

Shadow Habitats Regulations Assessment (sHRA)

Boscobel Lane, Bishops Wood

February 2024

For and on behalf of
Boningale Homes Limited



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This document does not constitute legal advice.

1.0 INTRODUCTION

Preface

- 1.1 The Conservation of Habitats and Species Regulations 2017¹ (as amended) (commonly referred to as the Habitats Regulations) require competent authorities to assess the impact of development plans on the network of internationally important protected areas comprising Special Protection Areas (SPAs), Special Areas of Conservation (SACs) and Ramsar sites (or European sites). This requirement is delivered via a Habitats Regulations Assessment (HRA) which comprises a series of mandatory tests.
- 1.2 Beamsley Ecology Ltd (Beamsley) has been commissioned by Boningale Homes Limited (hereafter referred to as the 'Applicant') to prepare this report to provide the competent authority with the information to carry out the HRA for Land off Boscobel Lane, Bishops Wood, (hereafter referred to as the 'Site'), for redevelopment of the Site for up to 100 residential dwellings and a local Use Class E(a) shop (hereafter referred to as the 'Development'). As the Development will require planning permission, the local planning authority, South Staffordshire Council, is the competent authority.
- 1.3 The Site is approximately 5.4 hectares (ha) in total area, centred on Ordnance Survey Grid Reference SJ 83830 09132. The Site location is shown in **Figure 1** below.

Figure 1: Site Location



¹ The Conservation of Habitats and Species Regulations 2017. SI No. 1012.

Proposals

- 1.4 Outline planning permission for up to 100 residential dwellings, a local Use Class E(a) shop and associated drainage. Details of access provided; all other matters reserved for subsequent approval.

Reports / Plans to Reference

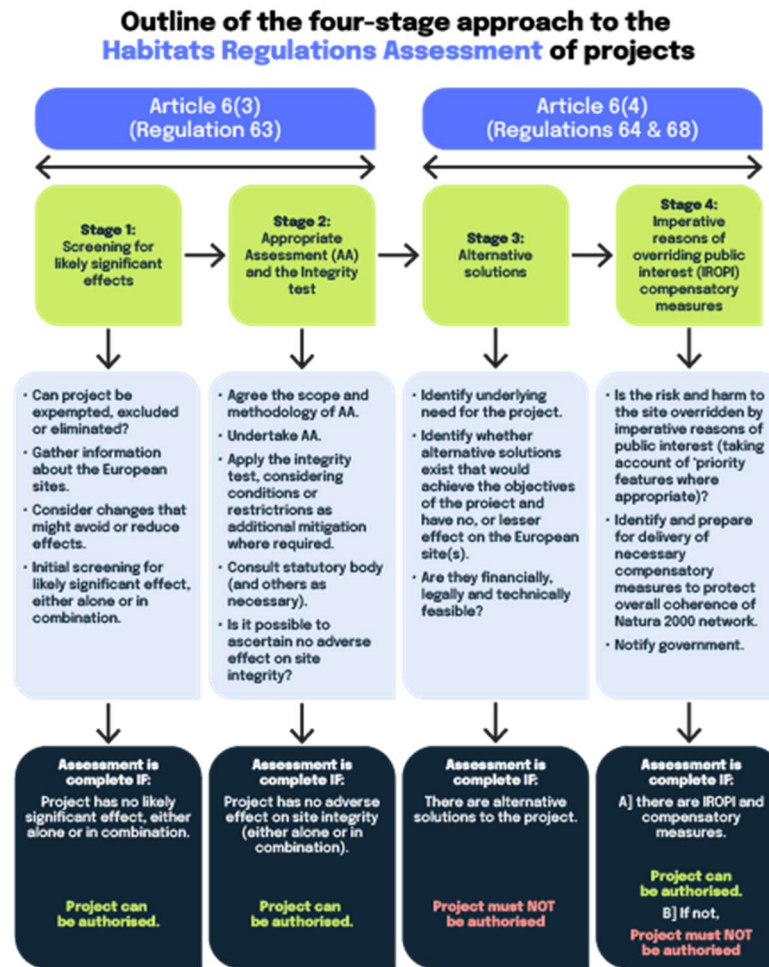
- 1.5 The assessment herein is informed by the following ecological studies:
- Preliminary Ecological Appraisal Report (Ref: ST5074(6)C, Version 2). Cass Design Consultants Ltd. (18/04/2024).

2.0 PRINCIPLES OF HABITATS REGULATIONS ASSESSMENT

European Sites and Natura 2000

- 2.1 The Habitat Regulations Directive (92/43/EEC) established a network of Natura 2000 sites, with the goal of protecting sites of exceptional ecological importance. These include Special Protection Areas (SPA's), Special Areas of Conservation (SAC) and (according to national planning policy) Ramsar sites.
- 2.2 The Habitat Regulations Directive (92/43/EEC) is transposed into UK law as the Conservation of Habitats and Species Regulations (Amendment) (EU Exit) Regulation 2019. Following the UK's exit from the EU, SAC's and SPA's in the UK no longer form part of the EU's Natura 2000 ecological network and instead fall within the new National Site Network (NSN).
- 2.3 Under the Habitats Regulations the granting of approval for developments is restricted if they are likely to have a significant effect on an SAC, SPA or Ramsar site. Guidance on undertaking assessment of plans or projects that may impact upon designated European sites recommends a staged approach. These stages are:
1. Screening- to check if the proposal is likely to have a significant effect on the site's conservation objectives. If not, you do not need to go through the appropriate assessment or derogation stages.
 2. Appropriate assessment- to assess the likely significant effects of the proposal in more detail and identify ways to avoid or minimise any effects.
 3. Derogation- to consider if proposals that would have an adverse effect on a European site qualify for an exemption.

Figure 2: Stages of an HRA



Stage 1 – Screening

- 2.4 This stage is a simple assessment to check or screen if a proposal is (i) directly connected with or necessary for the conservation management of a European site, (ii) risks having a significant effect on a European site on its own or in combination with other proposals. This stage considers the effects of development in the absence of mitigation. Mitigation measures are only considered if the assessment progresses to Stage 2 – Appropriate Assessment.
- 2.5 Assess the likely significant effect: Stage 1 seeks to assess if the proposal could have a significant effect on a European site that could affect its conservation objectives. This should only consider the risk or possibility of a significant effect based on evidence, not hypothetical risks.
- 2.6 The following should be considered: (i) the area over which the proposed activity would take place, (ii) any overlaps or interaction with the protected features of a site in a direct or indirect way, and (iii) the effect of any essential parts of the proposal, such as its location, timing or design.
- 2.7 Only where the risk of the proposal having a significant effect cannot be ruled out, does the assessment progress to Stage 2.
- 2.8 In combination effects: It must be checked if this effect could combine with any other proposal planned or

underway and affects the same site, that on its own also does not have a significant effect. If, in combination, the proposal could have a significant effect on the European site, the assessment will then progress to Stage 2.

2.9 To assess in combination effects, the following will be reviewed:

- applications for a new permission
- applications to change an existing permission
- granted permissions that have not begun or been completed
- granted permissions that need renewing
- plans that have been drafted but not yet adopted

2.10 A proposal, alone or in combination with other proposals, could cause a significant effect on a European site if there's:

- a reduction in the amount or quality of designated habitats or the habitats that support designated species
- a limit to the potential for restoring designated habitats in the future
- a significant disturbance to the designated species
- disruption to the natural processes that support the site's designated features
- only reduction or offset measures in place

2.11 If there's no likely significant effect on the site, either alone or in combination, then the assessment does not need to progress to Stage 2.

Stage 2 – Appropriate Assessment (AA)

2.12 Where there is a risk of a likely significant effect occurring, or there is not enough evidence to rule out a risk, then a more detailed and thorough assessment is required, which is appropriate for the nature and complexity of the proposals. The AA should:

- assess the likely significant effects of a proposal on the integrity of the site and its conservation objectives
- consider ways to avoid or reduce (mitigate) any potential for an 'adverse effect on the integrity of the site'

2.13 The AA appropriate assessment aims to demonstrate whether an adverse effect on the integrity of the site from the proposal can be ruled out or not. As part of the assessment, any mitigation measures that have been included as part of the proposal to remove or reduce potential adverse effects should be considered.

2.14 Test the Integrity of a European Site: The integrity of the site will be adversely affected if a proposal could, for example:

- destroy, damage or significantly change all or part of a designated habitat
- significantly disturb the population of a designated species, for example, its breeding birds or hibernating bats
- harm the site's ecological connectivity with the wider landscape, for example, harm a woodland that helps to support the designated species from a nearby European site
- harm the site's ecological function, or its ability to survive damage, and reduce its ability to support a designated species
- change the site's physical environment, for example, by changing the chemical makeup of its soil, increasing the risk of pollution or changing the site's hydrology
- restrict access to resources outside the site that are important to a designated species, for example, food sources or breeding grounds
- prevent or disrupt restoration work, or the potential for future restoration, if it undermines the site's conservation objectives

2.15 If mitigation measures are needed to avoid adverse effects, the Competent Authority should attach conditions or take other necessary steps to make sure the measures are carried out.

3.0 BASELINE INFORMATION

Landscape Appraisal

- 3.1 The Site is located immediately to the south of the village of Bishops Wood. Residential properties (and associated curtilage) are immediately adjacent to the northern boundary. Further agricultural land is present adjacent to the other Site boundaries, with minor roads present adjacent to the west and north-east.
- 3.2 Further afield, habitats are similar in composition with abundant farmland (predominantly arable) and blocks of deciduous woodland (some of which is mapped as ancient woodland as per Natural England's Ancient Woodland Inventory).
- 3.3 No notable landscape scale habitat corridors connect the Site to high value habitat in the wider area as the Site is surrounded by agricultural land.
- 3.4 At a local scale this agricultural land and associated boundary hedgerows will likely facilitate the movement of wildlife through the local area and across the Site.

Habitat Baseline

- 3.5 The majority of the Site comprises part of a large arable field with a circa. 1m margin at the field boundary throughout extending to 2m in some areas. Some ephemeral plant species are present within the crop. The field margins are dominated by tall, rank grasses and tall ruderal herbs. There is a low density of scattered bramble scrub.
- 3.6 A small (0.04ha) area of grassland is present in the northern section of the site.
- 3.7 Five hedgerows were defined at the Site boundaries, these include native hedgerows with and without trees.

4.0 IDENTIFYING THE EUROPEAN SITES POTENTIALLY AT RISK

Exclusion, Elimination and Exemption from the need for Assessment

4.1 Prior to the identification of vulnerable European sites, Stage 1 of **Figure 2** encourages a brief, 'pre-screening' exercise prior to the formal screening test to determine if there is an actual need for an HRA. It explores if a proposed development can be:

- Exempted from the HRA because it is '... directly connected with or necessary to the management of the ... European site';
- Excluded from the HRA because 'it is not a project within the meaning and scope of the Habitats Directive'; or
- Eliminated from the HRA because it can easily be shown that although 'it is a project ... it could not have any conceivable effect on any European site'.

4.2 Taking these in turn, it is clear on the basis of current information, that the Development represents a project within the meaning and scope of the Directive with the potential to cause harm to European sites; consequently, it can neither be excluded nor eliminated from the HRA. Likewise, the purpose of the project is clearly not the nature conservation management of any European sites and so it cannot be made exempt from further assessment either. Consequently, the next steps in Stage 1 of Fig. 1 need to be pursued and the identification of which European sites (and features) may be vulnerable.

Identification of European sites potentially at risk

4.3 This HRA has adopted a precautionary 10km radius from the Development Site to search for National Site Network (NSN) sites at risk. Based on similar experiences elsewhere, this is considered to be the maximum extent that a project of this type and scale could reasonably be expected to generate measurable effects.

4.4 Using data from MAGIC², sites within this area of search are listed in Table 1 with distances from the Development Site shown as the crow flies.

TABLE 1 *Test of likely significant effect*

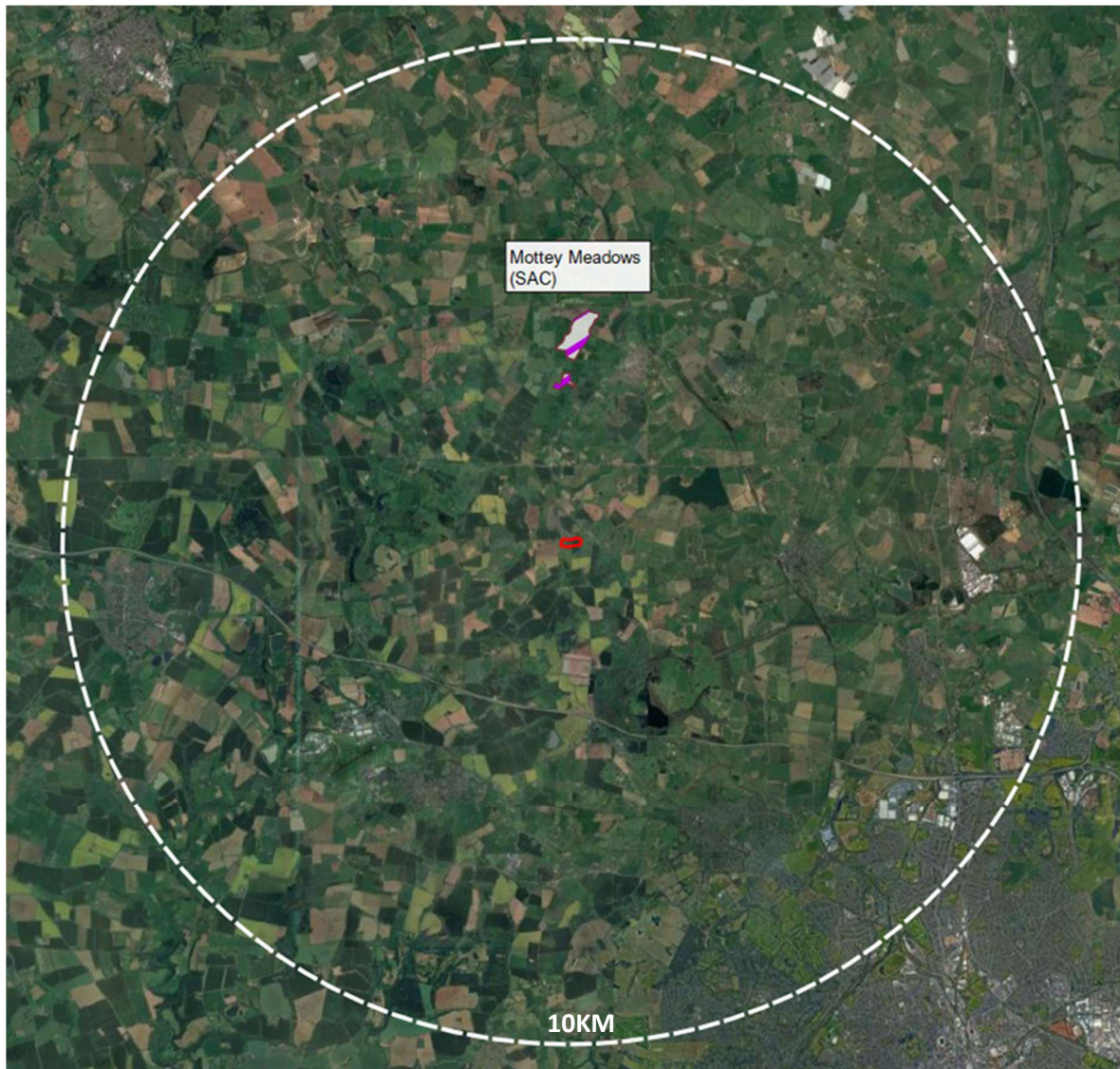
European Site	Designation	Distance from Development
Mottey Meadows	Special Area of Conservation (SAC)	3km N

4.5 Mottey Meadows SAC is taken forward for Stage 1: Screening assessment (See Section 6.0).

4.6 The location of this NSN site relative to the proposed development is shown on **Figure 3** below.

² Multi Agency Geographic Information for the Countryside <https://magic.defra.gov.uk> (accessed 26 November 2022)

Figure 3: European sites potentially at risk within 10km of application site.



5.0 EUROPEAN SITE DETAILS

Motley Meadows

- 5.1 Motley Meadows contains lowland hay meadows with limited influence of agricultural intensification and so demonstrates good conservation of structure and function. There are transitions to other dry and wet grassland types. The site is important for a range of rare meadow species, including fritillary *Fritillaria meleagris* at its most northerly native locality

Qualifying features

Annex I habitats (Primary Reason for Selection)

- 6510 Lowland hay meadows (*Alopecurus pratensis*, *Sanguisorba officinalis*)

Annex I habitats (Qualifying Feature)

- N/A

Annex II species (Primary Reason for Selection)

- N/A

Annex I habitats (Qualifying feature)

- N/A

Conservation Objectives

- 5.2 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
 - The structure and function (including typical species) of qualifying natural habitats, and,
 - The supporting processes on which the qualifying natural habitats rely

6.0 STAGE 1: SCREENING - TEST OF LIKELY SIGNIFICANT EFFECT (TOLSE)

Purpose

- 6.1 The screening exercise explores whether a plan or project will lead to a ‘likely significant effect... either alone or in combination’ or, in other words, whether there is a ‘risk’ that the Development will result in effects which ‘undermine the conservation objectives’ and cannot be ‘excluded on the basis of objective information’. The screening exercise should avoid ‘detailed assessment’ but if likely significant effects are identified (or cannot be ruled out) the closer scrutiny of an appropriate assessment is required; possible effects though, should be credible and not hypothetical.

Approach

- 6.2 The site identification exercise has shown that all the qualifying features of each European site are potentially at risk from recreational pressure and/or air pollution. Each issue is therefore taken in turn and the relevant feature of each European site assessed accordingly. Each task begins with a description of the issue in the context of the site or sites in question followed by a bespoke screening opinion. The Formal Screening Opinion is provided subsequently in Table 2, with conclusions presented in Section 7.0.
- 6.3 Drawing on case law, screening assessments should avoid in-depth analysis and operate only as a trigger to determine if an appropriate assessment is necessary. Because this exercise only seeks to satisfy the broad exploration of whether conservation objectives could be undermined, no in-depth analysis of the latter takes place in this section; the risk of an effect is taken at this stage as triggering the need for appropriate assessment across all conservation objectives.
- 6.4 For the avoidance of doubt, this exercise takes full account of the People Over Wind decision and does not consider any mitigation measures at this stage.

TABLE 2 Test of likely significant effect

Sensitive Interest Feature:	Impact:	Assessment
Motley Meadows SAC <u>Annex I habitats</u> Lowland hay meadows	Direct physical loss or damage to habitat	The Site is sufficiently distant and well separated from Motley Meadows (by at least 3km of intensive farmland and built development) to ensure that direct physical damage or loss of habitat will not occur as a result of construction activities. <u>Significant effect likely to occur:</u> No <u>Progress to Appropriate Assessment:</u> No
	Damage to habitats resulting from increased recreational pressure.	Consultation with Natural England returned the following comments: <i>‘Motley Meadows SSSI/NNR has restricted public access, whereby access is by permit holder only. The national trail footpaths that run parallel to Motley Meadows have a low level of public use. It is unlikely that there will any detrimental effects caused to the interest features of the SSSI from recreational activity. However as a matter of good practice where permissions are granted we would encourage the applicant to include an information pack for new</i>

Sensitive Interest Feature:	Impact:	Assessment
		<p><i>homeowners to provide information about recreational opportunities in the locality, the information pack will help to encourage the use of other recreational areas.'</i></p> <p>With no public rights of access to Motte Meadows SAC, the risk of the proposed development leading to significant impacts from increased recreational pressure can be considered negligible.</p> <p><u>Significant effect likely to occur:</u> No <u>Progress to Appropriate Assessment:</u> No</p>
	Contamination e.g. water pollution	<p>Water pollution is identified as a current pressure on Motte Meadows SAC in Natural England's site improvement plan.</p> <p>There are no hydrological connections between the Site and Motte Meadows SAC. As such, there is no impact pathway for the proposed development to have a significant effect on Motte Meadows SAC, resulting from water pollution leaving the Site.</p> <p><u>Significant effect likely to occur:</u> No <u>Progress to Appropriate Assessment:</u> No</p>
	Changes to Hydrology	<p>Hydrological change is identified as a potential threat to Motte Meadows SAC in Natural England's site improvement plan</p> <p>The proposals are for surface water to be held in Sustainable Urban Drainage System (SUDS) basins, which will allow surface water to be retained on Site and allowed to percolate into the groundwater. As such, there is not expected to be any significant changes to the Sites hydrology.</p> <p><u>Significant effect likely to occur:</u> No <u>Progress to Appropriate Assessment:</u> No</p>
	Water abstraction	<p>Water abstraction is identified as a potential threat to Motte Meadows SAC in Natural England's site improvement plan</p> <p>There are no plans for water extraction as part of the proposals.</p> <p><u>Significant effect likely to occur:</u> No <u>Progress to Appropriate Assessment:</u> No</p>

7.0 OVERALL SCREENING CONCLUSION

- 7.1 This document provides all relevant information to inform an HRA to be carried out according to the statutory procedures laid out in the Habitats Regulations 2017, as amended, using the methodology laid out in the Habitats Regulations Assessment Handbook.
- 7.2 The test of Likely Significant Effect (TOLSE) has found no significant effects are likely to occur at Mottey Meadows SAC; as such, the Appropriate Assessment stage of the HRA is not required.

APPENDICES

APPENDIX 1 HABITATS REGULATIONS ASSESSMENT CONTEXT

European Sites and Natura 2000

The network of European sites forms the cornerstone of UK nature conservation policy. Each component forms part of a 'national network' and each is afforded the highest levels of protection in domestic policy and law. The network comprises SPAs and SACs, classified under the 1979 Birds Directive and designated under the 1992 Habitats Directive respectively for a range of habitats or species (or qualifying features). As a matter of policy, potential SPAs (pSPAs), possible SACs (pSACs) and those providing formal compensation for losses to European sites, are also given the same protection³. According to long-established Government policy⁴, European sites also comprise 'Wetlands of International Importance' (or Ramsar sites listed under the Ramsar Convention) although these do not form part of the national network.

Prior to Brexit, SPAs and SACs formed part of the EU-wide Natura 2000 network to form the largest, coordinated network of protected areas in the world. The SPA and SAC designations made under the European Directives still apply and the term, 'European site' not only remains in use but remains embedded in the Regulations. Similarly, at present, EU case law still applies.

The Habitats Regulations Assessment of Projects

The Regulations apply a series of mandatory tests as interpreted by the principles of both European Union and domestic case law and informed by contemporary Defra⁵ and Department for Levelling Up, Housing and Communities (DLUHC) guidance⁶. Consequently, this HRA takes full account of all the above but also refers as appropriate to the Habitats Regulations Assessment Handbook⁷ which represents the leading source of independent advice on HRA; subscribers include Natural England, the Environment Agency and the Planning Inspectorate, amongst others.

Regulation 63(2) makes clear it is for the applicant to provide the necessary information to enable the competent authority to carry out its HRA. This is the role of this report. The approach adopted follows the four-stage methodology described in the Handbook and summarised in Fig. 1.

In brief, the first test determines (see Stage 1 in Fig.1) if the project can be excluded from the need for HRA simply because it is inconceivable it could result in an effect on a European site. If not, the HRA assesses whether the project is '... likely to have a significant effect on a European Site ... either alone or in combination with other plans or projects'. If this finds there is no credible risk of a significant effect arising, the project may be consented without further scrutiny. Together, these tests are referred to as 'Screening'. For the avoidance of doubt, an in-combination assessment is required only where an impact is identified which is so small that alone, its effects would not be significant but, when considered in combination with other minor effects on the same feature from other plans or projects, the combined 'residual effects' become significant.

³ For the avoidance of doubt, the list of statutory European sites also comprises: A site submitted by the UK to the European Commission (EC) before Exit Day (a candidate SAC or cSAC) as eligible for selection as a Site of Community Importance (SCI) but not yet entered on the ECs list of SCI, until such time as the Appropriate Authority has designated the site or it has notified the statutory nature conservation body that it does not intend to designate the site. After Exit Day, no further cSACs will be submitted to the EU. Statutory European sites also include SCI included on a list of such sites by the European Commission from cSACs submitted by the UK before the UK left the EU, until such time as the UK designates the site when it will become a fully designated SAC.

⁴ ODPM Circular 06/2005: Biodiversity and Geological Conservation – Statutory Obligations and their Impact within the Planning System (16 August 2005), to be read in conjunction with the current NPPF, other Government guidance and the current version of the Habitats Regulations.

⁵ Habitats regulations assessments: protecting a European site. Defra and Natural England. 24 February 2021.

⁶ <https://www.gov.uk/guidance/habitats-regulations-assessments-protecting-a-european-site> (accessed 26 November 2024)

⁷ Planning Practice Guidance <https://www.gov.uk/guidance/appropriate-assessment> (accessed 26 November 2024)

⁸ Tyldesley, D., and Chapman, C., (2013) The Habitats Regulations Assessment Handbook, April 2021 edition UK: DTA Publications Ltd

If likely significant effects cannot be ruled out, the greater scrutiny of an appropriate assessment is required (see Stage 2 in Figure 2⁸). This employs the precautionary principle and seeks to determine if the competent authority can ascertain that the Development 'will not adversely affect the integrity of the European site'. In other words, the competent authority must be able to prove the absence of harm. If it can, consent may be granted. If not, consent cannot normally be granted although derogations apply if strict tests are met. However, it is not anticipated these would be met by the Development. These tests are explained in greater detail below.

Defra guidance allows competent authorities to reduce the duplication of effort by drawing on the outcomes of other HRAs where there has been no material change in circumstances. If there is any doubt that the earlier assessment is suitable for consideration at the later stage, the project is assessed normally⁹. Typically, this exercise might draw on the HRAs of the local development plan, water company resource plans alongside other studies relating to recreation and traffic, where relevant.

Throughout, this report to inform the HRA to be carried out by the competent authority, evaluates the Development in the context of the principles of case law, policy, evidence and best practice.

Definitions, Evidence, Precautionary Principle & Case Law

The overall approach to the two stages was helpfully summarised by Advocate General Sharpston in the Sweetman case¹⁰:

"47. It follows that the possibility of there being a significant effect on the site will generate the need for an appropriate assessment for the purposes of article 6(3). An example of the type of confusion that this poorly-drafted piece of legislation can give rise to can, I suggest, be seen in the judgment in the Landelijke Vereniging case [2004] ECR I-7405. In para 41, the court talks of an appropriate assessment being required if there is a "mere probability" that there may be significant effects. In para 43, it refers to there being a "probability or a risk" of such effects. In para 44¹¹, it uses the term "in case of doubt". It is the last of these that seems to me best to express the position. The requirement at this stage that the plan or project be likely to have a significant effect is thus a trigger for the obligation to carry out an appropriate assessment. There is no need to establish such an effect; it is, as Ireland observes, merely necessary to determine that there may be such an effect. ...

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". ...

50. The test which that expert assessment must determine is whether the plan or project in question has "an adverse effect on the integrity of the site", since that is the basis on which the competent national authorities must reach their decision. The threshold at this (the second) stage is noticeably higher than that laid down at the first stage. That is because the question (to use more simple terminology) is not "should we bother to check?" (the question at the first stage) but rather "what will happen to the site if this plan or project goes ahead; and is that consistent with 'maintaining or restoring the favourable conservation status' of the habitat

⁸ Adapted from *The Habitats Regulations Assessment Handbook (October 2018)* www.dtapublications.co.uk,

⁹ The suitability of earlier, or higher level assessments is subject to the decision of the CJEU in *Coöperatie Mobilisatie voor het Milieu v College van Gedeputeerde (C-293/17)* [2019] Env. L.R. 27 ("Dutch Nitrogen").

¹⁰ *People Over Wind and Sweetman v Coillte Teoranta (C 323/17)* [2018] PTSR 1668

¹¹ The CJEU in *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris Van Landbouw, Natuurbeheer en Visserij (C127-02)* [2005] 2 CMLR 31 ("the Waddenzee case")

or species concerned?.”

Stage 1 – Screening

The screening test is defined in Regulation 63(1) as follows:

[Where a plan or project] ... is likely to have a significant effect on a European site ... (either alone or in-combination with other plans or projects) ...

In this context (see Sweetman, above):

- ‘*Likely*’ is a low threshold and simply means that there is a risk or doubt regarding such an effect, which cannot be excluded on the basis of objective information¹²;
- ‘*Significant*’, means ‘any effect that would undermine the conservation objectives for a European site ...’;¹³
- ‘*Objective*’, in this context, means clear verifiable fact rather than subjective opinion¹⁴.

Furthermore, in Boggis, the Court concluded¹⁵ that ‘... a claimant ... must produce credible evidence that there was a real, rather than a hypothetical risk, which should have been considered.’

These interpretations mean the assessment of credible risks in the screening exercise should not be exhaustive and should act as a trigger for further scrutiny, points clearly described by Advocate General Sharpston in Sweetman, quoted above. This was followed in the Bagmoor Wind case¹⁶ where the Court stated:

‘If the absence of risk ... can only be demonstrated after a detailed investigation, or expert opinion, that is an indicator that a risk exists and the authority must move from preliminary examination to appropriate assessment’.

An assessment of in-combination effects is only required where a residual impact is identified which would not have a significant effect on its own but where likely significant effects may arise cumulatively with other plans or projects. In line with Regulation 63(3), this requirement is also carried through into the appropriate assessment if one is necessary.

It follows, therefore, that where it can be shown that there is no credible risk of a significant effect arising alone, there can be no cumulative effect with others and so no need for an in-combination assessment. This approach was made clear in Foster and Langton¹⁷, where the Court stated:

‘There is no basis to carry out an assessment of the in combination effects when there are no effects to take into account.’ (para 36).

Stage 2 – Appropriate Assessment & The Integrity Test

Regulation 63(5) states where a project is ‘likely to have a significant effect alone or in combination’, it can

¹² Waddenzee at para. 44 and Sweetman, above.

¹³ Waddenzee at paras. 44, 47 and 48.

¹⁴ Bagmoor Wind Limited v The Scottish Ministers [2012] CSIH 93 at para. 45

¹⁵ Peter Charles Boggis and Easton Bavants Conservation v Natural England and Waveney District Council, High Court of Justice Court of Appeal case C1/2009/0041/QBACF [2009] EWCA Civ. 1061 at paras 36 and 37.

¹⁶ Bagmoor Wind Limited v The Scottish Ministers [2012] CSIH 93 ibid

¹⁷ EWHC 2684 (Admin) [2015] Foster and Langton

only be consented if the competent authority can ascertain (following an appropriate assessment) that it 'will not adversely affect the integrity of the European site'.

The Supreme Court in *Champion*¹⁸ held that "appropriate" is not a technical term and indicates no more than that the assessment should be appropriate to the task in hand.

Fundamentally, the HRA process employs the precautionary principle and Regulation 63 ensures that where a project is 'likely to have a significant effect', it can only be adopted if the competent authority can ascertain (following an appropriate assessment) that it 'will not adversely affect the integrity of the European site'. It means that the absence of harm must be demonstrated before a project can be consented.

The burden of proof is made clear in *Waddenzee* and where:

'... doubt remains as to the absence of adverse effects ... the competent authority will have to refuse authorisation'¹⁹ [and] 'that is the case where no reasonable scientific doubt remains as to the absence of such effects'²⁰.

However, absolute certainty is not required. In *Champion*, whilst referring to Advocate General Kokott in *Waddenzee* at para. 107, the Supreme Court found that:

'... absolute certainty' is not required as: '... the necessary certainty cannot be construed as meaning absolute certainty since that is almost impossible to attain ...'.

The integrity of a European site was described in *Planning Practice Guidance*²¹ as:

"the coherence of its ecological structure and function, across its whole area, that enables it to sustain the habitat, complex of habitats and/or the levels of populations of the species for which it was designated."

In *Sweetman*²² the CJEU defined integrity as:

'the lasting preservation of the constitutive characteristics of the site ... whose preservation was the objective justifying the designation of that site

Drawing on this, the European Commission²³ defined it more recently as follows:

The integrity of the site involves its constitutive characteristics and ecological functions. The decision as to whether it is adversely affected should focus on and be limited to the habitats and species for which the site has been designated and the site's conservation objectives.

In the Advocate General's opinion on the above case (*Sweetman*)²⁴, she stated that a plan or project involving '... some strictly temporary loss of amenity which is capable of being fully undone ...' would avoid an adverse effect on the integrity of a site. This was supported by the Court which ruled that '... the lasting and irreparable loss...' of part of a European site would represent an adverse effect on its integrity.

¹⁸ R (on the application of *Champion*) v. North Norfolk District Council [2015] 1 WLR 3170 at para. 41

¹⁹ *Waddenzee* at para. 57.

²⁰ *Waddenzee* at para. 59.

²¹ Reference ID: 65-003-20190722

²² *Sweetman v An Bord Pleanála* (C 258-11) [2014] PTSR 1092 at paragraph 39

²³ "Managing Natura 2000 sites: The provisions of Article 6 of the Habitats Directive 92/43/EEC", European Union. 2019.

²⁴ Advocate General Opinion in Case C-258/11 *Sweetman* paras 58-61)

Further, in the *Holohan case*²⁵, it was held that:

“Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora must be interpreted as meaning that an ‘appropriate assessment’ must, on the one hand, catalogue the entirety of habitat types and species for which a site is protected, and, on the other, identify and examine both the implications of the proposed project for the species present on that site, and for which that site has not been listed, and the implications for habitat types and species to be found outside the boundaries of that site, provided that those implications are liable to affect the conservation objectives of the site”.

Drawing further on *Waddenzee*, the ‘in-combination test’ is also carried forward into the appropriate assessment.

The *Wealden judgement* (2017)²⁶ clarifies a limitation on the use of thresholds when used to rule out the likelihood of significant effects alone or in combination with other plans or projects, specifically the use of Average Annual Daily Traffic (AADT) figures. The Court concluded that where the likely effect of an individual plan or project (i.e. alone) does not itself exceed the relevant thresholds (i.e. 200 Heavy Duty Vehicles (HDV) or 1,000 for all traffic) its impact must still be considered alongside the similar effects of other plans and projects to assess whether the combined effect could be significant. Where the in-combination effect is greater than this threshold, an appropriate assessment is typically required.

Stages Three and Four – The Derogations

If adverse effects on the integrity of the site can be avoided, the project can be consented. If not, derogations would have to be sought to allow the project to continue. These require there to be no less damaging ‘alternative solutions’, that ‘imperative reasons of overriding public interest’ must apply and that ‘compensatory measures’ must be delivered; these are regarded as a ‘last resort’ and considered only in exceptional circumstances. They are not considered further since the project is not considered to meet these tests.

Mitigation and Recent Case Law

In *People Over Wind*²⁷ in April 2018 the CJEU set out clear guidance as to the role of mitigation measures in an HRA. In taking a different approach from decisions in the UK courts, the CJEU held that measures embedded within a plan or project specifically to avoid or reduce the magnitude of likely significant effects should not be taken into account at the screening stage but reserved for the appropriate assessment. This HRA therefore restricts consideration of mitigation measures to the appropriate assessment.

In *Grace & Sweetman*²⁸ the ECJ considered the approach to mitigation at the appropriate assessment stage and held that it is only when it is sufficiently certain that a measure will make an effective contribution to avoiding harm, guaranteeing beyond all reasonable doubt that the project will not adversely affect the integrity of the area, that such a measure may be taken into consideration”.

In the Dutch nitrogen case²⁹, the CJEU confirmed that an appropriate assessment is not to take into account the future benefits of mitigation measures if those benefits are uncertain, including where the procedures needed to accomplish them have not yet been carried out or because the level of scientific knowledge does not allow them to be identified or quantified with certainty. The same approach was applied to “autonomous”

²⁵ *Holohan v. An Bord Pleanála* (C-461/17) [2019] P.T.S.R. 104

²⁶ *Wealden District Council v Secretary of State for Communities and Local Government, Lewes District Council* [2017] EWHC 351 (Admin).

²⁷ *People Over Wind and Sweetman v Coillte Teoranta* (C 323/17) [2018] PTSR 1668

²⁸ *Grace & Sweetman v An Bord Pleanála* (C-164/17) [2019] PTSR 266 at paragraphs 51-53 and 57.

²⁹ *Coöperatie Mobilisation for the Environment and Vereniging Leefmilieu* (C 293/17, C 294/17) [2019] Env. L.R. 27 at paragraph 30

measures taken outside that plan³⁰.

Role of the Competent Authority

As this report has been prepared to help South Staffordshire Council undertake its own HRA, and so discharge its duties under the Habitats Regulations, the Council is the competent authority, and it must decide whether to accept this report or otherwise.

³⁰ See too the *Compton Parish Council* case, referred to above, at paragraph 207.



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