

Analysis of the UK's International Nature Obligations – Phase 2

October 2023

Natural England Commissioned Report NECR514

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Catalogue code: NECR514

Report details

Author(s)

Christina Cork – Senior Specialist, DTA Ecology

Natural England Project Manager

Sue Beale – Principal Advisor, Habitat Regulation Reform, Legislative Reform Team

Contractor

DTA Ecology, Rectory Farm, Finchampstead, Wokingham, Berkshire, RG40 4JY

Keywords

Obligations; Conventions; Biodiversity; Nature;

Acknowledgements

Many thanks to Tim Page, Natural England, for reviewing the draft and supplying suitably challenging questions.

Citation

Cork, Christina. 2023. Analysis of the UK's International Nature Obligations Phase 2. NECR514 Natural England.

Foreword

Natural England commissioned Phase 2 of the Analysis of the UK's International nature obligations as a companion piece to the initial analysis carried out within Phase 1 of the project. This component focuses on the key elements of the Conservation of Habitats & Species Regulations which have secured win-win solutions in terms of nature, society and the economy across England, emphasising how these key elements link to and enable the achievement of non-EU international obligations, clearly illustrating their long-term value and importance.

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Executive summary

The Conservation of Habitats & Species Regulations provide a step wise approach to the screening, assessment and decision-making process. The framework ensures that, where the integrity of a European Site (Special Protection Area (SPA) and/or Special Area of Conservation (SAC)) is threatened, only those proposals that are required to meet an 'overriding' public interest will proceed; and only in situations where there are no other alternative solutions, whilst ensuring that, those habitats and species affected have measures put in place to ensure their long term 'status' is maintained or restored.

There are key elements contained within the Regulations which have strong links with the ability of the UK to meet its international obligations to nature, these include;

- Protection as a matter of law creates a framework for certainty – the setting out as a matter of law, the tests which must be applied in making substantive judgements as to the permissibility of a proposed plan or project.
- Provisions are targeted to specific habitats and species - specifically targeted to potential effects upon the habitats and species which are the qualifying features of a European site, and only those features, not on wider ecosystem function.
- HRA applies to all proposals (plans and projects) without exception - unless they are directly connected with or necessary to the (conservation) management of the European site.
- The screening test sets a low threshold - it is an intentionally low threshold to ensure that any proposal which may undermine a site's conservation objectives, in

light of the best scientific knowledge in the field, is subject to an appropriate assessment.

- Mitigation and compensatory measures are treated differently - This approach ensures that priority is given to effective mitigation, in accordance with the mitigation hierarchy of avoid – mitigate – compensate.
 - In combination and taking account of cumulative effects – it is not sufficient to only consider the impacts of the specific project in isolation, the consideration of in-combination effects is central the assessment process.
 - On and off-site proposals and effects on qualifying features - applies to proposals which may affect the population for which a site has been designated or classified, irrespective of its location.
 - An assessment of the implications of the proposal that is legally ‘appropriate’- case law has established that the assessment should be appropriate to the level of detail of the plan or project and proportionate.
 - The precautionary principle is embedded in the integrity test – in this way a proposal can only proceed if it is possible to ascertain that it will not significantly adversely affect the integrity of the site.
 - The derogation tests - A potentially damaging proposal can be allowed to proceed, if there are no alternatives and if there are imperative reasons of overriding public interest (i.e., potential harm is outweighed by the public benefits).
 - Compensatory measures - compensatory measures secured as a matter of law, not merely policy;
- a) Government approval needed - in the case of allowing a proposal which represents a threat to the integrity of the site.

- b) Links to site conservation management - requirements and the taking of steps to avoid deterioration

Case Studies

The case studies each highlight different elements of the Conservation of Habitats & Species Regulations which secure win-win solutions for the environment, society and/or the economy.

- **Catfield Fen** - illustrates the use of the precautionary approach, in the face of uncertainty, as to the specific impact of the licence abstraction and the outcome of protecting 50% of the GB population of the endangered fen orchid.
- **Ashton Park** – illustrates the strength of off-site effects having to be included within the assessment and the opportunity that creates to secure habitat mitigation; safeguarding core existing habitats and the provision of additional greenspace.
- **The Solent Aware** – illustrates the need for a mitigation strategy, enabled social and economic development with local recreational green and blue infrastructure providing social, health and wellbeing benefits for existing and thousands of new residents.
- **Road development** – the holistic compensation package, delivered wider public benefits, in the form of access improvement – for pedestrians, cyclists and horse riders.

In each case, a clear link is made between the actions set out within the Conservation of Habitats & Species Regulations and the international obligations which are achieved through that mechanism.

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1. Introduction

1.1 The Scope

The scope of works provides for an overarching analysis of how the Habitat Regulations function, with clear links provided to the international obligations detailed in Phase 1.

In the sections which follow we identify the key elements and characteristics of how the Regulations function. These do not follow exactly the steps and wording, as provided in the wording of the Habitats Regulations, but take a more holistic view. The courts have consistently held that Article 6 needs to be read as a whole. At paragraph 32 of its judgment in Case C-258/11 (*Sweetman and Others*), the Court held that the provisions of Article 6 of the Habitats Directive must be construed as a coherent whole in the light of the conservation objectives pursued by the directive. Indeed, Article 6(2) and Article 6(3) are designed to ensure the same level of protection of natural habitats and habitats of species, whilst Article 6(4) merely derogates from the second sentence of Article 6(3). The Article embodies the aims of the Habitats Directive to promote biodiversity by maintaining or restoring certain habitats and species at a favourable conservation status whilst taking account of economic, social, cultural and regional requirements, as a means of achieving sustainable development.

A central strength of the Habitats Regulations derives from the way in which it creates a step wise approach to the screening, assessment and decision-making process. This framework ensures that, where the integrity of a European site is threatened, only those proposals that are required to meet an 'overriding' public interest will proceed; and only in situations where there are no other alternative solutions, whilst ensuring that, those habitats and species affected have measures put in place to ensure their long term 'status' is maintained or restored. In this regard it is a framework for sustainable development.

Whilst some elements of site designation and site management are discussed immediately below, the primary focus is on the HRA process as it relates to the European sites, within the national sites network.

1.2 FCS and National site network designation

The focus of the Habitats Regulations is framed around achieving a 'favourable conservation status' for the habitats and species, listed on the Annexes to the parent Directive as being of European conservation importance.

This translates through to the Habitats Regulations themselves by providing in Regulation 16A for a national network of sites to be established:

'to maintain at, or where appropriate restore to, a favourable conservation status in their natural range (so far as it lies in the United Kingdom's territory, and so far as is proportionate)—

(i) the natural habitat types listed in Annex I to the Habitats Directive;

(ii) the species listed in Annex II to that Directive whose natural range includes any part of the United Kingdom's territory;

There are similar requirements for wild bird species, although the wording follows more closely that of the Wild Birds Directive.

Sites are included in order to achieve these aims.

1.3 Site Management

Following departure from the EU, Regulation 3A of the Habitats Regulations now sets out how the Habitats Directive should be read and interpreted within the UK and how the Directive therefore applies alongside the UK Habitats Regulations. In view of regulation 3A, Article 6(1) and (2) of the Directive remain binding in the UK and should now be read as follows (emphasis added by underline).

(1) For special areas of conservation, Member States and the United Kingdom shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.'

(2) Member States and the United Kingdom shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbances of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this directive.'

These provisions should be read together with, and add further weight to, the general duties under Regulation 9(1) and Regulation 9 (3).

*9.(1) The appropriate authority, the nature conservation bodies and, in relation to the marine area, a competent authority **must exercise their functions** which are relevant to nature conservation, including marine conservation, **so as to secure compliance** with the requirements of the Directives.*

[...]

*(3) Without prejudice to the preceding provisions, a competent authority, in exercising any of its functions, **must have regard** to the requirements of the Directives so far as they may be affected by the exercise of those functions.*

Turning to changes in legislation and guidance, the recently added Regulation 16A of the Habitats Regulations has introduced duties on the Secretary of State and the Welsh Ministers (the Appropriate Authorities) to manage and, if necessary, adapt the National Site Network with a view to achieving the 'Management Objectives' of the National Site Network. The duties have a direct parallel with the obligations under Article 6(1) and (2) in the Directive. The management objectives of sites in the National Sites Network are to:

maintain or restore habitats and species listed in the Habitats Directive to a favourable conservation status; and

contribute, in their area of distribution, to ensuring the survival and reproduction of wild birds and securing compliance with the overarching aims of the Wild Birds Directive.

Defra, the Welsh Government, Natural England and Natural Resources Wales also issued joint guidance in February 2021 covering the 'Duty to protect, conserve and restore

European sites', which provides that competent authorities must take action to help protect, conserve and restore the protected habitats and species of European sites.

The guidance also establishes that the appropriate authority must have regard to the importance of protected sites for achieving the aims of the Directives; to the coherence of the national site network as well as to the threats of degradation or destruction (including deterioration and disturbance of protected features) to which protected sites may be exposed. The current government guidance states (emphasis added)¹

'Duty to conserve European sites As a competent authority, you have a duty to help protect, conserve and restore European sites. The duty applies when you:

manage a site that you own or occupy

take decisions that might affect a site

get asked by a third party to use your powers to protect a site

carry out your statutory work affecting a site

If you can take action but you decide not to, you should be able to give clear and proper reasons why you have made that decision. You may be asked to give reasons by the SNCB, government or a third party.

'You have a duty to consider how you can help to:

protect, conserve or restore the designated features of the site to meet their conservation objectives.

prevent the deterioration of the site's habitats from human activity or natural changes, including habitats that support designated species

¹ <https://www.gov.uk/guidance/duty-to-protect-conserve-and-restore-european-sites>

prevent significant disturbance of the site's designated species from human activity or natural changes.'

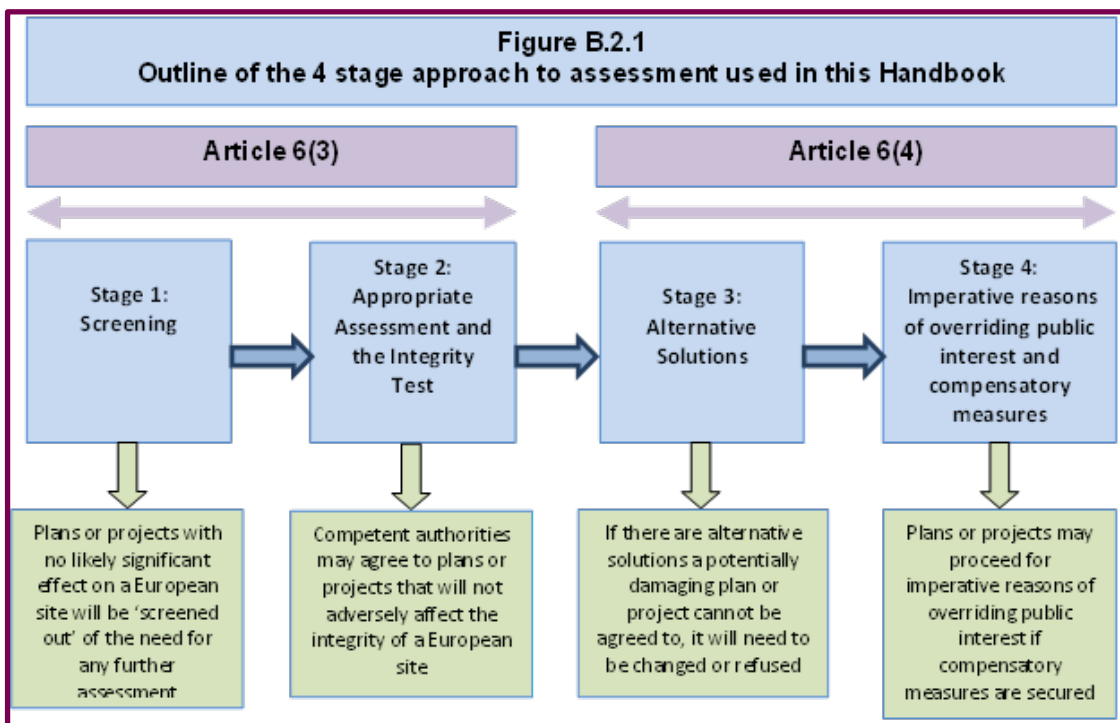
Finally, the above Government guidance issued in February 2021 on Habitats Regulations Assessment now explicitly includes reference to preventing or disrupting restoration work as a potential example of how the integrity of a site might be adversely affected. It states:

'The integrity of a site will be adversely affected if a proposal could, for example, prevent or disrupt restoration work, or the potential for future restoration if it undermines the site's conservation objectives.'

1.4 Site Protection – the process through the HRA.

'Habitats Regulations Assessment' HRA is a step-wise, decision-influencing process. It requires a series of checks, or tests, and administrative procedures, to be undertaken in a particular order. To fail to apply the tests or procedures properly, or to apply them in the wrong order, is inconsistent with the requirements of the Habitats Regulations and could leave a decision, to go ahead with a plan or project, or not, open to challenge. It is important to appreciate, at the outset, that the Habitats Regulations Assessment process influences decision-making procedures. It is helpful to break down the stages and steps in an assessment, as illustrated in Box 1.4 below (taken from the Habitats Regulations Handbook DTA Publications).

Box 1.4 Outline of the 4-stage approach to the assessment process



Box 1.4 provides an outline of the 4-stage approach to assessment used in the DTA Habitat Regulations Handbook.

Under Article 6(3)

Stage 1 is the Screening Stage – plans or projects which have no likely significant effect on a Habitats Site will be “screened out” at this stage and not subject to further assessment.

Stage 2 is the Appropriate Assessment stage and the Integrity test – Competent Authorities may agree to plans or projects which do not adversely affect the integrity of a Habitats Site.

Under Article 6(4)

Stage 3 is the appraisal of Alternative Solutions – if a plan or project will adversely affect the integrity of a Habitats Site and there are alternative solutions, the plan or project must be changed or refused.

Stage 4 is the Imperative Reasons of Overriding Public Interest (IROPI) and Compensation – a plan or project which is judged to have passed the test for IROPI can only proceed if compensatory measures have been secured.

2 Key Elements of the Habitats Regulations

2.1 Key Element 1 – Protection as a matter of law creates a framework for certainty

The first key element of the Habitats Regulations, as a crucial characteristic of the HRA process itself and thus the effectiveness of the Regulations in protecting SACs and SPAs is that they apply as mandatory procedures. They specify, as a matter of law, the tests which must be applied in making substantive judgements as to the permissibility of a proposed plan or project. This represented a fundamental change from the position under domestically derived law, where it was (and is) acceptable ultimately as a matter of policy to determine site protection. The reality of this position developed in the decade after the transposition of the Habitats Directive into UK law. Most notably through the case law such as *Waddenzee* in the CJEU and domestic cases law around the Thames Basin Heaths and Dilly Lane, and public inquiries for port development in Dibden bay.

Since the substantive tests of the acceptability of a project are set by law, and equally applicable by all Competent Authorities, in a consistent manner, this also paves the way for the ‘win-win’ situations that are exemplified in the case studies which follow at Section 4 below.

The framework created is one of ‘legal certainty’, which developers have consistently raised as of crucial value, creating confidence in a level playing field across administrative boundaries. Mitigation measures and compensation through the derogation procedures can be more readily accepted without fear that one developer might be accepting limitations or burdens that others might evade. This can be seen in the port developments since the Dibden Bay appeal, with the industry more openly and collaboratively working on acceptable way forward through the Regulations. Moreover, the requirements for contributions towards strategic mitigation for recreational pressure following Thames Basin Heaths, is now replicated widely, in particular in coastal SPAs.

2.2 Key Element 2 Habitats Regulation provisions are targeted to specific habitats and species – the qualifying features.

The underlying aim of the Habitats Directive is to maintain or restore specific habitats and species to a favourable conservation status across their natural range in the EU and the UK.

Regulation 16A (1) states

The appropriate authority must, in co-operation with any other authority having a corresponding responsibility, manage, and where necessary adapt, the national site network, so far as it consists of European sites, with a view to contributing to the achievement of the management objectives of the national site network.

Further Regulation 16A (2) provides

The management objectives of the national site network are—

(a) to maintain at, or where appropriate restore to, a favourable conservation status in their natural range (so far as it lies in the United Kingdom's territory, and so far as is proportionate)—

(i) the natural habitat types listed in Annex I to the Habitats Directive;

(ii) the species listed in Annex II to that Directive whose natural range includes any part of the United Kingdom's territory;

The Regulations describe “conservation status” and “favourable conservation status” as having the meanings given by paragraphs (e) (in relation to habitats) and (i) (in relation to species) of Article 1 of the Habitats Directive. The joint Defra and Welsh Government guidance incorporate this wording, stating that by meeting their conservation objectives sites *will contribute to favourable conservation status (FCS) for that species or habitat type at a UK level.*

The conservation status of a natural habitat is favourable when:

- *its natural range and area are stable or increasing*
- *the processes that maintain the structure and function of the habitat are likely to continue on a long-term basis*
- *its typical species are stable or improving*

The conservation status of a species is favourable when:

- *the population is maintaining itself on a long-term basis*

- *the natural range of the species is stable or improving*
- *its habitat is stable or improving and can support the species on a long-term basis*

HRA is therefore specifically targeted to potential effects upon the habitats and species which are the qualifying features of a European site, and only those features. The assessment process is not seeking to identify or assess any other biodiversity or wider environmental effects on other habitats and species, in the way that, for example, the Environmental Impact Assessment (EIA) process may do. This approach means that the Directive is primarily focused on habitat and species diversity rather than wider considerations such as ecological function. This is reflected in the preamble to the Directive which states that *‘the main aim of this Directive being to promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements.’*

Box 2.2 – Links to non-EU International Regimes

Bern and Bonn Conventions

Bern and Bonn Conventions are also framed to focus on achieving a Favourable Conservation Status for a subset of species (and their habitats). The definitions of conservation status align very closely to the Habitats Directives, as transposed into UK domestic law, having been the source of the Habitats Directive’s original wording.

Article 2 of the Bern Convention states, *“the Contracting Parties shall take requisite measures to maintain the population of wild flora and fauna at, or adapt it to, a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements and the needs of sub-species, varieties or forms at risk locally.”*

The aim of the Bonn Convention is;

“ to conserve migratory species by ensuring that Contracting Parties take the necessary action, individually and collectively, to avoid species becoming endangered. It seeks to establish cooperation between joining parties for the conservation of migratory species that may currently be in an “unfavourable Conservation Status.”

Agreements under the Bonn Convention

EUROBATS

This agreement is legally binding and amongst other measures requires that each party *‘shall identify those sites within its own area of jurisdiction which are important for the conservation status, including for the shelter and protection, of bats. It shall, taking into account as necessary economic and social considerations, protect such sites from damage or disturbance. In addition, each Party shall endeavour to identify and protect important feeding areas for bats from damage or disturbance.’*

Agreement on the Conservation of African and Eurasian Migratory waterbirds (AEWA)

This agreement requires special attention to endangered species as well as those with an ‘unfavourable conservation status’. It requires sites and habitats to be identified and encourage their protection, management, rehabilitation and restoration; and to ensure this forms a ‘network’.

Most annex II and IV Species listed on the Habitats and Birds Directives are also listed on the Berne and Bonn Annexes. There are some differences, for example the Bar tailed godwit is listed on Bonn/ AEWA not Birds Directive. Some gull species are listed on Birds Directive (as migratory species) but not automatically on Bonn or Bern. ²

² <https://jncc.gov.uk/our-work/conservation-designations-for-uk-taxa-updates/>

Ramsar – record internationally significant wetlands and promote their conservation. Whilst the criteria for selection of wetlands does take account of wetland species.

References: The Habitats Regulations, reg 16A, reg 63(1); MN2000 4.2 and 4.3

2.3 Key element 3 - Each qualifying feature has site-specific ‘conservation objectives’

Each qualifying feature of each European site has site-specific ‘conservation objectives’, and supporting supplementary advice, set by the statutory nature conservation bodies.

The conservation objectives embrace the need to both maintain and restore qualifying habitats and species to a favourable conservation status.

The conservation objectives and supporting supplementary advice provide a framework against which a consistent approach to assessment requirements can be taken. They are a central thread which run through the entire assessment process.

Box 2.3 - Links to non-EU International Regimes

Ramsar – Article 3

This article whilst not requiring the establishment of conservation objectives for Ramsar sites, their existence is implied from the requirement to inform the Convention if the ‘ecological character’ of the has changes or is likely to.

1. The Contracting Parties shall formulate and implement their planning so as to promote the conservation of the wetlands included in the List, and as far as possible the wise use of wetlands in their territory.
2. Each Contracting Party shall arrange to be informed at the earliest possible time if the ecological character of any wetland in its territory and included in the List has changed, is changing or is likely to change as the result of technological

developments, pollution or other human interference. Information on such changes shall be passed without delay to the organization or government responsible for the continuing bureau duties specified in Article 8. Ecological character requires determining in order to secure this outcome.

References: The Habitats Regulations, reg 63(1); Waddenzee 46 - 54; MN2000 2.3.1, 4.6.3, 5.3.1, 5.3.2 and European Commission (2012)

2.4 Key Element 4 - HRA requirement applies to all proposals

HRA applies to all proposals (plans and projects) without exception unless they are directly connected with or necessary to the (conservation) management of the European site. Variations, revocations and the renewal of permissions are all covered. The scope of what is considered plans and projects, captured by the requirements of HRA process has widened over time.

References: *The Habitats Regulations*, reg 63(1); *Waddenzee* paras 25 – 29, *EC v France* para 51 and the Advocate General’s Opinion in that case at paras 43 - 71, *EC v Poland* paras 122 - 127, *EC v Greece* paras 75 - 77, *Netherlands Nitrogen* cases Advocate General’s Opinion paras 116 – 117; *Commission v UK* MN2000 4.4.3

The scope of the existing protection is comprehensive. Other assessment processes apply to specific types of proposals, for example: operations identified at the time of notification as likely to damage a SSSI, which are listed in the SSSI citation; projects listed in the EIA Directive Annexes I and II; or the plans and programmes described as being subject to the SEA Directive / Regulations. The current joint guidance from Defra, Welsh Government, Natural England and Natural Resources Wales, sets out clearly what might be considered a plan or project, consistent with the developing case law.

Box 2.4a – Excerpt from *-Habitats regulations assessments: protecting a European site* – Defra, Natural England, Welsh Government and Natural Resources Wales February 2021

Decide if the proposal is a plan or project

You should decide whether the proposal is a plan, a project or neither. *Any proposal* that might have an impact on a European site is likely to be a plan or project.

If you're sure that the proposal is not a plan or a project, you do not need to carry out an HRA. You must still consider your general duty to protect, conserve and restore European sites before you make a decision or carry out your own work.

You should give the terms 'plan' and 'project' a *very broad meaning* to cover a wide range of activities.

When a proposal is a plan

A plan sets out where future activities or developments should take place within a certain area. This can include any changes that are proposed to an existing plan.

Examples of plans include:

- local plans and local development plans
- neighbourhood plans
- national policy statements
- marine spatial plans
- funding plans
- flood and coastal erosion risk management plans
- river basin management plans

When a proposal is a project

A project can be any activity or a number of activities that either needs a new or renewed permission from a competent authority before it goes ahead, or that a competent authority proposes to carry out itself. It can also include proposals to change an existing project.

Examples of projects include:

- building or installing transport schemes, housing, retail and industrial developments, wind farms, tidal energy schemes, and extraction of minerals, water or timber
- licensing, permitting or regulating an activity, for example, applications for planning permission, licences, consents or permits issued under byelaws and other legislation, and activities under permitted development rights
- your own statutory activities, such as maintaining highways and flood defences, repairing underground cables or keeping powerlines clear

Case law has played a particularly important role in applying the 'directly connected with or necessary to the (conservation) management of the site' exemption. It has dealt comprehensively with situations where member states had sought to systematically exempt certain types of plans or projects on the basis of the exception, and also where plans or projects necessary for the restoration of one qualifying feature in one site may be detrimental to a qualifying feature in the same or another European site.

Box 2.4b - Links to non-EU International Regimes

All the non-EU international regimes require frameworks to be put in place that protect important areas from damage.

There is no explicit requirement to regulate all activities on sites, but this is an implicit necessity if the overall objectives are to be achieved.

2.5 Key element 5 - The screening test sets a low threshold

The screening test has an intentionally low threshold to ensure that any proposal which may undermine a site's conservation objectives, in light of the best scientific knowledge in the field, is subject to an appropriate assessment. The screening test is applied either alone or in combination with other plans or projects (refer key element 7 below). The crucial nature of the screening test is such that it must not release from the requirement for an appropriate assessment any plan or project where it appears possible that it might, on further assessment, fail the Integrity Test.

AG Sharpston in Sweetman considers in detail –

“49. The threshold at the first stage of article 6(3) is thus a very low one. It operates merely as a trigger, in order to determine whether an appropriate assessment must be undertaken of the implications of the plan or project for the conservation objectives of the site. The purpose of that assessment is that the plan or project in question should be considered thoroughly, on the basis of what the court has termed “the best scientific knowledge in the field”.

...

Box 2.5 - Links to non-EU International Regimes

The low threshold for the screening test ensures in practice that proposals are picked up for ‘checking’ which leads to the next steps of determining ‘what will or might happen if the proposals go ahead.’

Without this screening step there are risks that the outcomes which characterised the wider international obligations may not be met.

The OSPAR Convention in particular defines Marine Protected Areas as

“marine protected area” means an area within the maritime area for which protective, conservation, restorative or precautionary measures, consistent with international law have been instituted for the purpose of protecting and conserving species, habitats, ecosystems or ecological processes of the marine environment.

[...]

which will:

- protect, conserve and restore species, habitats and ecological processes which have been adversely affected by human activities;
- prevent degradation of, and damage to, species, habitats and ecological processes, following the precautionary principle;
- protect and conserve areas that best represent the range of species, habitats and ecological processes in the maritime area.

Regarding the management of OSPAR Marine Protected Areas

3.2 The relevant Contracting Party should:

- a. develop for each area selected under paragraph 3.1 a management plan, in accordance with the management guidelines, to achieve the aims for which the area has been selected,
- b. determine what management measures would be appropriate in the light of those guidelines,

References: The Habitats Regulations, reg 63(1); Waddenzee paras 40 – 49, Sweetman Advocate General’s Opinion paras 46 – 48; MN2000 4.5.1 and 4.5.2

2.6 Key element 6 - Mitigation and compensatory measures are treated differently.

The HRA process clearly distinguishes between mitigation and compensatory measures. Mitigation measures (which avoid or reduce a predicated adverse effect) are taken into account as part of the stage 2 appropriate assessment. Compensatory measures (which offset or compensate for a predicted adverse effect) cannot be taken into account in the first three stages of the HRA process; they are only taken into account after the competent authority has found that there are no alternative solutions and imperative reasons of overriding public interest for the potentially damaging plan or project to proceed. In this way damage to the integrity of a site is only acceptable in cases of overriding public interest. Allowing damage, and compensating for the adverse effect, is not acceptable for proposals which deliver a solely private interest. In accordance with case law (People over Wind) mitigation measures should not be considered at the screening stage.

References: The Habitats Regulations, reg 68; World Ski Championships para 83, Greek River Diversion case paras 131 – 133, people over Wind etc; MN2000 5.4, 5.5, 5.6 and 5.8

This approach ensures that priority is given to effective mitigation, in accordance with the mitigation hierarchy. Changes which may open the door for taking account of compensatory measures in the appropriate assessment and integrity test would result in a

reduction in the level of protection currently afforded to European sites, because in effect, it would effectively diminish the force of the precautionary principle.

This approach to mitigation measures in HRA differs from, for example, the EIA process. The *People over Wind* case disallows the consideration of mitigation measures at screening stage of the HRA, whereas the EIA Directive specifically provides for “features of the project and/or measures envisaged to avoid or prevent what might otherwise have been significant adverse effects on the environment” to be described by the developer so as to inform the competent authority’s decision as to whether the project should be subject to the EIA process Article 4(4) and (5). Furthermore, developers are encouraged to include in their environmental statements “A description of the measures envisaged to avoid, prevent, reduce or, if possible, offset any identified significant adverse effects on the environment” to be taken into account by the authorities at all stages (Annex IV).

However, whilst this is a specific characteristic of the HRA process which has further developed through case law, having not been explicitly specified in the Directive or the Regulations, (that mitigation measures, which are intended to avoid or reduce harm to the site, cannot be taken into account in the screening stage of the HRA process) it does not in itself materially contribute to a higher level of protection. In many cases it is more likely that a proposal will be able to deliver nature positive outcomes if its mitigation measures can be taken into account up front.

References: The Habitats Regulations, reg 68; World Ski Championships para 83, Greek River Diversion case paras 131 – 133, *people over Wind* etc; MN2000 5.4, 5.5, 5.6 and 5.8

2.7 Key element 7 - In combination and taking account of cumulative effects

The HRA process requires competent authorities to assess the potential effects of proposals on qualifying features ‘either alone or in combination with other plans and projects’. In practice therefore an appropriate assessment can be triggered by a proposal either:

- Having a likely significant effect ‘alone’ (taking account of baseline conditions, including how previously implemented and ongoing developments, activities and operations, may be influencing the characteristics and specific environmental conditions of the site). OR –

- Having a likely significant effect 'in-combination' when its effects are added to the effects of other plans and projects.

The need to take account of in combination effects is central to the HRA process. The 'other plans and projects' are those which are not yet taken into account as part of the baseline conditions against which the 'alone' assessment was taken. Other plans and projects include those which have been submitted, or otherwise put forward for consideration and are awaiting a decision as to whether they should go ahead, or those which are agreed to but not yet undertaken or completed. The inclusion of plans, as well as projects, means that future development may have to be taken into account even though individual projects which may constitute development arising under plans have not yet been individually identified or proposed.

By way of comparison, other assessment procedures:

- encourage or require competent authorities to consider cumulative effects of plans and projects in the screening process; and
- encourage project proposers and plan makers to describe the cumulative effects of their projects and plans in environmental reports.

Consequently, this is not a requirement unique to HRA, but it is a fundamental protective measure in HRA, and a reason why a significant number of plans and projects are subject to appropriate assessment.

Box 2.7 - Links to non-EU International Regimes

Few non-EU international regimes specifically require the consideration of in-combination and cumulative effects, within specific decision-making processes. However, without these aspects, it becomes unlikely that the outcomes that need to be achieved in practice will be. Achieving favourable conservation outcomes necessitates an implementing framework that is able to regulate cumulative impacts to ensure that in practice negative outcomes from multiple pressures can be prevented.

References: The Habitats Regulations, reg 63(1); Waddenzee 53-54 and 61; and MN2000 4.5.3

2.8 Key element 8 - On and off-site proposals and effects on qualifying features

It is well established that the HRA process applies to:

- potential effects on qualifying features of a European site, whether they are on, or outside, the site at the time they may be significantly adversely affected; and
- plans or projects that may be located within or outside a European site, which may have a significant adverse effect upon the site.

The HRA process applies to proposals which may affect the population for which a site has been designated or classified. As such HRA can be triggered for a plan or project, irrespective of its location, if it may affect 'supporting habitat' outside the site, or mobile species when they are not within the site boundary if there may be a significant adverse effect on a qualifying feature of the site. Habitat beyond the site boundary, which helps to support a qualifying species for that site, is often referred to as 'functionally linked land' or sea. A Natural England Commissioned Report provides a review of authoritative decisions relevant to functional linkage.³

Box 2.8 - Links to non-EU International Regimes

Non-EU international regimes have a number of references to protect features – whether in sites or off sites.

EUROBATS for examples requires the identification of sites, but also important feeding areas with a requirement to protect these offsite places from damage and disturbance.

The Bern convention specifically mentions the need to consider off site activities

³ Functional linkage: How areas that are functionally linked to European sites have been considered when they may be affected by plans and projects - a review of authoritative decisions (NECR207)

<http://publications.naturalengland.org.uk/file/6572958821646336>

Activities taking place adjacent to such areas or within their vicinity do not adversely affect the factors giving rise to the designation and conservation of those sites.

References: The Habitats Regulations, reg 63(1); Waddenzee 40 – 49, and Lydd Airport paras 15,16 and 27; MN2000 4.5.1

2.9 Key element 9 - An assessment of the implications of the proposal that is legally 'appropriate'

The assessment of proposals, which may have a significant adverse effect on a European site, is required to be 'appropriate'. The findings of the appropriate assessment informs the integrity test.

When considering what is meant by an 'appropriate' assessment, case law has established that the assessment should be appropriate to the level of detail of the plan or project and proportionate, but complete and comprehensive, technically sound, sufficiently precise, based on up-to-date information, rigorous and robust and draw definitive conclusions about the implications of the proposal in view of the conservation objectives. These should be capable of informing the 'integrity test', in light of the best scientific knowledge in the field, removing all reasonable scientific doubt about the absence of significant adverse effects on the qualifying features potentially affected. Box 3.9 provides additional information on the evidence requirements to inform the appropriate assessment and integrity test.

Box 2.9 Section D.7.2 Excerpt from the Habitats Regulations Assessment Manual 'Evidence requirements to inform the assessment of projects under the Habitats Regulations generally.' DTA Publications

1. Best available scientific information:

To conclude no adverse effect on integrity, the competent authority must be convinced that no reasonable scientific doubt remains as to the absence of such effects. The CJEU ruled in the case of *Holohan*⁴ that:

‘Under Article 6(3) of the Habitats Directive, an appropriate assessment of the implications of a plan or project for the site concerned implies that, before the plan or project is approved, all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect the conservation objectives of that site must be identified, in the light of the best scientific knowledge in the field...’

Evidence which is based on information that is not scientific may not be enough to exclude such doubt. Likewise scientific evidence which has become outdated or superseded by improved approaches would introduce reasonable doubt as to whether the competent authority is using the best available information. The case of *Kennedy*⁵ in the Supreme Court did not concern evidence under the Habitats Regulations but considered evidence more widely and, in particular, scientific evidence. With reference to various court decisions the Supreme Court identified three areas where purported ‘scientific’ evidence had not been accepted as follows:

- Where evidence was ‘not based on any established body of knowledge’
- Where evidence ‘was the subject of only relatively recent academic research and a methodology that was not yet sufficiently developed that it could be treated as reliable’
- Where there was ‘no criteria by reference to which the court could test the quality of opinions and no substantial body of academic writing approving a methodology’

⁴ Case C-461/17 *Holohan, (and others) v An Bord Pleanála*, 7th November 2018

⁵ <https://www.supremecourt.uk/cases/docs/uksc-2014-0247-judgment.pdf>

2. Providing complete, precise and definitive findings:

Evidence which contains gaps, is incomplete or is insufficiently precise should not be considered capable of removing all reasonable scientific doubt. It is not necessary to remove all doubt however; the nature of assessments made in light of conservation objectives relating to natural ecosystems means that in some cases an inherent element of uncertainty remains. This was recognised by Advocate General Kokott in her opinion in the Waddenzee case where she explains how uncertainty might influence an assessment under the Regulations at paragraph 97:

‘This assessment must, of necessity, compare all the adverse effects arising from the plan or project with the site’s conservation objectives. To that end, both the adverse effects and the conservation objectives must be identified. The conservation objectives can be deduced from the numbers within the site. However, it will often be difficult to encompass all adverse effects in an exhaustive manner. In many areas there is considerable scientific uncertainty as to cause and effect. If no certainty can be established even having exhausted all scientific means and sources, it will consequently be necessary also to work with probabilities and estimates. They must be identified and reasoned.’

This provides a helpful reassurance that whilst the integrity test sets a ‘high bar’ it is acceptable to work with probabilities and estimates where there is considerable scientific uncertainty. The need to exclude reasonable scientific doubt should not be interpreted to suggest a need for absolute certainty. This is emphasised at para 107 of the opinion as follows:

‘However, the necessary certainty cannot be construed as meaning absolute certainty since that is almost impossible to attain. Instead, it is clear from the second sentence of Article 6(3) of the habitats directive that the competent authorities must take a decision having assessed all the relevant information which is set out in particular in the appropriate assessment. The conclusion of this assessment is, of necessity, subjective in nature. Therefore, the competent authorities can, from their point of view, be certain that there will

be no adverse effects even though, from an objective point of view, there is no absolute certainty.'

3. The ecological structure and function of the site:

In so much as it is necessary to sustain the habitats, complex of habitats and/or levels of populations of the species for which the site is (or will be) designated, evidence should be able to be linked to the structure and function of a site which is necessary to sustain the features. It is for this reason that an appropriate assessment must be made 'in view of' the site's conservation objectives.

Evidence requirements will need therefore to be informed by the conservation objectives for the site. It will also be important to examine the current conservation status or condition of the qualifying features, as may be recorded by site condition monitoring undertaken by the SNCB.

4. Removing uncertainty which is both reasonable and scientific:

When dealing with uncertainty the integrity test is one of 'reasonable scientific doubt' rather than absolute certainty. There can never be absolute certainty about what will happen in the future. Lord Nimmo-Smith considered the provisions of Regulation 63 (then Regulation 48) in a judgment in the Scottish Court of Session in October 1998. He observed:

"There can never be an absolute guarantee about what will happen in the future, the most that can be expected of a planning authority, as a competent authority under the regulations, or of SNH, as the appropriate nature conservation body, is to identify the potential risks, so far as they may reasonably foreseeable in light of such information that can reasonably be obtained, and to put in place a legally enforceable framework with a view to preventing these risks from materialising".

Further evidence to address residual doubt should not be required where the doubt which remains is either a) reasonable but unscientific or b) scientific but unreasonable; instead, a decision needs to be taken on the basis of the evidence currently available. Where doubt remains which is both reasonable and scientific, evidence would only reasonably be required where it has a realistic chance of

removing that doubt. Otherwise, a decision should be taken on the basis of the information already available.

References: The Habitats Regulations, reg 63(1-5); Waddenzee 52 - 55, 59 – 61, World Skiing Championships paras 61 – 72, The Alto Sil paras 104 – 108, The Greek River Diversion case paras 111 – 117, Briels paras 23 – 29, and Netherlands Nitrogen cases paras 45 - 67. MN2000 4.6.1, 4.6.2

2.10 Key element 10 – The precautionary principle is embedded in the integrity test

In applying the ‘integrity test’ following an appropriate assessment (and subject to the derogation provisions), the decision maker can allow the proposal to proceed only if it can ascertain that it will not significantly adversely affect the integrity of the site. In this way the precautionary principle is embedded in the integrity test.

The integrity test is perhaps the single most important and unique protection level / device in the HRA process and reflects the importance of the qualifying features to be protected. HRA is a decision-influencing process. In other assessment processes the outcome of the assessment is intended to ‘inform’ the competent authority’s decision, it does not ‘direct’ it. The convention, in other regulatory controls, is that the proposal should be given consent, or should be undertaken, unless the decision maker can demonstrate that there are material considerations that indicate the proposal should not go ahead. It is for the decision maker to attach weight to the merits of the proposal and the level and significance of the harm it may cause, in order to show why the harm outweighs the benefits and why the proposal should be refused. The Habitats Regulations integrity test effectively reverse this burden of proof and requires a refusal unless this provision can be satisfied.

Box 2.10a Additional principles taken from the Habitats Regulations Assessment Manual - DTA Publications

Principle 9

The ‘integrity test’ embodies the precautionary principle. It is not for the competent authority to show that there would be harm to the European site’s integrity before

refusing authorisation, but for it to establish that there would be no harm to site integrity before granting authorisation.

Principle 10

Plans or projects must not be approved unless the authority has made 'certain' that they will not have an adverse effect on site integrity. Such certainty would only exist where the competent authority is 'convinced' about the lack of effects on integrity which will be the case where no reasonable scientific doubt remains as to the absence of such effects.

Box 3.10b -Links to non-EU International Regimes

The OSPAR convention has the precautionary principle embedded across its requirements, from site selection to site management.

OSPAR's commitment to the precautionary principle was expressed in its 2010 Bergen

Statement which states that it will

reaffirm the need for Contracting Parties to continue and to intensify their efforts to develop and facilitate the use of diverse approaches and tools for conserving and managing vulnerable marine ecosystems and protecting the biodiversity. This includes the establishment of marine protected areas (MPAs) and representative MPA-networks by 2012, in accordance with the Plan of Implementation of the World Summit on Sustainable Development, consistent with the United Nations Convention on the Law of the Sea (UNCLOS) and based on the precautionary principle and the best scientific information available.

Article 2(2) provides

2. The Contracting Parties shall apply:

(a) the precautionary principle, by virtue of which preventive measures are to be taken when there are reasonable grounds for concern that substances or energy introduced, directly or indirectly, into the marine environment may bring about hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea, even when there is no conclusive evidence of a causal relationship between the inputs and the effects;

(b) the polluter pays principle, by virtue of which the costs of pollution prevention, control and reduction measures are to be borne by the polluter.

References: The Habitats Regulations, reg 63(5 -6); Waddenzee 44, 55 – 61; MN2000 4.6.4, 4.6.5

2.11 Key element 11 - The derogation tests

Owing to the application of the precautionary principle and the high level of protection afforded by the first two stages of HRA, there is a precisely defined, step-wise derogation provision for imperative proposals whose public interest outweighs the potential harm to the integrity of the site. If a competent authority thinks that a potentially damaging proposal should nevertheless go ahead, it must apply two further tests ensure that compensatory measures can be secured and give the Government notice before the proposal is carried out or permitted.

A potentially damaging proposal can be allowed to proceed, if

- it can be shown that there are no alternative solutions that would have a lesser effect on this and any other European site; and
- there are imperative reasons of overriding public interest (i.e., potential harm is outweighed by the public benefits) why the proposal should, nevertheless, go ahead.

References: *The Habitats Regulations*, reg 64(1 - 2); Castro Verde paras 27 – 40, Briels para 36; MN2000 5.3.1

If a priority habitat or species is potentially significantly adversely affected, the reasons of public interest must relate to human health, public safety, reasons of primary importance for the environment or to have otherwise been accepted as being imperative reasons of overriding public interest (including social and economic reasons) in an opinion given by the Secretary of State following a request by the competent authority.

References: *The Habitats Regulations*, reg 64(3, 4 and 4A); The Alto Sil paras 191 – 195, The Greek River Diversion case paras 121 – 128, Solvay et al v Region Wallone paras 74 – 79, and Briels para 36; MN2000 5.3.2

The precautionary nature of the stage 1 and 2 tests, and accompanying case law, does not allow a decision maker to recognise, or take account of, the wider merits of the proposal subject to assessment. Social, economic, safety, security or other public interests are not part of the stages 1 and 2 assessment requirements. In practice therefore, at

stages 1 and 2, the need to protect the European site potentially at risk is always the overriding consideration. When viewed through the lens of the precautionary approach which is inherent within stages 1 and 2, the importance of the derogation provisions to allow for a proportionate approach to decision making is clear.

Where a plan or project represents a risk to site integrity, and potential mitigation measures cannot be relied upon to avoid that risk, refusal is not inevitable where, in the absence of alternative solutions, a decision maker recognises a public interest which might be served by the plan or project, overrides the potential harm to the qualifying feature(s) potentially at risk. Following a negative outcome to an appropriate assessment, a decision maker is faced with a choice. *Either* they refuse authorisation in accordance with Article 6(3), *or* they consider the plan or project in accordance with the derogation provisions. If the conditions laid down within the derogations are satisfied, authorisation can be granted in accordance with Article 6(4) in spite of the adverse effects to site integrity which might arise as a consequence.

The Habitats Regulations are clear:

- In applying stages 1 and 2 of HRA, the overriding consideration is the need to avoid adverse effects to the European site concerned. The integrity test is an ecological decision, and a decision maker cannot take account of the wider merits of the plan or project concerned at that stage.
- Where a plan or project delivers a public interest, these wider merits can be taken into account as part of a decision-making process through stages 3 and 4 of the HRA process.

The primary purpose of the derogation provisions is to recognise that the public interest served by a proposal *might* override (or outweigh) the conservation interest potentially at risk. Ultimately, the Habitats Regulations are an effective tool for nature's recovery. Their step wise approach, which cumulates in the derogation requirements, delivers a strict level of protection. Where losses to protected sites result from plans or projects that 'override' the potential level of harm to the 'nature/ conservation' value of an individual site, the 'Conservation Status' of the habitat or species is ultimately still secured, at network level, through securing compensatory measures.

2.12 Key Element 12 Compensatory measures

An important aspect of the HRA process is that where a potentially damaging proposal is to go ahead by way of the derogation process, the Secretary of State, through the applicant and the competent authority, and advised by the statutory nature conservation body, must secure the provision of compensatory measures as a matter of law, not merely policy.

References: The Habitats Regulations, reg 68; World Ski Championships para 83, Greek River Diversion case paras 131 – 133; MN2000 5.4, 5.5, 5.6 and 5.8

The obligation is to ensure that compensatory measures which are necessary to ensure the overall coherence of the National Site Network are protected. There is no duty to go beyond this, for example, to achieve net benefit for the network or any site within it. In many cases compensatory measures include repair, restoration, enhancement or other improvements to individual European sites, whether or not the site is the one adversely affected, in order to seek protection of the coherence of the Network (see further part C of this report). In terms of the wording of the Regulations, if no compensatory measures are available, but they are necessary, the plan or project should not be allowed to go ahead. However, in practice, as discussed in section C, it is unlikely that appropriate compensatory measures could not be identified and secured in any particular case.

Box 2.12 - Links to non-EU International Regimes, derogations and compensatory measures

The Ramsar Convention is one of the earliest international agreements relating to nature conservation and contains a form of compensatory provision for habitat loss.

Deletions from the List - derogations

A Contracting Party may, because of its urgent national interest, delete or restrict the boundaries of wetlands already included in the List (Article 2.5 of the Convention). Article 4.2 states, however, that such deletions or restrictions should be compensated for by the creation of additional nature reserves or by the protection, either in the same area or elsewhere, of a suitable portion of the

original habitat. No Ramsar Site has ever been “deleted” in this way, and Parties have only extremely rarely restricted the boundaries of a Site on this basis.

There is no requirement for an ‘alternative’ test, but the requirement to balance urgent national interests.

2.13 Key element 13 - Government approval in the case of allowing a proposal which represents a threat to the integrity of the site.

If a competent authority is minded to go ahead or give consent to a potentially damaging proposal through the derogation process it must first notify the Secretary of State and wait 21 days before issuing the consent or starting the plan or project.

References: *The Habitats Regulations*, reg 64(4, 5 and 6).

The need for approval from Government ensures that competent authorities are applying the derogation process appropriately, that compensatory measures are secured and that there is consistency in use of the derogation procedure at national level. The Secretary of State can issue a direction to a competent authority prohibiting it from agreeing to the proposal, indefinitely or for a specified period.

2.14 Key Element 14 - Links to site conservation management requirements and the taking of steps to avoid deterioration

In addition to the requirements to assess proposals under the HRA provisions, there are equally important protective provisions derived from Article 6 of the Habitats Directive worthy of mention in this report:

- Firstly, requiring the establishment of all necessary conservation measures which correspond to the ecological requirements of the qualifying features of each European site (under Article 6(1)); and
- Secondly, to take appropriate steps to avoid deterioration of habitats or significant disturbance of the qualifying species under Article 6(2).

Conservation objectives for European sites and management objectives for the National Site Network reflect these provisions by including both the aim of maintaining the

favourable conservation status of qualifying habitats and species as well as the aim of restoring them, where they are not in a condition that represents a favourable conservation status.

Failure to fully address ecological requirements through conservation measures (under 6(1)) or to take all appropriate steps to avoid deterioration (under 6(2)), can undermine the integrity of the sites and weaken the coherence of the network. Furthermore, it can have significant (and often unintended) consequences by reducing environmental capacity for new plans and projects subject to assessment under Article 6(3). For example, where a site is deteriorating and failing to meet its conservation objectives, a proposed plan or project with minor impacts would be unable to conclude no adverse effect on site integrity. This can make the approval of proposals more difficult because case law, EC and Defra guidance have established that a significant adverse effect on site integrity can be caused by a proposal whose effects would undermine the achievement of a 'restore' conservation objective for qualifying habitats and species. Despite their critical importance in ensuring that the objectives of the Nature Directives are met, historically, these provisions under Article 6(1) and 6(2) have not been fully implemented in the UK. A failure to retain duties in respect of ecological requirements through conservation measures and the taking of appropriate steps to avoid deterioration and significant disturbance would compromise the approach we are recommending in Part 1 of this report.

References: The Habitats Directive Article 6(1) and (2), The Habitats Regulations, regs 9, 16A, 25, 38 – 40, 65 - 66; Hughes v Carmarthenshire County Council paras 33- 35, Sustainable Shetland especially paras 29 – 38; MN2000 parts 2 and 3; and also see Defra joint guidance for competent authorities February 2021⁶.

Box 2.14 - Links to non-EU International Regimes

All non-EU international regimes are orientated to achieve positive outcomes and avoid negative impacts on sites. For example;

⁶ <https://www.gov.uk/guidance/habitats-regulations-assessments-protecting-a-european-site>

Ramsar Convention

– includes the requirement to ensure wetland use does not adversely affect its ecological character.

Bonn

The Treaty text itself provides some clear and binding obligations to undertake measures to coordinate and achieve outcomes. It leaves the specific measures for contracting parties to decide. EUROBATS Art 3 (2) and AEWA (Art III) both require important habitats to be protected.

e.g. AEWA Article III (2)

(c) identify sites and habitats for migratory waterbirds occurring within their territory and encourage the protection, management, rehabilitation and restoration of these sites, in liaison with those bodies listed in Article IX, paragraphs (a) and (b) of this Agreement, concerned with habitat conservation;

(d) coordinate their efforts to ensure that a network of suitable habitats is maintained or, where appropriate, re-established throughout the entire range of each migratory waterbird species concerned, in particular where wetlands extend over the area of more than one Party to this Agreement;

Bern

Article 4(2) requires *“The Contracting Parties in their planning and development policies shall have regard to the conservation requirements of the areas protected under the preceding paragraph, so as to avoid or minimise as far as possible any deterioration of such areas.”*

Emerald network. “Recommendation No. 8 of 2012 “on Areas of Special Conservation Interest” (ASCIs), the Standing Committee resolved to adopt the following rules

“ 1.1 Parties will designate, by national legislation or otherwise, the sites on their territory adopted as Emerald sites by the Standing Committee to the

Bern Convention, as foreseen in the Calendar for the implementation of the Emerald Network of Areas of Special Conservation Interest (2011-2020

2.1 The national designation of the adopted Emerald sites will ensure that they are protected from external threats and subject to an appropriate regime for achieving a satisfactory conservation status of the species and natural habitats listed in Resolutions no. 4 (1996) and no. 6 (1998) present on the site, involving, if and where appropriate, management plans, administrative measures and contractual measures;

2.3 Specific short and long-term site objectives will be drawn up for the management of Emerald sites, in compliance with the national/regional conservation objectives of the country, in order to facilitate the monitoring of their implementation and the regular assessment of their achievement;”

OSPAR

At the OSPAR Ministerial Meeting in Cascais, Portugal (1 October 2021), Contracting Parties agreed to further expand the OSPAR network of MPAs and other effective area-based conservation measures (OECMs) to cover at least 30% of the whole OSPAR maritime area by 2030, which is over 4 million km². This also recommended that sites in the OSPAR network have;

1. A management plan,
2. Management measures determined,
3. Adoption of management measures in practice

3 Case Studies

How key elements of the Habitats Regulations secure positive outcomes for the environment, economy and society

This section presents five case studies by providing an analysis against the core question ‘ How the key elements of the Habitats Regulations secure positive outcomes for the environment, economy and society.’

Each of the case studies were selected to demonstrate aspects on which Natural England wished to focus. Case studies 2a and 2 b are based on the consideration of offsite impacts (Case study 2a) and the strategic mitigation approach (Case study 2b)

- precautionary decision making,
- consideration of offsite impacts,
- drive towards securing strategic solutions
- and compensatory measures.

Case Study 1

Catfield Fen – Example of precautionary approach

Summary of Case Study

Catfield Fen reserve is part of the Ant Broads and Marshes National Nature Reserve (NNR), which covers much of the floodplain of the middle Ant Valley in Norfolk . The NNR is considered to be one of the best and largest remaining areas of fen habitat in Western Europe. The area is a stronghold for the Swallowtail butterfly and site is managed by Butterfly Conservation, as Fen mixture of open water, reed, sedge and carr woodland. The Fen has a long history of management,

which depends on the control of water levels. The reed is cut on a 1–2 year cycle and sedge, on a 3–5 year cycle. This is used for thatching and produces an ideal range of vegetation structures for a diversity of wildlife. There is managed public access to the site.

This case involved a challenge to EA's intention to not renew two abstraction licences on the basis that it was not possible to conclude no adverse effect on the integrity of the Broads SAC.

The licence at Plumsgate Road has been in existence since 1986 and has been the subject of previous short-term renewals. The Ludham Road licence has been in existence since 1988 and has also been subject to previous short-term renewals. NE expressed concerns in 2011 that Catfield Fen was drying out. There was a public inquiry held after EA refused to renew these licences and the holders appealed. Following the public inquiry, the inspector reported;

“Many uncertainties and unresolved differences exist in the evidence presented and therefore a precautionary approach is necessary. ... It cannot be concluded beyond reasonable scientific doubt that abstraction under the licences would not have an adverse effect on the integrity of sites protected by European law, namely, the Broads SAC.”

This case study illustrates the use of the precautionary approach, in the face of uncertainty, as to the specific impact of the licence abstraction.

EA based its decision on the application of the precautionary approach, and in doing so helped to protect 50% of the GB population of the endangered fen orchid.

The case also considered the nature of overriding interests, and what was a public v private interest.

Site and Qualifying

Catfield Fen, is part of the Ant Broad SSSI and wider the Broads SAC. It is also a component of the Ramsar site, with plant and invertebrate wetland features.

Catfield Fen itself contains the Annex I priority habitat, Calcareous Fen, and the Fen Orchid, designated as a species of Community interest.

Qualifying features (present)- Annex I of the Habitats Directive.

H7210. Calcareous fens with *Cladium mariscus* and species of the *Caricion davallianae*; Calcium-rich fen dominated by great fen sedge (saw sedge)*

Qualifying features (present)- Annex II of the Habitats Directive.

S1903. *Liparis loeselii*; Fen orchid

Conservation Objectives

Ensure that the integrity of the site is maintained or restored as appropriate, and ensure that the site contributes to achieving the Favourable Conservation Status of its Qualifying Features, by maintaining or restoring;

- The extent and distribution of qualifying natural habitats and habitats of qualifying species
- The structure and function (including typical species) of qualifying natural habitats
- The structure and function of the habitats of qualifying species
- The supporting processes on which qualifying natural habitats and the habitats of qualifying species rely
- The populations of qualifying species, and,
- The distribution of qualifying species within the site.

Supplementary advice on conservation objectives [Supplementary Advice The Broads Special Area of Conservation \(SAC\)](#)

IPENS Site Improvement Plan [Site Improvement Plan The Broads Special Area of Protection](#)

HRA Stage relevant to case study

Screening / LSE

The EA's view at the inquiry was that a number of changes could constitute an adverse effect in respect of the Habitats Directive. These include:

- a decrease in the extent of natural habitats,
- a decrease in the populations of qualifying features,
- a change in the distribution of a natural habitat,
- a change in the distribution of qualifying species and
- the deterioration of a qualifying feature.

Evidence was presented to inquiry of the decline in quality of the site over time. The inspector considered various potential causes of ecological changes; being from

- Groundwater impacts,
- site management,
- natural succession/ terrestrialisation.

The inspector stated “I do not consider that it has been shown that the groundwater levels reaching the surface are so limited that the changes exhibited would not be influenced by local abstraction and hence are capable of influencing the ecology of the site”

AA and integrity test

The conclusion of the Appropriate Assessment (as amended by the later addendum) stated that the EA could not conclude beyond reasonable scientific doubt that abstraction under the licences, alone and in-combination with other projects (other abstractions in this case), would not have an adverse effect on the integrity of sites protected by European law.

Precautionary approach

“There is evidence from the EA’s model for increasing acidity as a result of abstraction which, although the amount of change in pH is uncertain, indicates a pathway for changes to hydrochemical conditions, which has the potential to cause decline in calciphiles and Calcareous Fen. Whilst there is no definite evidence for the cause of Sphagnum increase, it has been shown to increase acidity once established, leading to further threat to the fen orchid”

“The appellant has said that absolute certainty, as in Waddenzee, cannot be achieved in the approach to decisions under the Habitats Directive. The appellant also implies that the decision maker has to have evidence that there is reasonable scientific doubt about the adverse effect on the integrity of the site if permission is to be refused. However, as in Smyth “a strict precautionary approach” must be taken and Waddenzee stated that consent can only occur where “no reasonable scientific doubt remains as to the absence of such effects.” [...] In that sense, it is for the appellant to show that there is no reasonable scientific doubt. In this case, it has not been shown that no reasonable scientific doubt remains regarding adverse effects on site integrity. Many uncertainties and unresolved differences exist in the evidence presented and therefore a precautionary approach is necessary. ... It cannot be concluded beyond reasonable scientific doubt that abstraction under the licences would not have an adverse effect on the integrity of sites protected by European law, namely, the Broads SAC.”

Positive outcomes achieved – conservation

By taking a precautionary approach to this decision, the outcome secured 50% of the national population of fen orchids, an endangered plant species. In the absence of a precautionary approach, it would have been difficult to refuse the renewal applications.

In addition, the wider SSSI features and habitats and species of local significance have also been secured from negative impacts from these abstractions

Positive outcomes achieved – economic/ social / other

The wider economic, social and well-being outcomes of this decision are the ecosystem services of a Butterfly Conservation reserve, that is also a component of a National Nature Reserve. The value of the site for conservation of Fen Orchids and Swallowtail butterflies, leads to a wider desire for visitor access. Through carefully managed open days to the sites the local population and wider visitors to the area are able to view the rich biodiversity of the site.

Small scale the harvesting for thatching material also provides an economic contribution to the local economy.

Links to international obligations

H7210 Calcareous fens correspond to the EUNIS classification under the Berne Convention D5.24 Fen Cladium mariscus beds

D5.2 Beds of large sedges normally without free-standing water

Fen Orchid is also listed on Berne Convention Appendix 1. Thus, additional protection required by virtue of Article 5.

This site has been transmitted to the Bern secretariat, and as such is a part of the UK contribution to the Emerald network. The provisions of the Bern Convention, and Resolution No. 8 (2012) on the national designation of adopted Emerald sites and the implementation of management, monitoring and reporting measures apply. [Emerald Network Data Forms](#). Article 2 of Resolution 8 provides

2.1 The national designation of the adopted Emerald sites will ensure that they are protected from external threats and subject to an appropriate regime for achieving a satisfactory conservation status of the species and natural habitats listed in Resolutions no. 4 (1996) and no. 6 (1998) present on the site, involving, if and where appropriate, management plans, administrative measures and contractual measures;

2.3 Specific short and long-term site objectives will be drawn up for the management of Emerald sites, in compliance with the national/regional conservation objectives of the country, in order to facilitate the monitoring of their implementation and the regular assessment of their achievement;”

UK Red list – considered Endangered under IUCN criteria. Without this site, there would be considerably more risk of this species becoming extinct in UK. This would be contrary to the Global Biodiversity Framework – Kunming Montreal agreement – Goal A ‘*Human induced extinction of known threatened species is halted, and by 2050 extinction rate and risk of all species are reduced tenfold and the abundance of native wild species is increased to healthy and resilient levels*’.

And the UK's recently published environment targets to "halt the decline in species populations by 2030 and the increase populations by at least 10% to exceed current levels in 2042.

The site is also a component of the Broadland Ramsar sites. The features of the Ramsar include assemblages of rare plants and invertebrates. The continuing drying out the site would threaten the ability to achieve the ecological character of the site as required by Article X of the Ramsar Convention.

Case Study 2a

Ashton Park – Offsite Bat Habitat Protection

Summary of Case

The Ashton Park development case study is a good example of how important it can be to take account of off-site impacts on the populations of species using a SAC.

This case highlighted the importance of the woodlands in Trowbridge to the SAC bat populations for which the Bath and Bradford -on-Avon SAC was designated.

Site and Qualifying features

Bath and Bradford-on-Avon Bats SAC

HRA Stage relevant to case study

Consideration of Off-site impacts

Precautionary principle

Positive outcomes achieved – conservation

The Council, the project proposer and Natural England agreed that there was a functional linkage between the local population and that for which the Bath to Bradford-on-Avon SAC has been designated. The local population therefore contributes to the achievement of the conservation objectives for the SAC, and the supporting habitat is functionally linked to the integrity of the site.

The ‘internationally significant population’ of Bechstein’s bat with the woodlands to the south of Trowbridge being ‘functionally linked’ to the maintenance of the population for which the SAC has been designated.

Difficulties in monitoring and surveying Bechstein’s, due to their quiet echolocation calls which are indistinguishable from other myotis species, were recognised.

Thus, a precautionary approach was adopted to the extent to which the local population contributes to the achievement of the conservation objectives for the SAC.

Positive outcomes achieved – economic/ social / other

See case study 2b.

Links to international obligations

Without the consideration of the Trowbridge population of Bechstein bats under the HRA there is a high risk that the UK would not have been in compliance with the EUROBATs Agreement under the Bonn Convention, and provisions of the Bern Convention.

See case study 2b.

Case Study 2b

Strategic Mitigation – Offsite protection of Bats

Summary of case

This strategic mitigation example was progressed after the Ashton Park example – provided as Case Study 2a above.

Wiltshire Housing Site Allocation Plan identifies the need for *circa* 2500 dwellings, employment, schools, local centres, public open space, landscaping and associated highways work. Inclusion also of a new relief road Yarnbrook and West Ashton.

The landscape around Trowbridge provides offsite habitat to three species of bat which are functionally linked to the Bath and Bradford on Avon Special Area of Conservation (SAC). This strategic mitigation was triggered following the decision in Case Study 2a above where the HRA was unable to conclude no adverse effect on site integrity, without further incorporation of mitigation options.

The Trowbridge Bat Mitigation Strategy TBMS has been prepared as a Supplementary Planning Document (SPD) to provide certainty for developers and local communities in terms of how development and mitigation measures will be guided to ensure the integrity of the SAC and the (offsite) core bat habitats around the town are protected and enhanced.

At its heart is the delineation of buffer areas around the woodlands and two zones (the red and yellow zones) within which major development will either be resisted, or considered, subject to the delivery of appropriate mitigation

measures to address habitat creation and the management of recreational pressure (grey hatched zone).

Requirements for mitigation is based on zoning. Red, yellow and grey zones. The zones are based on the likely impacts from developments in these zones.

- Red zone developments will be unlikely to be granted planning permission.

- Developments in the yellow zone must meet the requirement for onsite ecological mitigation and make a financial contribution to the strategic bat mitigation plan circa £800 per dwelling.
- Developments in the grey zone need only make a financial contribution to the strategic bat mitigation.

The implementation of the TBMS in the grey and yellow zones ensures new housing allocated in the Wiltshire Housing Site Allocation Plan (WHSAP) can rely on the conclusions of the HRA for no adverse effects on site integrity where mitigation requirements are complied with.

Yellow Zone – site design requirements the development must be designed to ensure no net loss of habitat onsite. Applications must use the DEFRA Biodiversity Metric (most recent version), to demonstrate no net loss on site. Which should be included in the developments Ecological Mitigation Plan.

All applications must identify and retain core bat habitat and provide dark buffers.

Site and Qualifying

Bath and Bradford on Avon Special Area of Conservation (SAC) is composed of ten discrete areas distributed over a wide geographical area crossing the boundary between Bath and North East Somerset and Wiltshire, to the south and east of Bath in the triangle specifically between Bath and Corsham in the north and Winsley in the south.

Qualifying Features:

- S1303. *Rhinolophus hipposideros*; Lesser horseshoe bat
- S1304. *Rhinolophus ferrumequinum*; Greater horseshoe bat
- S1323. *Myotis bechsteinii*; Bechstein`s bat

Conservation Objectives

Ensure that the integrity of the site is maintained or restored as appropriate, and ensure that the

site contributes to achieving the Favourable Conservation Status of its Qualifying Features, by maintaining or restoring;

- The extent and distribution of the habitats of qualifying species
- The structure and function of the habitats of qualifying species
- The supporting processes on which the habitats of qualifying species rely
- The populations of qualifying species, and,
- The distribution of qualifying species within the site.

Conservation Objectives Supplementary Advice [Supplementary Advice for Bath and Bradford-on-Avon Bats Special Area of Conservation](#)

Parties involved.

Wiltshire County Council.

Natural England

Key Elements of HRA relevant to case study

Precautionary principle

The TBMS has been prepared as a Supplementary Planning Document (SPD) to provide certainty for developers and local communities in terms of how development and mitigation measures will be guided to ensure the integrity of the SAC and the core bat habitats around the town are protected and enhanced.

Strategic mitigation options.

The TBMS provides a scheme of mitigation which addresses impacts from each of the allocations in the plan alone and the in-combination impacts of these in combination with other development coming forward through neighbourhood plans,

as rural exception sites and development within the settlement boundary. In view of the uncertainty surrounding bat use of the landscape, the strategy takes a precautionary approach to allow appropriate assessments for individual applications to be concluded favourably without delay, provided the principles are followed.

In relation to recreational pressure, the TBMS picks up on evidence from the visitor survey to demonstrate that development closest to the woods should be resisted due to its potential to lead to effects alone and in-combination. Beyond this, the strategy identifies a zone of medium sensitivity where a degree of new development would be acceptable provided measures are taken to offset the recreational pressure it will generate. establishing a new Suitable Area of Natural Greenspace (SANG). This is based on the ratio of 8 ha per 1000 new residents in order to calculate the size of SANG. It is expected this would represent the maximum expenditure scenario.

The project commits to employing a CIL Delivery Officer and the final balance between provision of SANG and provision of other measures will be determined once this officer is in post.

Positive outcomes achieved – conservation

With the TBMS, avoidance of impacts alone is achieved through:

- Mitigating for all habitat lost to development through the creation of new Core Bat Habitat within the allocation site boundary.
- Using best practice survey methods to defining Core Bat Habitat and ensuring this is retained and buffered in the site masterplan.
- Meeting criteria to ensure Core Bat Habitat has the best possible chance of being used by SAC bats when the development is completed.

Avoidance of residual impacts which could act in-combination with other plans and projects is achieved by:

- Contributions towards 'The Batscape;' habitat mitigation measures to be delivered at offsite locations through a scheme administered by the Council (determined by the TBMS)
- Contributions will be secured from developers through legal s.106 agreement.

Positive outcomes achieved – economic/ social / other

TBMS wider social and economic outcomes.

- Timely delivery of housing and related developments in accordance with planned local needs.
- Retention of existing core habitat and provision of additional greenspace within developments, well-being benefits.
- Ability for local community groups to be engagement in undertaking planting as part of the tree planting projects.
- Additional employment of CIL Delivery Officer on SANG provision and provision of other measures.
- Wider diversity benefits of retaining high biodiversity value hedgerow and woodland areas
- Financing of mitigation measures by developer contributions

Links to international obligations

Myotis bechsteinii is listed on Appendix 2 of the Bern Convention.

Myotis bechsteinii is listed on Appendix 2 of the Bonn Convention, and thus also covered by the Eurobats agreement under the Bonn Convention.

[Bonn Resolution Meeting of Parties 9 Implementation of the Conservation Management Plan](#)

Article 3 of EUROBATs provides

"1. Each Party shall prohibit the deliberate capture, keeping or killing of bats except under permit from its competent authority.

2. Each Party shall identify those sites within its own area of jurisdiction which are important for the conservation status, including for the shelter and protection, of bats. It shall, taking into account as necessary economic and social considerations, protect such sites from damage or disturbance. In addition, each Party shall endeavour to identify and protect important feeding areas for bats from damage or disturbance.

[...]

6. Each Party shall take such additional action as it considers necessary to safeguard populations of bats which it identifies as being subject to threat and shall report under Article VI on the action taken.

[...]

Article 4

"National Implementation

1. Each Party shall adopt and enforce such legislative and administrative measures as may be necessary for the purpose of giving effect to this Agreement.

2. The provisions of this Agreement shall in no way affect the right of Parties to adopt stricter measures concerning the conservation of bats."

Case Study 3

Recreational pressures from housing – Strategic Mitigation

The Solent Aware

The Solent is internationally important for its wildlife, particularly bird species. Each winter, the Solent hosts over 90,000 waders and wildfowl including 10 per cent of the global population of brent geese. Three Special Protection Areas (SPAs) are designated amongst other interests to protect over-wintering birds.

Extensive research was undertaken during 2009-2013 to assess the impact of recreational activity on wintering birds on the Solent. This work was known as the Solent Disturbance Mitigation Project and formed part of the Solent European Marine

Sites (SEMS) Scheme of Management. Solent Disturbance Mitigation Project included:

- The response of birds to disturbance;
- Face to Face surveys of visitors to the coast; and
- Postal survey to households living around the Solent.

Modelling of survey results and predicted new housing growth indicates and anticipated increase of 13% in visitor numbers to the Solent. Subsequently in 2013 Natural England issued a letter to Local Authorities stating that there is an expected Likely Significant Effect (LSE) associated with all new housing planned around this area. The best available evidence (based on an accompanying population increase) suggested that all dwellings) with 5.6km of the boundary of the SPA would have a Likely Significant Effect in combination, and thus require mitigation measures. By 2034, an additional 64,000 dwellings are planned for this area. Although the developer has the legal duty to provide the mitigation, a strategic approach to the provision of the mitigation for recreational impacts was

proposed by local authorities to facilitate delivery and ensure a consistent approach.

A study commissioned by Solent Recreation Mitigation Partnership (SRMP) recommended the following measures as part of a strategy to prevent any 'net' increase in visitors to the SPAs.

- A delivery officer;
- A team of wardens and rangers (5-7) ;
- Coastal dog walkers project;
- Review of parking;
- Review of watersport zones and watersport access;
- Codes of conduct pack;
- A series of site specific project;
- Watersport permits and enforcement;
- SANGS and additional green infrastructure/ alternative roost sites. aims to provide strategic mitigation solutions for developments which might otherwise give rise to unacceptable recreational pressures on local SPAs.

Site and Qualifying

Solent and Southampton Water SPA

Chichester and Langstone Harbour SPA

Portsmouth Harbour SPA

Parties involved.

Local Planning Authorities

as competent authority for decision making on new developments within their area.

Developers/ House builders

responsible for payment for strategic mitigation solutions or the provision of their own bespoke schemes.

Natural England

Nature Conservation Body under the Habitats Regulation.

HRA Stage relevant to case study

Appropriate Assessment / site integrity

Strategic mitigation

Relevant consideration of the precautionary principle

The 5.6 kilometre zone around the Solent Special Protection Areas



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The map shows the 5.6 kilometre zone around the Solent Special Areas of Protection (SPAs). The map shows Solent SPAs (dark blue) the 5.6 km zone (light blue) and the Local Authority Boundaries (green).

This zone is established to screen in individual developments to contribute financially to the SRMS on the basis of distance visitors will travel to visit a site.

The consultants who recommended the package of mitigation measures urged caution in the use of SANGS at Solent SPAs – due to the survey of visitors showing that being ‘beside the sea’ was a key component of their visit, and thus an alternative site may be difficult to recreate.

Positive outcomes achieved – conservation

The Strategy sets out the strategic approach, the mitigation measures to be implemented, and the arrangements for governance, reporting, and monitoring. It provides mitigation measure for the impact of in-combination recreation arising from housing which is planned around the Solent up to 2034.

Two research studies were commissioned to help identify which measures would be the most effective in encouraging responsible dog walking – the primary cause of major ‘flight’ disturbances of coastal birds.

These recommended the use of a website, social media and other initiatives to raise dog walkers' awareness of bird disturbance and to promote alternative inland greenspaces. The study emphasised that these initiatives would require adequate resourcing to allow for dedicated work with dog walkers and dog interest groups to achieve a way forward that fully considers their needs. (REF Strategy)

Positive outcomes achieved – economic/ social / other

Timely delivery of social and economic development, including 64,000 new dwellings in the next 11 years together with local recreational green and blue infrastructure providing social, health and wellbeing benefits for existing and thousands of new residents.

Developers make a simple contribution to the SRMS costs, the scale depends on the property size (number of bedrooms). The developer contributions are paid to local planning authorities. Each authority decides which legal mechanisms are applicable to secure the developer contributions from schemes in its area and the potential for phased / staged payments in relation to specific proposals. Building on the example from Thames Basin Heaths, the SRMS also uses an investment fund. There is an assumption that £363,000 needs to be invested each year for the plan period. At the start of the in-perpetuity period (2034/35), the fund is predicted to have a capital value of around £20million. Spending on mitigation measures during the 80 year in perpetuity period will be funded partly by drawing on that capital and partly from the interest earned on the remaining balance. So, at the end of the in-perpetuity period in 2113/14, the capital will have reduced to around zero.

This pays for employment of Rangers and wardens.

Bird Aware also provides events for local schools, a series of local activities

Links to international obligations

Without the prevention of additional disturbance from recreational visits, the following implications for non- EU international obligations would be likely.

Ramsar

Failure to ensure the ecological character of the sites, through failure to address threats from recreational pressures.

Bern convention

There is a very large overlap of all bird species on which the SPAs are designated, and the species listed on Bern for conservation. All SPAs have been confirmed to the Berne Secretariat as comprising a core element of the Emerald network of Protected Areas.

Bonn Convention

In addition to the core requirement of the convention to enter agreements for migratory birds, the Agreement on the Conservation of African and Eurasian

Migratory Waterbirds, requires strict protection of migratory birds (not at a favourable conservation status) the Critical Site Network under this agreement identifies all the Mid Essex coast SPAs, and Benfleet to Southend Marshes SPA and Ramsar site.

Art 2 of AEWA

1. Parties shall take co-ordinated measures to maintain migratory waterbird species in a favourable conservation status or to restore them to such a status. To this end, they shall apply within the limits of their national jurisdiction the measures prescribed in Article III, together with the specific actions determined in the Action Plan provided for in Article IV, of this Agreement.

2. In implementing the measures prescribed in paragraph 1 above, Parties should take into account the precautionary principle.

Without the Habitats Regulations there is a risk that Article 2 & 3 of the Bonn Convention would fail to be complied with, whereby the necessary strict protection would fail to be implemented.

Other key information

Additional links and information

Liley D, Stillman R & Fearnley H (2011) Solent Disturbance & Mitigation Project Phase II Results of bird disturbance fieldwork 2009/10. Solent Recreation Mitigation Strategy

Liley D & Tyldesley D (2013) Solent Disturbance & Mitigation Project Phase III Towards an Avoidance and Mitigation Strategy.

Clarke C (2016) Market research relating to initiatives to encourage responsible dog Walking

Jenkinson S (2016) Mitigation options for influencing the behaviour of walkers with dog in the Solent area

[Solent Recreation Mitigation Strategy](#)

[Eastleigh District Council – Guidance on making up front payment in lieu of entering s.106 agreements.](#)

[Solent Recreation Mitigation Partnership. Seventh Annual Report on Implementation June 2021](#)

Case Study 4

Road development – Compensatory measures

Summary of Case

This case involved highways improvements to the Junction 10 of the M25. The M25 Junction 10 and the A3 is a key route from London to Portsmouth. The Development predominantly follows the existing M25 Junction 10 and A3.

A large part of the footprint and surrounding area of the Development is part of the Thames Basin Heaths SPA, and Ockham and Wisley Commons Site of Special Scientific Interest (“SSSI”), together with areas designated as a Local Nature Reserve and Site of Nature Conservation Interest. There is also some ancient woodland adjacent to the Development and other ancient woodlands in the local area

At LSE Stage three European sites were screened in

- Thames Basin Heaths SPA;
- Mole Gap to Reigate Escarpment SAC; and
- Ebernoe Common SAC

The adverse effects on the Thames Basin Heath SPA habitat loss effects resulting from the permanent land take of 5.9ha and temporary land take of 8.7ha from within the SPA.

This case study illustrates

- the successful route through the Habitats Regulations for proposals that are clearly in the overriding public interest – delivering on socio/ economic requirements.
- Furthermore, the holistic compensation package, that delivered wider public benefits, in the form of access improvement – for pedestrians, cyclists and horse riders.
- The compensation measures involved the removal of an old growth coniferous plantation within the TBH SPA itself. Illustrates that there is more flexibility in delivery of compensation measures, where recreation of heathland within the SPA boundary would not have been considered mitigation.
- The delivery of wider environmental benefits also illustrates how case like this can provide the delivery mechanism for wider Environmental targets. Without the Habitats Regulations, a potential funding mechanism would be lost.

Site and Qualifying

Thames Basin Heaths SPA;

Mole Gap to Reigate Escarpment SAC; and

Ebernoe Common SAC

Relevant Parties

National Highways

Natural England

RSPB

Environment Agency

Royal Horticultural Society.

HRA Stage relevant to case study

Screening

The approach adopted included the identification of European sites in accordance with Design Manual for Roads and Bridges (DMRB) guidance HD44/09 and thus considered the following:

- European sites within 2km of the Development;
- SACs within 30km of the Development with bats as a qualifying feature;
- where the Development crosses adjacent/upstream or downstream of watercourses designated as a European site; and
- any European site within 200m of the affected road network associated with increased air quality emissions as a result of the Development.

AA and integrity test

Alternative solutions

The public examination (ExA) considered information on alternatives submitted by the Applicant and Interested Parties and was satisfied that no feasible alternative solution exists that would represent a lesser effect. Having identified the objectives of the Project and considered all alternative solutions that provide a means of fulfilling these objectives, the Secretary of State is also satisfied that no alternative solutions are available.

IROPI

SoS set out the three elements of the IROPI test:

Imperative test passed on the basis that the road improvement objective was a nationally important link providing access to global markets and connections to Heathrow, Gatwick and the channel ports for much of the UK, as well as for the south-east region. Additionally, the A3 is also an important strategic route, linking London with the international port of Portsmouth, as well as Guildford, which is the largest centre of employment in Surrey. In addition to regional importance the M25 and the A3, converging at Junction 10 of the M25, are both key corridors locally connecting people to employment, services, and leisure activities.

Public interest - The national networks national policy statement (NNNPS) sets out the need for, and Government's policies to deliver, development of NSIPs on the national road networks in England. This section of the M25 is one of busiest sections on the Strategic Road Network (SRN) and, in line with government policy, there is a critical need to deliver the Project to add capacity to the junction, improve public safety, reduce congestion and support growth that would otherwise be restricted by the existing congestion and safety issues at this location. The Secretary of State confirmed for this reason the Project is in the public interest and is in the long-term.

Overriding The Secretary of State was satisfied that the Project is in accordance with the NNNPS which sets out a critical need to improve the national networks and that this Project is identified in the Department of Transport Road Investment Strategy 2015-2020 (RIS) as a key investment for the South-east region. The Secretary of State considers that the long-term benefit of the Project for both current and future users of the Project in terms of reduced congestion, improved safety, as well as supporting growth in the wider area outweighs the potential harm to the integrity of the Thames Basin Heaths SPA given the absence of the qualifying features core habitats for nesting, roosting and foraging in the area to be lost.

Compensatory measures

The design of the suite of compensatory measures, including selection of the land parcels, appropriate ratios and management measures, was undertaken and

agreed with NE, Forestry Commission (“FC”), Surrey County Council, Surrey Wildlife Trust and the RSPB.

(Full details of compensatory measures provided below under heading Positive outcomes achieved – conservation.)

Positive outcomes achieved – conservation.

The HRA concluded that the impacts on the TBH site amounted to habitat loss effects resulting from the permanent land take of 5.9ha and temporary land take of 8.7ha from within the Thames Basin Heaths SPA.

The objectives of the package of compensatory measures are to enable the populations of the three SPA qualifying species to remain stable or to increase and to ensure that the coherence of the national site network is maintained.

National Highways are quoted (reference Website) *“Our scheme will involve some of the most extensive environmental mitigation ever carried out by National Highways, including restoration of the heathland, woodland enhancement, and replacement of lost habitats. These works will be phased over several years and will be supported by a commitment to manage and monitor the restored and enhanced areas for up to 25 years, while they establish.”*

The package of compensatory measures is designed to compensate for the loss of SPA land and for the potential reductions in invertebrate resource within the SPA. It comprises two main elements, ‘SPA compensation land’ and ‘SPA enhancement areas,’ as summarised below: A third element is the Cockcrow green bridge.

SPA Compensation Land and SPA Enhancement Areas.

SPA compensation land: two new areas of habitat creation to be designated as part of the SPA, amounting to an approximate ratio of 1:1 of replacement for the permanent loss (referred to as the “C1 Old Lane SPA compensation land” and the “C2 Wisley SPA compensation land”); and

SPA enhancement areas: a suite of enhancement measures to be applied to 47.4ha of land within the existing SPA boundary, applying a 3:1 ratio of

enhancement area for the permanent and temporary land take within the SPA (eight parcels of land have been identified, referred to as enhancement areas E1 to E8).

SPA compensation land (6.1ha in size) would provide grazed grassland fields and wood pasture habitat directly adjacent to areas of heathland forming part of the SPA. Additional tree planting in these areas and linkage with existing open habitats of the SPA is specifically intended to increase invertebrate resource and may also provide foraging opportunities for the nightjar and woodlark qualifying features.

The management objectives for the SPA enhancement areas are targeted towards creating and maintaining suitable habitat and structural conditions to support the SPA qualifying features, through increased provision of nesting and foraging habitat and increased invertebrate food resource.

The Secretary of State agreed that the proposed compensatory measures are targeted to the adverse effects identified, in that they address the loss of SPA habitat and potential reduction in invertebrate resource. The measures are considered to be sufficiently diverse to provide habitats that will enhance the invertebrate assemblage of the SPA and provide increased structural diversity within the proposed and existing habitats, leading to increased foraging or nesting habitat for the three qualifying features. The type of measures proposed are reliable, proven, tried and tested habitat creation and management techniques, based on sound science, which would create and enhance heathland habitats and the habitats of value to the qualifying features.

Principle of additionality

NE is quoted by the SoS as stating “There are no legal requirements on Surrey County Council or Surrey Wildlife Trust to carry out the works proposed as compensation and enhancement measures arising out of the designation of the land as SSSI or SPA. The maintenance of the integrity of the SPA and the maintenance of the SSSI in favourable condition is achieved to a satisfactory level through management of the existing areas of open heathland and open water - this has consistently been the basis of our advice to SWT.”

Site designation

Until the point at which the compensatory land located outside of the existing SPA boundary becomes part of the European site, protection is provided by Government policy.

Cockcrow green bridge

The Cockcrow green bridge proposed as the UK's first "heathland" green bridge. Spanning 30 metres in width, the bridge aims to "re-connect the commons either side of the A3 and provide a natural and safe corridor for local wildlife. It has been designed with reptiles and invertebrates at its heart. And it will help local creatures, such as sand lizards, silver studded butterflies and heath tiger beetles, to spread across the local area and encourage them to grow in numbers."

The species benefited from the overall scheme are of national and local significance. Illustrating the wider environmental benefits of the scheme.

Positive outcomes achieved – economic/ social / other

Timely delivery of a nationally important highways infrastructure project with significant economic, social, safety and other benefits, including new and safer routes for cyclists, pedestrians and horse- riders.

"Our improvements will improve connections, smooth traffic flows, and create safer journeys for all. The scheme will also deliver improvements to the local network of footpaths and bridleways. We'll be providing a new 5km route between the Ockham Park and Painshill interchanges, removing the need to cross busy main roads. It will be available to pedestrians, cyclists and horse riders and connects with many other footpaths, bridleways, and roads in the local area." [...]"Aside from providing a safe, and improved route for pedestrians, cyclists and horse riders, the route will be used as a corridor for services, such as gas, water, electricity, and telecommunication. These will be buried in the ground."

Picture of proposed green bridge



© National Highways - M25 junction 10/A3 Wisley improvement scheme

The photograph shows a model of the proposed green bridge at the M25 junction with the A3 at Wisley. It shows people and horses crossing the bridge and an area of heath.

Links to international obligations

Without the Habitats Regulations processes in this case - there may be implications for Berne Convention, Bonn Convention, and achievement of CBD/ GBF targets.

The three ground nesting bird species are all on the Berne convention annexes for protection.

4 Summary of recommendations and Conclusions

This report has shown the way through the Habitats Regulations and the key elements of their provisions. Building from the conclusions from Report 1 the Habitats Regulations are critical for enabling delivering of non-EU international regimes, and most recently the Global Biodiversity Framework (GBF) Kunming Montreal protocol.

Whilst this report has deconstructed the HRA process, into its component parts, it is important to acknowledge that the Habitats Regulations put in place a step wise process, that enables robust assessment. Its strength is in the holistic approach. Even in cases which have the potential to adversely affect the integrity of a site, where a proposal can

show that there are no less damaging alternative solutions, and the public interest outweighs the harm to a European site, plans or projects can proceed.

This relies on the screening in of proposals with a low threshold and works to ensure that plans or project progress through the steps. The steps are well designed to evaluate impacts and put in place a process for evaluating whether proposals should proceed and the safeguards (mitigation and compensatory measures) that should be put in place.

It is DTA- Ecology's opinion, from individual experiences and conversations with colleagues in the nature conservation agencies, that there can be a reluctance to progress down the derogations route, rather than use the derogations for their intended purpose.

Furthermore, it demonstrates that current legal process doesn't inhibit the proper application of scientific judgement and knowledge. It is not necessary to remove all doubt, and in some cases an inherent element of uncertainty remains. As covered in Box 3.9 Advocate General Kokott in her opinion in the Waddenzee case states;

'This assessment must, of necessity, compare all the adverse effects arising from the plan or project with the site's conservation objectives. To that end, both the adverse effects and the conservation objectives must be identified. The conservation objectives can be deduced from the numbers within the site. However, it will often be difficult to encompass all adverse effects in an exhaustive manner. In many areas there is considerable scientific uncertainty as to cause and effect. If no certainty can be established even having exhausted all scientific means and sources, it will consequently be necessary also to work with probabilities and estimates. They must be identified and reasoned.'

However, this report has provided reassurance that whilst the integrity test sets a 'high bar' it is acceptable to work with probabilities and estimates where there is considerable scientific uncertainty.

The case studies have also illustrated where proposals fulfil the requirements for derogation the flexibility of compensatory measures has shown that 'win-win' outcomes are very often possible. Case studies show that when strategic mitigation and compensatory measures are taken forward they can provide wider public benefits, than merely offsetting potential harm to the national sites network.

Lastly compensation measures provide a funding mechanism for wider delivery of the legally binding environment targets. Without the Habitats Regulations, this tool for delivery would be lost.

5 References

Case law for Article 6(3) and (4) (in order of judgment dates)

Waddenzee the ruling in Case - 127/02 (Netherlands) The National association for conservation of the Waddenzee and the Netherlands association for the protection of birds v the Secretary of State for agriculture, nature conservation and fisheries 7/9/04

Castro Verde case C – 239/04 European Commission v Portugal 26/10/06

World skiing championships case C – 304/05 European Commission v Italy 20/9/07

Hart [2008] EWHC 1204 (Admin), R (on the application of Hart District Council) v the Secretary of State Communities and Local Government 1/5/08

Case C – 241/08 European Commission v France 4/3/10

Alto Sil case C – 404/09 European Commission v Spain case 24/11/11

Solvay et al v Region Wallone the ruling in case C – 182/10 (Belgium) 16/2/12

The Greek River Diversion the ruling in case C - 43/10 (Greece) 11/9/12

Hughes v Carmarthenshire County Council Court of Appeal [2012] EWCA Civ 1509 [2012] Env L R 17 18/10/12

Sweetman the ruling in case C – 258/11 (Ireland) 11/4/13

Briels the ruling in case C – 521/12 (Netherlands) 15/5/14

Lydd Airport [2014] EWHC 1523 (Admin), RSPB and Lydd Airport Action Group v Secretaries of State for Communities and Local Government and for Transport, London Ashford Airport Limited and Shepway DC 16/5/14

EC v Greece case C – 600/12 European Commission v Greece 17/7/14

Sustainable Shetland [2015] UKSC 4 Sustainable Shetland v Scottish Ministers and others (UK Supreme Court) 9/2/15

Smyth [2015] EWCA Civ 174 Smyth v Secretary of State Communities and Local Government (Court of Appeal) 5/3/15

Case C – 441/17 European Commission v Poland 17/4/17

People over Wind the ruling in case C – 323/17 (Ireland) 12/4/18

Dutch Nitrogen cases the ruling in cases C – 293/17 and 294/17 (Netherlands) 7/11/18

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