



Research Briefing
**The Planning Series:
16 – Habitats Regulations
Assessment**

Author: **Helen Davies and Wendy Dodds**

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National Assembly for Wales
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Author: **Helen Davies and Wendy Dodds**

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Contact Us

Research Service
National Assembly for Wales
Tŷ Hywel
Cardiff Bay
Cardiff
CF99 1NA

☎ : 0300 200 6548

✉ : Wendy.Dodds@Assembly.Wales

🌐 : seneddresearch.blog

🐦 : [@SeneddResearch](https://twitter.com/SeneddResearch)

🌐 : Assembly.Wales/Research

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Research Briefing
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1. What are Habitats Regulations Assessments?

The Habitats Regulations Assessment (HRA) process was introduced by the EU Nature Directives: EU Directive 92/43/EEC (**the Habitats Directive**) and EU Directive 2009/147/EC (**the Birds Directive**). The **Conservation of Habitats and Species Regulations 2017** and the **Conservation of Offshore Marine Habitats and Species Regulations 2017** are the principal means by which the requirements of these Directives are transposed into domestic law. The HRA process is set out in Part 6 (Assessment of Plans and Projects) of the *Conservation of Habitats and Species Regulations 2017* (the Habitats Regulations). The Habitats Regulations apply on land and at sea up to 12 nautical miles from the coast. The *Conservation of Offshore Marine Habitats and Species Regulations 2017* apply in UK waters more than 12 nautical miles from the coast.

The purpose of an HRA is to avoid a plan or project having a significant effect on European sites, either alone or in combination with other plans or projects. European sites are designated under the Nature Directives as either Special Areas of Conservation (SACs) and Special Protection Areas (SPAs) – collectively known as Natura 2000 (N2K) sites. HRAs also apply to Ramsar wetland sites (designated under the 1971 Ramsar Convention for their internationally important wetlands), candidate SACs (cSAC), proposed Special Protection Areas (pSPA), and proposed and existing European offshore marine sites.

The HRA process helps to ensure that the integrity of the internationally important **Annex I habitats and Annex II species** for which the N2K sites were designated, is maintained. Whilst HRAs provide strict protection, they are not a prohibition on new development or activities. Instead they involve a case-by-case examination of the implications for each N2K site, its qualifying features and its conservation objectives.

In general terms, an HRA is an obligation to put concern for potential effects on N2K sites at the forefront of every decision made in relation to plans and projects at all stages, including decisions to provide funding or other support. It involves the application of a series of tests, at several stages.

There are a number of parties involved in the assessment. The “applicant” is the person or developer seeking consent for a plan or project subject to the HRA requirements. As stated in Habitats Regulation 63(2):

(2) A person applying for any such consent, permission or other authorisation must provide such information as the competent authority may reasonably require for the purposes of the assessment or to enable them to determine whether an appropriate assessment is required.

The “competent authority” is the decision maker under the HRA requirements and can include local authorities, harbour authorities, and other public bodies. They determine whether or not an appropriate assessment is required, whether proposals would have an adverse effect and, if necessary, whether or not derogation tests are met (Box 1 and Table 1). It is the competent authority’s responsibility to carry out the appropriate assessment. The “statutory nature conservation body (SNCB)” must be consulted by the competent authority during an appropriate assessment to provide advice and assistance on some decisions. In Wales, Natural Resources Wales (NRW) is the SNCB. Habitats Regulation 63(4) provides for public consultation at the discretion of the competent authority (it is not a statutory requirement). The “appropriate authority” in Wales under the Habitats Regulations are the Welsh Ministers. Under the HRA requirements, the competent authority must inform the appropriate authority before it consents to a plan or project (despite it having adverse effects on the integrity of a European site) on grounds of the derogation tests being met. The tests

differ depending upon whether or not the site hosts a priority habitat type or species (Habitats Regulation 107). The appropriate authority could allow the derogation to proceed, or direct that the plan or project is not approved. In some cases the appropriate authority may also be the competent authority. The European Commission oversees implementation of the Habitats Directive and may be consulted in respect of derogations.

Box 1: Appropriate assessment, adverse effect and derogation

Chapter 8 of the Habitats Regulations sees **land use plans** subject to HRA requirements. This must occur prior to the plan being adopted and be undertaken iteratively at all stages of plan preparation. It is the responsibility of the planning authority to scope whether the plan is likely to have a significant effect on an N2K site(s) or Ramsar site. If it is considered that the plan is likely to, the planning authority must undertake an **appropriate assessment** in consultation with NRW. [Welsh Government's Technical Advice Note 5 \(TAN5\)](#) describes this process as a 'Habitats Regulations Appraisal' and sets out the methodology that should be applied to development plans.

For **projects**, following screening any project that is likely to have a significant effect on an N2K site(s), and where measures to avoid that likelihood are not available, will need to proceed to the **appropriate assessment** stage. This will look at the component parts of the project and their potential impact on the ecological functioning of the site features and the site's conservation objectives. It is undertaken by the competent authority either before it gives the project consent or before it decides to undertake the project. Its scope, the information to be contained and the timescale required to undertake it, will vary on a case-by-case basis.

Under the Habitats Regulation 63(5-6), the plan or project can only proceed if the competent authority has determined it will not have an **adverse effect** on the integrity of a European site. As defined in the European Commission's 2000 [guidance document 'Managing Natura 2000 sites: the provisions of Article 6 of the 'Habitats' Directive 92/43/EEC' \(PDF 787KB\)](#):

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 Habitats Directive provides a **derogation** under Article 6(4) that allows, in limited circumstances, for a plan or project to be approved even though it would or may have an adverse effect. As stated in Defra's 2012 [guidance \(PDF 156KB\)](#), a plan or project can only proceed under the derogation requirements providing that following three sequential tests are met:

-
- There must be no feasible alternative solutions to the plan or project which are less damaging to affected European site(s);*
 - There must be "imperative reasons of overriding public interest" (IROPI) for the plan or project to proceed; and*
 - All necessary compensatory measures must be secured to ensure that the overall coherence of the network of European sites is protected.*
-

As the European Commission oversees implementation of the Habitats Directive, it may be consulted in respect of derogations. In Wales, the decision as to whether to allow a project to proceed under the provisions of Article 6(4) is a matter for the Welsh Ministers. The Defra guidance highlights that whilst only a small number of plans or projects would ever reach this stage of consideration "applicants should not be daunted by the derogations process, and if the tests are met a plan or project can be approved".

2. When is an HRA required?

Article 6(3) of the Habitats Directive states:

Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives.

An HRA must, therefore, be applied to marine and terrestrial projects (development projects or otherwise) that could adversely affect the integrity of the species and habitats for which the N2K sites were designated. An example of such an HRA is provided in Box 5. HRAs also apply to the planning framework including local development plans, [Developments of National Significance Framework \(PDF 498KB\)](#) and [Nationally Significant Infrastructure Projects \(PDF 498KB\)](#).

According to the [European Commission's 'Assessment of plans and projects significantly affecting Natura 2000 sites' \(PDF 673 KB\)](#), key indicators can be used to determine if a plan or project may have a significant effect on an N2K site. These include the following impact types and significance indicators:

- Loss of habitat area: percentage of loss;
- Fragmentation: duration or permanence, level in relation to original extent;
- Disturbance: duration or permanence, distance from site;
- Population density: timescale for replacement;
- Water resource: relative change; and
- Water quality: relative change in key indicative chemicals and other elements.

It is advisable for applicants to engage in early discussions on HRA requirements with the relevant competent authority and SNCB. If in doubt as to the likely impact of a proposed development on any N2K site, for example, Chapter 5 of [Planning Policy Wales](#) (Edition 9, November 2016) recommends that developers engage in pre-application discussions with their Local Planning Authority (LPA) and NRW. [Technical Advice Note 5: Nature Conservation and Planning \(TAN 5\)](#) (2009) adds "it is essential that all potentially important nature conservation issues... are identified and fully addressed at the earliest stages of preparing a planning application". In addition to assessment under the Habitats Regulations, applicants should also consider the need for the assessment of any plan or project under the [Environmental Impact Assessment \(EIA\) Directive \(PDF 1.9MB\)](#) and the [Strategic Environmental Assessment \(SEA\) Directive \(PDF 166KB\)](#).

3. What is the process for undertaking an HRA?

Whilst the obligation to undertake an HRA derives specifically from Article 6(3) and 6(4) of the Habitats Directive, it is Part 6 (Assessment of Plans and Projects) of the Habitats Regulations that sets out the procedural requirements.

There is no statutory **method** for undertaking an HRA and the approach may vary on a case-by-case basis, though the adopted method must be appropriate to its purpose under the Habitats Directive and Regulations. Whilst the method is not prescribed by law, if found not to be appropriate in a

particular case it could lead to a challenge in the Courts. As stated, the **procedure** is prescribed by law, therefore, failure to comply with the procedures could lead to a legal challenge.

Guidance issued from the **European Commission in 2001 'Assessment of plans and projects significantly affecting Natura 2000 sites' (PDF 673 KB)** sets out a four stage assessment process involving a number of steps and tests that need to be applied in sequential order (Table 1 and Figure 1). Article 6(3) of the Habitats Directive is concerned with the strict protection of sites (Stages 1 and 2), while Article 6(4) is the procedure for allowing derogation from this strict protection in certain restricted circumstances (Stages 3 and 4). Each step in the process must be documented and recorded carefully for full traceability and transparency of the decisions made.

Table 1: The steps to be undertaken at each stage of the HRA process (information source: TAN 5)

Stage	Steps to be undertaken by the developer (unless otherwise stated)
<p>Stage 1 – Screening</p>	<ol style="list-style-type: none"> 1. Identify all N2K sites in and around the area. 2. Acquire, examine and understand conservation objectives of each interest feature of each N2K site potentially affected. 3. Consider the plan or project proposals and the changes that they may cause that may be relevant to the N2K sites. This is likely to involve estimating likely magnitude, duration, location and extent of effects of the changes as far as they may reasonably be predicted at this stage. 4. Identify if any elements of the plan or project are likely to have a significant effect on any interest feature, alone or in-combination with other projects and plans, directly or indirectly. <p>Seek official screening statement from the competent authority e.g. the Local Planning Authority. Whilst not a statutory obligation at this stage (only required when an appropriate assessment is being undertaken), competent authorities may consult NRW (as the SNCB) at this early screening stage in order to seek advice as to whether effects are likely to be significant or verify the competent authority’s decision as to the likelihood of significant effects. If significant effects are likely or uncertain, proceed to Stage 2.</p>

<p>Stage 2 – Appropriate Assessment</p>	<p>6. Provide information to the competent authority as reasonably required for the purposes of assessing the implications for N2K sites in light of relevant conservation objectives. Draft a report to inform the competent authority's Appropriate Assessment.</p> <p>7. Competent authorities: before deciding to give any consent, permission or other authorisation for a plan or project, undertake an Appropriate Assessment of the implications for each affected site in light of its conservation objectives, using the best information, science and technical know-how available.</p> <p>8. Competent authorities: consult the appropriate nature conservation body (e.g. NRW), and the general public (if considered appropriate), and have regard to any representations made.</p> <p>9. Competent authorities: consider whether any possible adverse effect on integrity of any site could be avoided by changes to the plan or project, having regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which they propose that the consent, permission or other authorisation should be given (mitigation measures necessary to avoid or reduce adverse effects, see Box 2).</p> <p>10. Competent authorities: in light of the conclusions of the assessment, and taking account of NRW and public representations, either: agree to the plan or project only after having ascertained that it will not adversely affect the integrity of any N2K site; or if it cannot be ascertained that the plan or project will not adversely affect the integrity of any N2K site, consider overriding public interest at Stage 3 & 4.</p>
<p>Stage 3 – Assessment of Alternative Solutions</p>	<p>11. Identify alternative solutions and assess these as per the methodology set out for Stage 2.</p> <p>12. If no viable alternative solutions exist, or all reasonable alternatives have been considered and assessed, and the least damaging option is the one that has been selected, proceed to Stage 4. Otherwise, the plan or project should be abandoned.</p>

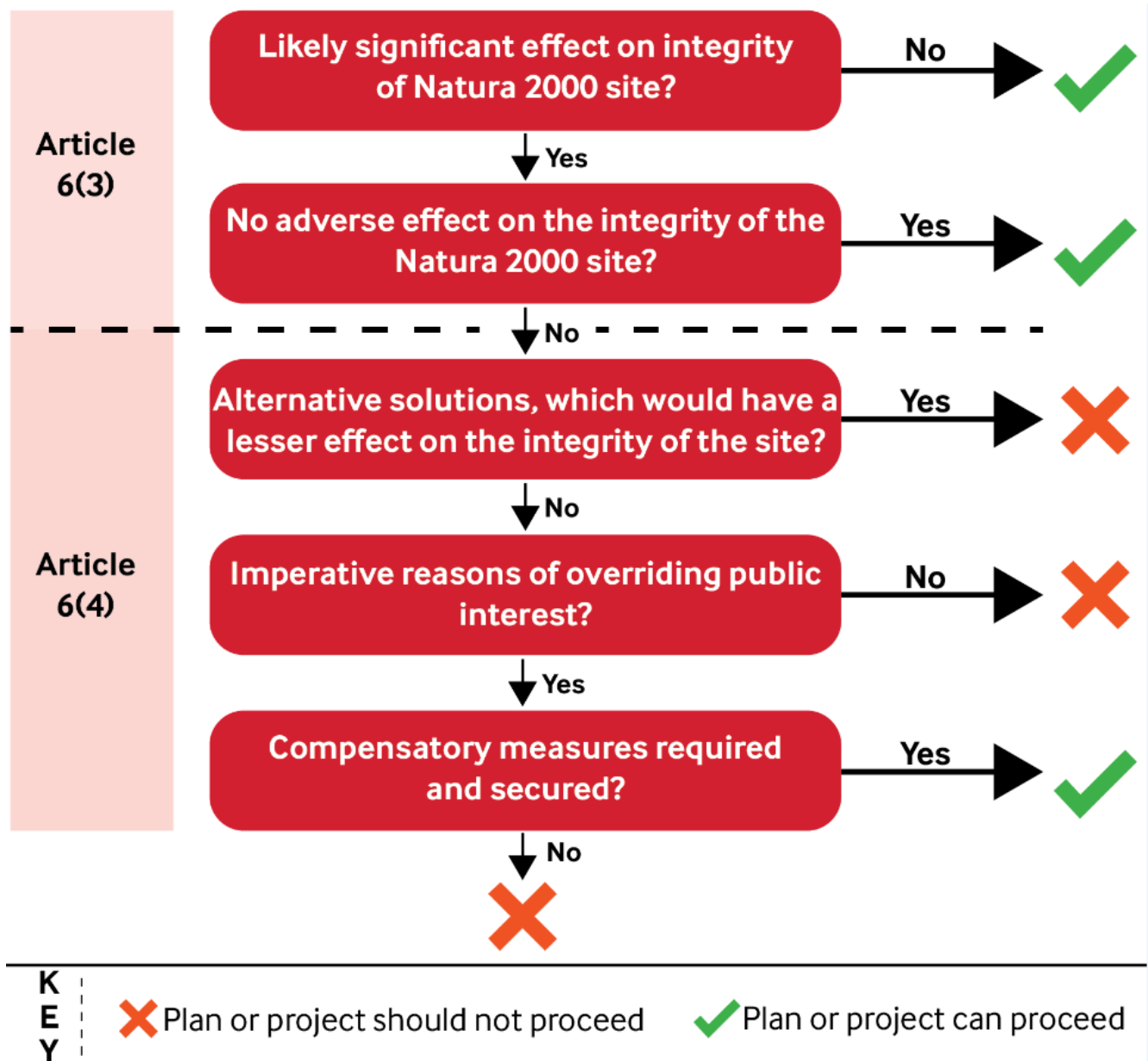
**Stage 4 –
IROPI**

13. Present the case for Imperative Reasons of Overriding Public Interest (IROPI) (economic, social or environmental) for allowing a plan or project that will have adverse effects on the integrity of a N2K site to proceed (note that social and economic reasons do not apply if the project would affect priority habitats or species).

14. Competent authorities: If satisfied that there are no alternative solutions, and that IROPI applies, seek permission from Welsh Ministers to proceed with the project.

15. Welsh Ministers may require compensatory measures to be delivered as part of the plan or project to ensure the overall coherence of Natura 2000 is protected. Compensatory measures must be practical, implementable, likely to succeed, proportionate and enforceable, and they must be approved by the Welsh Ministers (Box 3).

Figure 1: Simplified overview of the HRA process



Source: National Assembly for Wales, Research Service.

Box 2: Mitigation Measures

The European Commission's 2000 [guidance document 'Managing Natura 2000 sites: the provisions of Article 6 of the 'Habitats' Directive 92/43/EEC' \(PDF 787KB\)](#) defines mitigation as:

... measures aimed at minimising or even cancelling the negative impact of a plan or project, during or after its completion.

Measures can include physical modifications and temporal adjustments to the plan or project's construction or operation. Whilst they may be proposed by the applicant/developer during the appropriate assessment, it is for the competent authority to determine the level of mitigation required. The following Mitigation Hierarchy should be adhered to, with the level of preference shown highest to lowest:

- Avoid impacts at source;
- Reduce impacts at source;
- Abate impacts on site; and
- Abate impacts at receptor.

To enable mitigation measures to be assessed the following are required: evidence of how they will be secured; who will implement them; the degree of confidence in their likely success; timescales for implementation; how they will be monitored; and how mitigation failure will be rectified.

Box 3: Compensatory Measures

Where the appropriate authority determines it necessary to proceed with the project for Imperative Reasons of Overriding Public Interest (IROPI), irrespective of the failure to demonstrate that the project will not have an adverse effect on the integrity of a European site, all necessary compensatory measures must be provided. Compensatory measures are intended to ensure that the ecological coherence of the Natura 2000 network is protected if a particular European Site may be adversely affected.

Whilst not defined in the Habitats Directive, according to the [European Commission's 2001 guidance 'Assessment of plans and projects significantly affecting Natura 2000 sites' \(PDF 673KB\)](#), compensatory measures appropriate to adverse effects on N2K sites consist of restoration, creation, enhancement and preservation of habitat stock. They need to be assessed to ensure that they:

- Are appropriate to the site and the loss caused by the project or plan;
- Have the ability to maintain or enhance the overall coherence of Natura 2000;
- Are feasible; and
- Can be operational by the time the damage to the site is effected (unless this can be proved unnecessary on the circumstances of the case).

Measures required for the 'normal' implementation of the N2K site cannot be considered compensation.

The three boxes below (4-6) provide recent Welsh examples of a plan and two projects that have required an HRA. As stated, the applicant must provide sufficient information to inform the competent authority's assessments. Such information from the developer may include information on likely significant effects, mitigation solutions, reasonable alternatives, and potential compensatory measures. It is the decision maker i.e. the competent authority, who undertakes the HRA screening assessment for the plan or project. If an appropriate assessment is required, this will be undertaken by the competent authority, and the general public may or may not be consulted.

Box 4: An HRA of a Local Flood Risk Management Strategy

The HRA screening process conducted by Capita Symonds in June 2013 on behalf of the applicant Pembrokeshire County Council, concluded that two measures from Local Flood Risk Management Strategy (LFRMS) (PDF 551KB) had the potential to have significant adverse effects on ten of the N2K sites identified. The process, therefore, proceeded to Stage 2. The appropriate assessment revealed that the measures could affect the integrity of two of these sites due to the possibility of changes to water flows.

However, given the strategic nature of the LFRMS (the magnitude, duration, location, size and extent of the works that will be undertaken under the LFRMS are to be decided at project level), it was determined that the Strategy could be approved without the need for Stages 3 or 4 of the process. Instead, further HRAs will need to be conducted on lower tier plans and projects that take these measures forward.

Box 5: An HRA of an onshore wind farm project - Mynydd y Gwynt Wind Farm

The proposed 27-turbine windfarm development at the Sweet Lamb Rally complex in Y Foel was formally rejected by the Secretary of State for Energy and Climate Change, Amber Rudd, on 20 November 2015, following a six-month examination process by The Planning Inspectorate.

During the examination, NRW expressed concern that red kites, a qualifying feature of the nearby Elenydd – Mallaen SPA, could “collide with the blades” and be “electrocuted” on the gridlines. The Applicant, Mynydd y Gwynt Ltd, argued that red kites found on site did not originate from the SPA, an assumption based on “limited surveys which do not meet best practice guidelines” according to NRW. Furthermore, “sufficiently robust collision risk figures” had not been provided.

The Secretary of State concluded that insufficient information was available to determine whether there would be an “adverse effect on the integrity of the red kite feature of the Elenydd – Mallaen SPA”, and as such the proposed development must be rejected. Furthermore, the Secretary of State was unable to consider the application as a derogation under Regulation 64 of the Habitats Regulations (Stages 3 and 4 of the HRA process), as this lack of sufficient information meant that the least damaging alternative could not be determined.

Box 6: An HRA of a marine renewable energy project - Tidal Lagoon Swansea Bay

An HRA screening assessment was undertaken by the developer for a 320 MW Swansea Bay Tidal Lagoon project (PDF 2.3MB) in 2013. The process concluded that there was potential for significant adverse effects to qualifying features of five N2K sites, including dune and coastal habitats, otters and fish. As such, these sites and features proceeded to the next stage of the HRA process. The developer's **Appropriate Assessment concluded in 2014 (PDF 4MB)** that "there would be no adverse effect on the integrity of any Natura 2000 sites and features as a result of the Project, alone or in-combination with other plans and projects".

Planning permission was granted for this Nationally Significant Infrastructure Project by the Secretary of State for Energy and Climate Change, Amber Rudd, MP when she awarded a Development Consent Order on 9 June 2015

4. Can an HRA decision be challenged?

If a citizen wishes to challenge a decision made by a local authority relating to an HRA, they may wish to pursue judicial review of the decision. However, making a claim for judicial review would require specialist legal advice, and can be very expensive. If the judicial review was unsuccessful, with the judge ruling in favour of the local authority, the citizen could consider whether to request permission to appeal to the Court of Appeal. If the appeal is also unsuccessful, further appeals might be possible to the UK Supreme Court, and then finally, to the Court of Justice of the European Union. Aggrieved citizens may contact the European Commission about any administrative action, absence of action or practice by a public authority in a Member State that is considered to be against European Union law.

In January 2015 the **RSPB made a legal challenge against the construction of wind farms in the Firths of Forth and Tay** which had been approved by Scottish ministers in October 2014. In July 2015 the Court of Session upheld the challenge, stating that the appropriate assessment had taken irrelevant considerations into account, had applied the wrong legal test, and reached a 'perverse' conclusion in relation to ornithological risk. The Scottish Government appealed this decision, and it was concluded by Scotland's most senior judge that the earlier judge had interpreted the law incorrectly, and that the appropriate assessment was not defective.

5. Key Sources

Welsh Government

- Welsh Government: [Planning Policy Wales](#) (Edition 9, November 2016)
- Welsh Government: [Technical Advice Note \(TAN\) 5: Nature Conservation and Planning \(2009\)](#)

Key legislation

- [EU Directive 92/43/EEC](#) (the Habitats Directive)
- [EU Directive 2009/147/EC](#) (the Birds Directive)
- [The Conservation of Habitats and Species Regulations 2017](#) (the Habitats Regulations)
- [The Conservation of Offshore Marine Habitats and Species Regulations 2017](#)

European Commission

- [Assessment of plans and projects significantly affecting Natura 2000 sites \(2001\) \(PDF 673KB\)](#)
- [Managing Natura 2000 sites: the provisions of Article 6 of the 'Habitats' Directive 92/43/EEC \(2000\) \(PDF 787KB\)](#)
- [Guidance document on energy transmission infrastructure and Natura 2000 and EU protected species \(final draft 2014\) \(PDF 4.2 MB\)](#)
- [Hydropower and Natura 2000: Good practice Guide \(revised draft 2016\) \(PDF 5.7 MB\)](#)

Planning Inspectorate

- [Advice note ten: Habitats Regulations Assessment relevant to nationally significant infrastructure projects \(2012\) \(PDF 1.1 MB\)](#)

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