

The Anglia Rail: Reduction Strategy HRA Stage 1 Screening S01 Sea Wall

NOTE

1. On Day [24] of the Inquiry, the Inspector asked for a Note on the HRA Screening Report (S01 Sea Wall) in light of the recent judgment of the CJEU in **C-323/17 *People Over Wind v Coillte Teoranta***. A copy of that judgment accompanies this Note.
2. [This Note has been agreed by Counsel for Network Rail and Counsel for Suffolk County Council.]
3. In ***People Over Wind***, the CJEU was asked the following question (para 22):

“Whether, or in what circumstances, mitigation measures can be considered when carrying out screening for appropriate assessment under Article 6(3) of the Habitats Directive?”

4. It provided the following answer (para 40):

“ In the light of all the foregoing considerations, the answer to the question referred is that Article 6(3) of the Habitats Directive must be interpreted as meaning that, in order to determine whether it is necessary to carry out, subsequently, an appropriate assessment of the implications, for a site concerned, of a plan or project, it is not appropriate, at the screening stage, to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on that site.

5. That must be read in light of the earlier parts of the Court’s reasoning.
6. Firstly, the basis on which the conclusion was reached by the appropriate authority that an appropriate assessment was not required. This is set out at paras 17 – 19 of the judgment:

“17. The screening report drawn up by those consultants concluded, inter alia, as follows:

- ‘(a) In the absence of protective measures, there is potential for the release of suspended solids into waterbodies along the proposed route, including directional drilling locations.
- (b) With regards to [the Nore pearl mussel], if the construction of the proposed cable works was to result in the release of silt or pollutants such as concrete into the pearl mussel population area of river through the pathway of smaller streams or rivers, there would be a negative impact on the pearl mussel population. Sedimentation of gravels can prevent sufficient water flow through the gravels, starving juvenile [Nore pearl mussels] of oxygen.’

- 18 It is apparent from the file before the Court that ‘protective measures’ were also analysed by that report.

- 19 Subsequently, on the basis of that report, the following recommendation was drawn up for Coillte by the 'programme manager':

'As set out in detail in the ... appropriate assessment screening report, on the basis of the findings of that report and in light of the best scientific knowledge, the grid connection works will not have a significant effect on the relevant European sites in light of the conservation objectives of the European sites, alone or in combination with the Cullenagh wind farm and other plans or projects, and an appropriate assessment is not required. This conclusion was reached on the basis of the distance between the proposed Cullenagh grid connection and the European sites, and the protective measures that have been built into the works design of the project.'

7. Secondly, the Court's review of the rationale behind the requirement for an appropriate assessment to be carried out and the questions which needed to be considered in determining whether an appropriate assessment was required (see paras 32-37):

“32 Article 6(3) of the Habitats Directive sets out clearly that the obligation to carry out an assessment is dependent on both of the following conditions being met: the plan or project in question must not be connected with or necessary to the management of the site, and it must be likely to have a significant effect on the site.

33 It is apparent from the file before the Court that the referring court considers the first of those conditions to be met.

34 As regards the second condition, it is settled case-law that Article 6(3) of the Habitats Directive makes the requirement for an appropriate assessment of the implications of a plan or project conditional on there being a probability or a risk that the plan or project in question will have a significant effect on the site concerned. In the light, in particular, of the precautionary principle, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have a significant effect on the site concerned (judgment of 26 May 2011, *Commission v Belgium*, C-538/09, EU:C:2011:349, paragraph 39 and the case-law cited). The assessment of that risk must be made in the light inter alia of the characteristics and specific environmental conditions of the site concerned by such a plan or project (see, to that effect, judgment of 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583, paragraph 45 and the case-law cited).

35 As the applicants in the main proceedings and the Commission submit, the fact that, as the referring court has observed, measures intended to avoid or reduce the harmful effects of a plan or project on the site concerned are taken into consideration when determining whether it is necessary to carry out an appropriate assessment presupposes that it is likely that the site is affected significantly and that, consequently, such an assessment should be carried out.

36 That conclusion is supported by the fact that a full and precise analysis of the measures capable of avoiding or reducing any significant effects on the site concerned must be carried out not at the screening stage, but specifically at the stage of the appropriate assessment.

37 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.”

(underling added as emphasis)

8. That is not the position with the HRA Screening Report for S01 Sea Wall. It is common ground that the Report should not be read as having concluded that, but for carrying out works in accordance with the standards and guidance set out on the (second) page 4, there was a “probability or a risk that the plan or project in question will have a significant effect on the site concerned”. As confirmed this morning, there will be no habitat loss at S01 as a result of the Order scheme.
9. It is also common ground that the standards and guidance referred to were not being advanced as measures to ‘mitigate’ an effect on the site concerned. In terms of reading the Report, it was clear that those measures were a ‘nice to have’ (SCC’s words) rather than a ‘need to have’.
10. A query was also raised as to the definition of ‘mitigation’ or a ‘mitigation measure’ in this context. There is no clear, definitive definition of ‘mitigation’ in this context. However, in the context of the CJEU judgment, it is suggested that it was regarded (by reference to the specific measures at issue in the judgment) as being measures proposed (or required) to avoid or to reduce a significant effect¹ on the site which there is a probability or risk would otherwise arise.
11. NR and SCC are therefore agreed that no issue arises as to the reliance which can be placed on the HRA Screening Assessment for S01 Sea Wall in light of the CJEU judgment.

¹ Using the language set out in the CJEU judgment