

ADVICE TO HART, RUSHMOOR AND SURREY HEATH COUNCILS

SPA MITIGATION CAPACITY REVIEW SUPPORTING ADVICE

STATUS: FINAL VERSION

BY
DTA ECOLOGY



Rectory Farm
Finchampstead
Wokingham
Berkshire
RG40 4JY

Tel 0118 973 4700
caroline@dt-a.co.uk
📞 Website: www.dt-a.co.uk

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1 Introduction

1.1 Background

- 1.1.1 This advice is submitted by [DTA Ecology Ltd](#) to Rushmoor Borough, Hart District and Surrey Heath Borough Councils (The Councils) in connection with a joint ongoing work-stream to review mitigation capacity for development affecting the Thames Basin Heaths SPA. The *'Thames Basin Heaths SPA Delivery Framework'* was published in 2009 and provides a zone based strategic approach to the delivery of mitigation in respect of recreational pressure. All development within 5 km of the boundary of the SPA is affected, as well as some larger development proposals within 7km.
- 1.1.2 Rushmoor and Surrey Heath Borough Councils lie entirely within the 5km zone of influence meaning that *all* development proposals are subject to the delivery framework. Hart District Council lies predominantly within the 7km zone (with the exception of the south western corner) such that the majority of development within Hart District is likewise affected. The Councils, together, comprise the Hart, Rushmoor and Surrey Heath Housing Market Area (the HMA). The implications of the delivery framework for the HMA are summarised below.
- 27% of the HMA is designated SPA or within the 400m exclusion zone
 - 59% of the HMA is within the 5km zone of influences
 - 92% of the HMA falls within the 7km zone of influence
- 1.1.3 The Delivery Framework has enabled the delivery of development within the HMA whilst avoiding adverse effects to the integrity of the SPA (which had, prior to the delivery framework, imposed a considerable constraint). Whilst the framework has been highly instrumental to the delivery of development over the past 11 years the mitigation requirements are increasingly regarded as representing a growing burden on future development opportunities. The Councils are concerned that the current approach to avoidance and mitigation will ultimately result in a moratorium on net new residential development in parts of the HMA, and a joint project is underway to investigate and seek to implement alternative and complementary avoidance and mitigation measures.
- 1.1.4 This advice is provided under the umbrella of a main capacity review study which has been undertaken by Ecological Planning and Research (EPR). The findings of the main review are contained within the report entitled 'Hart, Rushmoor and Surrey Heath SPA Mitigation Project – Mitigation Capacity'. This supporting advice is intended to be read alongside the main EPR report.

1.2 Limitations

- 1.2.1 The purpose of this advice is to provide a high level strategic overview of the work being undertaken by the Councils. DTA Ecology input is restricted to 2 days and this advice must be read and interpreted accordingly.
- 1.2.2 DTA Ecology has not been involved in the extensive body of work which has been delivered as part of the overall Mitigation Capacity Review. DTA Ecology has not read or digested the underlying detail of the documents subject to review by EPR. EPR's analysis and findings are therefore assumed to be correct in terms of underpinning details and supporting calculations. DTA input has been limited to a review of the written outputs from a high level strategic overview; concentrating on any points of principle and/or perceived risks which

might undermine the aims and objectives of the work being delivered and how it might inform / influence future work.

1.2.3 This supporting advice has been drafted with reference to:

- A review of the Final Capacity Review Brief document (the Consultants' brief)
- A review of the Hart, Rushmoor and Surrey Heath SPA Mitigation Project – Mitigation Capacity' report by EPR (hereafter referred to as 'the EPR report')
- Existing understanding of the approach to mitigation measures under the provisions of the Habitats Regulations
- Existing understanding of the Thames Basin Heaths Delivery Framework approach

1.3 The aims of the Hart, Rushmoor and Surrey Heath SPA Mitigation Project

1.3.1 The overall aim of the SPA Mitigation Project is 'to investigate and seek to implement alternative and complementary avoidance and mitigation measures'. The specific aims of the mitigation capacity review are to determine whether the approaches to capacity calculation taken in a series of preceding research reports are appropriate and capable of providing solutions to an identified paucity of SANG supply; to identify further underpinning evidence and alternative approaches to calculating mitigation capacity, if required; and to characterise a package of measures that would be suitable to enable full mitigation for future development within the HMA.

2 DTA Observations

2.1 What is SANG?

- 2.1.1 Suitable Alternative Natural Greenspace (SANG) is a concept which has been developed, implemented and rigorously tested as a fundamental part of strategic mitigation approaches which can be relied upon to avoid adverse effects to designated sites from recreational pressure and associated disturbance impacts. The original delivery framework referred to SANG as *'the provision of alternative recreational land to attract new residents away from the SPA'*. The SANG approach has been subject to intense legal scrutiny and is now a well-established and highly successful mechanism to facilitate the delivery of development whilst protecting designated sites.
- 2.1.2 Beyond the protection afforded to sensitive protected sites, SANG also brings additional benefits to local communities in increasing access to greenspace with associated health and well-being implications. SANG delivery can not only enhance the local area but also deliver parallel benefits in terms of sustainable transport aims and targets.
- 2.1.3 Natural England has provided guidelines for the creation of SANG and the delivery framework imposes a requirement that developers designing SANG should *'have regard'* to these guidelines. The Framework states *'in assessing the required quality for new SANG land regard should be had to the guidance published by NE'*.
- 2.1.4 The Natural England guidelines therefore carry significant weight, and regard should be had to them, but the delivery framework does not impose anything more restrictive than an expectation that the design of SANG will *'have regard'* to those guidelines.
- 2.1.5 It is necessary to keep respective roles and responsibilities firmly in mind. The Councils are the competent authorities under the Habitats Regulations and they are ultimately responsible for ensuring that their decisions are compliant with the requirements of the Habitats Regulations. Natural England are the nature conservation body and the Council must *'have regard'* to their advice when delivering their duties.
- 2.1.6 Natural England's guidelines are provided in good faith to assist developers and they provide a useful checklist against which SANG proposals might be helpfully tested. If all the guidelines are met then a developer can have greater confidence that his proposals will be acceptable to Natural England. If a SANG proposal has not met all of Natural England guidelines then it is more likely to attract closer scrutiny, increasing the possibility that an objection may be raised or some delay might arise in determination.
- 2.1.7 The key point here is that SANG as a concept is introduced in the delivery framework and is defined with reference to its function. SANG is alternative recreational land which serves a function of attracting new residents away from the SPA. Natural England has produced guidelines which can helpfully be referred to by developers but these guidelines are not prescriptive in a strict or legal sense. As set out in the EPR report, many sites which have not met all the points in the NE *'checklist'* have, nevertheless still been accepted as SANG.

2.2 SANG 'alternatives'

- 2.2.1 DTA Ecology would advise that the use of the phrase 'SANG alternatives' is open to misinterpretation. There is a distinction to be made between SANG at a strategic level and the SANG guidelines produced by Natural England intended to serve as a helpful checklist to increase confidence for project proposers in the design and delivery of SANG.
- 2.2.2 DTA Ecology recognises that the wording in the NE guidelines is open to misinterpretation in this regard. The Appendix 1 checklist refers to 'must haves', 'should haves' and 'desirable'. In other words there is a degree of tension which arises between an overarching delivery framework (published by a competent authority) which states that a project proposer should 'have regard' to Natural England's guidelines, and the guidelines themselves which imply that certain criteria must be met. An external party considering both documents might easily be confused and may conclude that a competent authority will not look favourably on a proposal that does not satisfy the 'must have' elements of the NE guidelines.
- 2.2.3 The potential for an individual proposal to deviate from the guidelines but still, on closer examination, be acceptable as SANG is entirely reasonable. Guidelines, by their nature, are unable to take account of site specific circumstances. Guidelines are drafted in such a way to provide a steer on the basis of some generic principles which best reflect and respect the aims and objective of the SANG concept.

Recommendation 1: The relationship between the relevant supplementary planning documents delivering the framework and the NE guidelines should be subject to review.

- 2.2.4 The use of the phrase 'SANG alternatives' can therefore be misleading. If a SANG which doesn't satisfy all of the NE guidelines can, nevertheless, on a case by case basis still be accepted by the competent authority (and Natural England) as SANG, reference to such an approach is not an alternative to SANG (as a concept) but is, instead, an alternative to the design and delivery of SANG apart from the NE guidelines.
- 2.2.5 The phrase SANG alternatives has been adopted to refer to alternatives to the delivery of SANG out-with the NE guidelines. DTA Ecology would not agree that such options are genuine SANG alternatives. Instead they are alternative ways of defining SANG (which is different). From one angle this difference can appear somewhat subtle but the nuance here is important. An alternative to SANG as a concept represents a fundamental departure from one of the key pillars of the delivery framework. Reviewing how SANG are defined, in light of best available evidence and survey information from SANG delivered to date is quite different. It is the opinion of DTA Ecology that genuine alternatives to the delivery of SANG (as a concept) will struggle to satisfy the requirements of the Habitats Regulations.
- 2.2.6 In this regard DTA Ecology notes that EPR have used the term 'modified SANG'. This is preferable to 'SANG alternative' as it more accurately reflects the work undertaken. However, upon further reflection DTA Ecology would promote an approach which didn't include reference to SANG as a concept. What is being proposed within the wider work package and further explored through the EPR report is best described as a review of the SANG guidelines published by NE.
- 2.2.7 In accordance with good decision making principles, the approach to the design and delivery of any mitigation measure (including SANG) should always be informed by best available information. Guidelines and approaches developed in respect of an initiative such as SANG

should therefore be subject to regular review as a matter of good practice to ensure that mitigation approaches remain fit for purpose.

- 2.2.8 For the avoidance of misunderstanding some alternative approaches considered within the wider work being progressed are entirely unrelated to the delivery of SANG. The comments provided above do not apply to proposals which are put forward as genuine alternative to the provision of SANG (rather than alternatives to how SANG is designed).

Recommendation 2: The use of the phrase ‘SANG alternative’ should be used with care. SANG as a concept is a central pillar to any strategic approach to mitigation. DTA Ecology would advise against any suggestion that genuine alternatives to the provision of suitable alternative natural greenspace (as a concept) would satisfy the criteria against which mitigation measures are subject to scrutiny in accordance with the Habitats Regulations.

- 2.2.9 It will be for Natural England to form a view on whether they decide to review their guidelines on the basis of the analysis of any evidence presented. That would not however prevent the Council, as the competent authority, from developing their own additional guidance as to the circumstances when a deviation from the NE guidelines might be acceptable.
- 2.2.10 Alternatively an approach might recognise a hierarchy whereby a developer is first encouraged to meet the NE guidelines (which, given the growing number of SANG which have departed from them, might helpfully be renamed as ‘best practice guidelines’ if NE are amendable to such a suggestion). If a project proposer feels that these guidelines cannot reasonably be met in light of the circumstances which apply to their development, they might then seek to comply with some updated criteria which reflect the findings of the review work undertaken. By way of example there would be scope to set out further clarification over the grounds upon which a shorter circular route might be acceptable etc.

2.3 Genuine challenges in the delivery of mitigation measures

- 2.3.1 The consultants brief explains that the Councils are concerned that the current approach to avoidance and mitigation will ultimately result in a moratorium on net new residential development in parts of the HMA. This is a point which bears further consideration.
- 2.3.2 In principle, the Councils are correct to acknowledge that, over time, the delivery of mitigation measures to avoid adverse effects to the integrity of the SPA will become increasingly constrained. This is a basic consequence of supply and demand. As more land is allocated to development there is less available for the delivery of SANG. Furthermore not all land which has not been developed on is suitable for SANG. Hence, as more of the suitable land is given over to SANG, less suitable land remains. SANG delivery is also compounded by other factors, such as an increasing awareness of the potential financial returns involved in delivery of SANG driving up land prices.
- 2.3.3 Eventually therefore, it is reasonable to anticipate that the delivery of the mitigation required under the Delivery Framework will become increasingly more challenging as time goes on and it is unsurprising that the Council are looking to review mitigation capacity in this light.
- 2.3.4 Having said that, as set out above, there is nothing wrong in principle with the current approach to the design and delivery of mitigation measures being subject to review in light

of survey findings and best available information. A first step, as is being undertaken, is therefore to explore whether the existing approaches to the delivery of mitigation might helpfully be reviewed.

- 2.3.5 When robust evidence is presented which justifies a review of existing approaches, such that the mitigation tests as set out under the Habitats Regulations might still be satisfied, there is nothing in principle to prevent such a review. It is beyond the scope of this advice to comment on the extent to which the evidence can be argued to justify any such review, but in principle, it should not be seen as contrary to the Habitats Regulations to consider it.
- 2.3.6 Looking beyond the findings of any such any review, the anticipation of an eventual moratorium on development fails to recognise the full provisions of the Habitats Regulations. In particular the derogation provisions provided for under regulations 64 and 68.
- 2.3.7 Regulation 63(5) applies after an appropriate assessment and is clear that *'in light of the conclusions of the assessment, and subject to regulation 64, the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site'*. Where there are genuine challenges in the ability to secure the necessary mitigation measures to avoid adverse effects, is a moratorium an inevitable consequence?
- 2.3.8 A direct reading of regulation 63(5) is explicit that it is not, as the provision applies subject to regulation 64. Regulation 64 is clearly of relevance and it reads as follows:
- 64.—(1) If the competent authority is satisfied that, there being no alternative solutions, the plan or project must be carried out for imperative reasons of overriding public interest (which, subject to paragraph (2), may be of a social or economic nature), it may agree to the plan or project notwithstanding a negative assessment of the implications for the European site or the European offshore marine site (as the case may be).*
- 2.3.9 The application of the derogation provisions is complex but, under the circumstances which apply across the Councils (in particular where almost all development is subject to the delivery framework), it should not be assumed that genuine challenges in the delivery of measures would inevitably result in a moratorium on development.
- 2.3.10 DTA Ecology would therefore question the assertion which underpins the concerns of the Councils in this regard. An approach to mitigation measures may, eventually, prevent a conclusion of no adverse effect to site integrity if suitable mitigation cannot be secured. Such a situation will only result in a moratorium on development if, there are no alternative solutions to the delivery of the development concerned. By definition, the presence of alternative solutions will avoid any moratorium. The approach to demonstrating the absence of alternative solutions is critical in this regard. In the absence of alternative solutions a moratorium would only result if the development concerned cannot be taken forwards on the grounds of imperative reasons of overriding public interest.
- 2.3.11 It is beyond the scope of this advice to explore the implications of the derogation provisions to the current situation in further detail. However, at this high level, DTA Ecology would urge caution in making assertions as to the outcome of any consideration of development proposals under the derogation provisions. Whether a moratorium on development would ever arise, in practice, will be dependent on any such consideration.

Recommendation 3: Caution is advised in any assertions that challenges in the delivery of mitigation measures will inevitably result in a moratorium on new development without first considering the derogation provisions.

2.4 Implications of a reluctance to engage with the derogation provisions

2.4.1 In practice, a reluctance to engage with the derogation provision can drive a weakening or dilution of the mitigation requirements which are deemed to be acceptable under the Habitats Regulations. In other words, a desire to grant consent without engaging with the derogation provisions results in a more lenient approach to mitigation approaches and standards. The end result being that the application of the integrity test risks becoming flawed. By definition, genuine uncertainties in the extent to which proposed mitigation measures will avoid adverse effects, represents *reasonable scientific doubt* as to the absence of such effects.

2.4.2 Where mitigation measures can be relied upon to avoid adverse effects to site integrity (i.e. they remove the reasonable scientific doubt as to the absence of any such effects which existed in the absence of mitigation) such measures should be secured and delivered as part of an appropriate assessment. This is in accordance with regulation 63(6) which states:

(6) In considering whether a plan or project will adversely affect the integrity of the site, the competent authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which it proposes that the consent, permission or other authorisation should be given.

2.4.3 In applying the integrity test however, it cannot be assumed that mitigation measures to avoid adverse effects to site integrity will always be available. In some cases, opportunities for mitigation are limited (for a number of reasons). Where the delivery of mitigation measures which can be relied upon to avoid adverse effects is unachievable, the correct approach under the Regulations would be to consider the derogation provisions.

Recommendation 4: SANG is a concept which is applied across a number of European sites. Any approach to review or refine the design and delivery of SANG must be evidence based and subject to scrutiny against the integrity test. A reluctance to engage with the derogation provisions should not result in a dilution of the SANG concept which may have knock on effects for delivery on other sites.