contribution of vehicle emissions from the roadside to local pollution levels is not significant*"). As air pollution is not currently identified as a significant pressure at the site it is considered that the LBTH plan is unlikely to have significant effects on this site, alone or in combination. Policy 7.14 of the London Plan requires development to be air quality neutral; this requirement is replicated by Policy D.ES2 of the Local Plan.
- 3.1.11 The HRA did not therefore identify the potential for significant effects in relation to air quality, nor did it rely on avoidance / mitigation measures being applied in coming to this conclusion.

² Natural England (2014) Site Improvement Plan Lee Valley SPA

³ Walthamstow wetlands <https://walthamstowwetlands.com/about-us>

Water Resources and Flow Regulation

- 3.1.12 The HRA concludes (page 25) that the Thames Water - Water Resources Management Plan (WRMP) provides the best estimate of future water resource demand, and therefore it is reasonable to assume that the growth predicted within the LBTH plan can be accommodated without significant effects on any European sites due to public water supply abstractions. Furthermore, since the WRMP explicitly accounts for the growth predicted across London, 'in combination' effects between the Local Plan and the WRMP are unlikely to occur as a result of public water supply abstractions.
- 3.1.13 The HRA did not therefore identify the potential for significant effects in relation to water resources and flow regulation, nor did it rely on avoidance / mitigation measures being applied in coming to this conclusion.

Flooding and Water Level Management

- 3.1.14 The HRA concludes (page 26) that the distance of LBTH from any European sites, and the absence of hydrological linkages ensures that there are not likely to be any effects on any sites via this pathway.
- 3.1.15 The HRA did not therefore identify the potential for significant effects in relation to flooding and water level management, nor did it rely on avoidance / mitigation measures being applied in coming to this conclusion.

Effects on Critical Habitats Outside of European Sites

- 3.1.16 The provisions of the Habitats Regulations ensure that 'direct' (encroachment) effects on European sites as a result of land use change (i.e. the partial or complete destruction of a European site) are extremely unlikely under normal circumstances, and this will not occur as a result of the Draft Local Plan. However, many European interest features (particularly animal species) may use or be reliant on non-designated habitats outside of a European site during their life-cycle. Developments some way from a European site can therefore have an effect if its interest features are reliant on the habitats being affected by the development.
- 3.1.17 With regard to the European sites within the study area, this is only potentially an issue for three species: stag beetle *Lucanus cervus* (Epping Forest SAC, Richmond Park SAC and Wimbledon Common SAC), and overwintering gadwall and shoveler (Lee Valley SPA / Lee Valley Ramsar).
- 3.1.18 In relation to **Epping Forest SAC**, the HRA concludes (Table 4.4) that effects on the stag beetle feature are only possible if there are potentially significant habitat areas within LBTH that are used by the species (e.g. as a 'stepping stone' between sites in London) and are affected by development. As Tower Hamlets is one of the most urban London Boroughs it is extremely unlikely that there are such areas or habitat resources, and there are no nationally or locally designated sites within the Borough that have stag beetle as an interest feature or which appear to support the features that would typically be required for this species (substantial dead wood). The plan will have no effects in this regard.
- 3.1.19 The HRA concludes (Table 4.5) that overwintering gadwell and shoveler are unlikely to make significant use of non-designated habitats within the LBTH area and significant effects in relation to the **Lee Valley SPA / Lee Valley Ramsar** would not be expected (gadwall and shoveler are duck species that do not make substantial use of terrestrial habitats over the winter period, so will be largely confined to the waterbodies of the SPA).
- 3.1.20 The HRA concludes that **Richmond Park SAC** and **Wimbledon Common SAC** are too remote from the LBTH plan area to give rise to such effects (page 28).

- 3.1.21 The HRA did not therefore identify the potential for significant effects in relation to mobile species, nor did it rely on avoidance / mitigation measures being applied in coming to this conclusion.

In-combination Effects

- 3.1.22 Annex A of the HRA summarises the results of a broad assessment of potential 'in combination' effects of the LBTH plan with other plans and programmes and the results are discussed in Section 4.5 of the HRA.
- 3.1.23 Based on this, and the baseline and assessment information provided, Section 4.5 concludes that the main risk of 'in combination' effects is associated with air quality impacts (N-deposition) on Epping Forest SAC and (to a lesser extent) the Lea Valley SPA and Lea Valley Ramsar sites. Other 'in combination' quantum of development effects (e.g. on water availability or sewerage capacity) are addressed by existing regulatory regimes that are subject to HRA, and the policies of the LBTH plan include measures that will assist in this regard.
- 3.1.24 The HRA notes that current case-practice suggests that HRAs of local plans "*can only be concerned with locally emitted and short range locally acting pollutants*" as wider diffuse pollution is beyond the control or remit of the authority. This is arguably correct, since trans-boundary air pollution can only be realistically addressed by national legislation or higher-tier plans, policies or strategies. This does not mean, however, that consideration of air quality effects should be limited to specific 'sources' within the LPA boundary (and hence under LPA control); in particular, a consequent effect of development or growth may be changes in traffic behaviour or volumes on road outside the LPA boundary, which could affect European sites alone or in combination.
- 3.1.25 In considering these effects, due regard has been given to existing policies in higher-tier plans and strategies, including the London Plan and Mayoral strategies. For example, Policy 7.14 of the London Plan requires development to be air quality neutral; this requirement is replicated by Policy D.ES2 of the Local Plan. Due regard has also been given to the existing policies in the other plans considered and the safeguards that these provide in terms of pollutant pathways.
- 3.1.26 The HRA concludes that the contribution of the LBTH plan to air quality effects on European sites is not likely to be significant.
- 3.1.27 The HRA did not therefore identify the potential for significant in-combination effects in relation to air quality, nor did it rely on avoidance / mitigation measures being applied in coming to this conclusion.

3.2 Are Additional Changes Required to Local Plan Policies?

- 3.2.1 The draft LBTH plan includes policies that relate to the issues identified in the HRA and also reflects recommendations from previous iterations of the HRA. Relevant policies, together with details of how they were amended in light of earlier iterations of the HRA are summarised below:
- Policy D.ES2 Air Quality - Given that air quality is the principal pressure identified for Epping Forest SAC it was recommended that the text of the policy (or supporting text) require that scheme-level air quality impact assessments consider potential impacts on European sites, particularly Epping Forest SAC (in addition the receptors usually identified), through indirect mechanisms – particularly changes in traffic behaviours or volumes associated with the development; this assessment should take account of potential effects in combination with other developments that may directly or indirectly affect this SAC. The supporting text to D.ES2 was amended as recommended. This is not a plan-level mitigation measure designed to ensure

the plan avoids significant effects, rather it is intended to offer guidance to lower-tier projects to ensure that potential air quality effects are suitably considered.

- Policy D.ES3 Urban Greening and Biodiversity - It was previously recommended that the policy should be reworded to refer to 'European sites', with an appropriate definition within the supporting text, to ensure that it covers the full suite of sites protected by the Habitats or Wild Birds Directives (including SACs and SPAs; Sites of Community Importance' (SCIs); any candidate SAC (cSAC)); and potential SPAs (pSPAs)) or to which these protections are applied as a matter of UK Government policy (possible SACs (pSACs) and listed Ramsar sites). This is particularly relevant given that the closest European site is a Ramsar and SPA. The policy has been amended as recommended. The supporting text to the policy also highlights the potential need for HRA at the project level to include recreational pressure as an issue. The LBTH policy previously considered European sites and SNC collectively under a single set of provisions. The policy was amended to provide a separate criterion in relation to European sites. This amendment simply provides clarification of the importance of European sites and is not an avoidance or mitigation measure.

3.2.2 The review of the HRA has not identified the need for any further changes to these policies or any other policies in the LBTH plan.

4. Natural England's Response

4.1.1 Natural England has been consulted throughout the preparation of the Local Plan and accompanying HRA. Natural England confirmed by email on 5th of May 2017 that the approach and scope of the HRA as set out in the report that accompanied the Regulation 18 consultation document were acceptable. Natural England were consulted on later iterations of the HRA during the formal consultation stages associated with the LBTH plan and raised no concerns with the findings.

4.1.2 LBTH instructed Wood to contact Natural England to obtain its view on the implications of the 'People over Wind' judgement for the HRA of the LBTH plan. The response from Natural England was provided in writing by letter dated 26th July 2018. The letter is attached as **Annex A** to this note. The letter confirms that Natural England are satisfied that the September 2017 HRA report has been carried out in accordance with the Court of Justice for the European Union judgement and sufficiently demonstrates that the Plan will not have any adverse effect on the integrity of European sites, as it concludes that no measures are required to mitigate for any significant effects on European sites through an Appropriate Assessment.

4.1.3 Natural England also confirmed in its Letter that it is also satisfied with the conclusions of the report in relation to air pollution.

5. Conclusions

5.1.1 This technical note has considered the implications of the 'People over Wind' judgement for the HRA of the LBTH plan. The judgement determined that a full and precise analysis of the measures capable of avoiding or reducing any significant effects on the European sites concerned must be carried out, not at the HRA screening stage, but specifically at the stage of the Appropriate Assessment.

5.1.2 Section 3 of this note reviews the results of the HRA and demonstrates that no significant effects were identified when the HRA was undertaken, nor did it rely on avoidance/mitigation measures

being applied in coming to this conclusion. A review of the LBTH plan policies in light of this exercise has not identified a need for any further revisions to it. Natural England has confirmed by letter dated 26th July 2018 that they are satisfied that the September 2017 HRA report has been carried out in accordance with the judgement. In light of the findings of this note, the HRA as submitted is considered to be compliant with the additional requirements arising from the 'People over Wind' judgement and it is considered that no re-assessment is required.

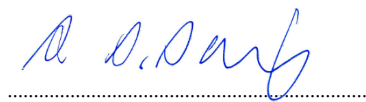
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Annex A: Letter from Natural England

Date: 26 July 2018
Our ref: 252195
Your ref: HRA and Tower Hamlets Local Plan



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Dear Mr Nicholson

Thank you for contacting Natural England regarding the Tower Hamlets Draft Local Plan - HRA Screening Report.

Natural England has considered the September 2017 report in light of the recent judgement of the Court of Justice for the European Union on 12 April 2018¹. The judgement determined that a full and precise analysis of the measures capable of avoiding or reducing any significant effects on the European sites concerned must be carried out, not at the HRA screening stage, but specifically at the stage of the Appropriate Assessment.

Natural England are satisfied that the September 2017 report has been carried out in accordance with the Court of Justice for the European Union judgement and sufficiently demonstrates that the Plan will not have any adverse effect on the integrity of European sites, as it concludes that no measures are required to mitigate for any significant effects on European sites through an Appropriate Assessment.

Natural England is also satisfied with the conclusions of the report in relation to air pollution.

Yours sincerely

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Consultations Team

¹ People over Wind and Sweetman v Coillte Teoranta, Case C-323/17: Consideration of avoidance and reduction measures in Habitat Regulations Assessment.