Agriculture, Fisheries and the Natural Environment (Mar 2021)

Environmental Permitting - Intensive Pig and Poultry – Interim approach to Habitat Regulations Assessment in light of legal rulings

Introduction

We currently use a habitat impact assessment approach to assess the impact of ammonia emissions from EPR pig and poultry sites on nature conservation sites. Recent case law and evidence means that we need to review our procedures. We have been exploring options but due to the complexity of the issues have yet to finalise and implement a new approach.

We are therefore proposing an 'interim approach' and introducing changes to our assessment process to make it more robust and to address new case law.

Objectives of the interim approach

The objective is to update our approach in light of two key legal judgments to ensure we are compliant. These are:

> **Screening:** The Wealden judgment[1] highlighted that we needed to review our approach to assessing the emissions from multiple sources that could act in-combination and have an impact. We use a de-minimis of 4% of the Critical Load or Critical Level when considering what nearby permitted activities need to be considered in-combination. Currently we only consider sources with a process contribution (PC) of >4%. These are summed up and assessed against a damage threshold of 20%. Theoretically, multiple contributions of <4% could combine to have an impact.
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> **Impact:** The Dutch N judgments[2] in 2018 indicated that where a European site is in exceedance of a critical load, care should be taken when a proposal might add nutrients. It does not mean that there can be no development in sites which are in unfavourable conservation status, however, we need to approach permitting with caution. Exceeding thresholds do not of themselves mean harm is being caused to a designated feature of a site, but care is needed when relying on thresholds. Our current process allows up to 20% contribution in some cases. This needs to be reviewed.

The proposed changes outlined in the interim approach will address both of these issues, thereby ensuring environmental protection.

Scope of changes:

Because of the stringent requirements of the Habitats Regulations, the interim approach will apply to the assessment of European sites. There are ~400 European sites and over 4100 SSSI's. Whilst SSSIs underpin European sites, they are protected under the Wildlife and Countryside Act 1981. We will update our approach to assessing impacts on SSSIs at a later date. We have identified key parts of the process which need a change. We have considered the impacts on our business (workload for our National Permitting Service (NPS)), the sector (applicants), the environment and the risk of legal challenge.

Proposed Key Changes

1. **Pre-application screen.**
   Existing approach:

[1] Wealden DC vSSCLG [2017] EWHC 351
[2] C-293/17 and C294/17 Court of Justice of the European Union

- For all European sites within 5 km of the proposed application we calculate the process contribution (PC) using the Environment Agency's Ammonia Screening Tool (AST) at the closest point (worst case prediction).
- If the PC <4% - no detailed modelling is required
- If PC alone >20% - detailed modelling is required
- If PC is between 4 and 20%, an in-combination assessment of our permitted farms is carried out in order to identify whether detailed assessment is required. If the PC from the application site, and any other nearby farms acting in-combination are <20%, no detailed modelling is required. If their summed contribution >20%, detailed modelling is required

Proposed approach:

- Using the AST, if the PC alone >4%, detailed modelling will be required
- We will collate information about other regulated sources operating in-combination during pre-app, but in-combination assessments will be carried out during determination.

Rationale:

Following our existing process, a new farm could have a PC of up to 20% using the AST. If no farms acted in-combination, we would advise no further scrutiny is needed using detailed modelling. It is possible that these would not be in line with the Dutch N ruling.

However, 4% provides a reasonably precautionary screening threshold, provided it is used with the AST, and represents a prediction at the closest receptor.

Impact:

The change would ensure we capture any potential environmental impacts and provide them with additional scrutiny at the determination stage. The change would address the outcomes of recent case law.

More applicants will need to submit detailed modelling with their application. However this will impact a very small proportion of application sites. Our data shows that 1 case out of 80 from a years' worth of pre-application requests assessed, would have had a change in outcome.

2. **Duly making** – no fundamental change, however it will be made clear to applicants when their application is duly made that this does not pre-determine their application.
3. **Determination** - In Combination Assessment:
    a. Consultation letter sent to Local Planning Authority (LPA) to identify any planning applications since the last APIS background map update. This would account for any contributions not considered in the background.
    b. Use a de-minimis of 1% for assessing other plans and projects in-combination.
4. **Determination** – Assessment of impact - additional step to check impact in light of Dutch N.

    We propose to follow our existing approach and use 4% and 20% thresholds to assess impacts alone and in-combination.

    As an additional step, where the background concentration exceeds the critical load or level, we propose to compare the ammonia PC with an additional threshold of 1%.

    Please note this is a detailed assessment stage, and routine checks on the conservation status of the European site, background concentrations, exceedances of both critical loads and levels will need to be investigated here as part of the detailed assessment, and to ultimately arrive at a decision.

Acronyms

EPR – Environmental Permitting Regulations

LPA – Local Planning Authority

PC – Process Contribution