



Scottish Natural Heritage
Dualchas Nàdair na h-Alba

All of nature for all of Scotland
Nàdar air fad airson Alba air fad

HABITATS REGULATIONS APPRAISAL OF PLANS

GUIDANCE FOR PLAN-MAKING BODIES IN SCOTLAND

VERSION 3.0
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Preface and Acknowledgements

The project which led to the publication of the first version of this guidance (August 2010) was advised by a Steering Group. The members of the Steering Group were: CASA Planning and Environment (for practitioners) (until December 2009), City of Edinburgh Council (for COSLA), The Highland Council (for COSLA), Jacobs (for practitioners), RTPI in Scotland, Scottish Environment Protection Agency, Scottish Government and Scottish Natural Heritage (Chair and Project Manager).

As part of the project, all Local and Strategic Planning Authorities and National Park Authorities in Scotland were contacted for examples of Habitats Regulations Appraisals and for their informal comments on the experience of the process to date (October 2009). The Steering Group and the consultants are grateful for the prompt and helpful responses received from the Councils of Aberdeen City, Aberdeenshire, Angus, Argyll & Bute, Clackmannanshire, Comhairle nan Eilean Siar, Dumfries and Galloway, East Ayrshire, East Dunbartonshire, East Lothian, Edinburgh City, Falkirk, Fife, Highland, Inverclyde, Midlothian, North Ayrshire, North Lanarkshire, Orkney Islands, Perth & Kinross, Scottish Borders, South Ayrshire, South Lanarkshire, Stirling, West Dunbartonshire, West Lothian; the National Park Authorities of the Cairngorms and Loch Lomond and the Trossachs; and the Strategic Development Planning / Transport Authorities for Aberdeen City & Shire, Ayrshire and TAYplan.

To help to illustrate various points in the guidance, examples are drawn from appraisals carried out in Scotland and elsewhere. The Steering Group does not necessarily endorse the whole of these appraisals, or their outcomes, as best practice.

The guidance was originally prepared by David Tyldesley and Associates for Scottish Natural Heritage and has been adapted to respond to the comments of the Steering Group. The advice and views expressed in this guidance are not necessarily shared by all of the organisations on the Steering Group.

The guidance has been prepared to assist with the preparation of terrestrial plans, particularly development plans under town and country planning legislation. However it may also be useful in a more general way in relation to plans for the marine environment.

This is a 'living' document and it will be adapted and updated in light of increasing experience of Habitats Regulations Appraisal in Scotland. The version on SNH's web site should always be referred to as the most up-to-date available.

Terminology

A glossary of terms used in this guidance is provided at Appendix A. The first occurrence of the term defined in the glossary is highlighted in ***bold italics*** throughout the guidance (excluding the Executive Summary). Natura terminology is very specific, and in some instances the words have a meaning distinct to that in common usage. It is therefore essential in undertaking a Habitats Regulations Appraisal and in recording it that terminology is used accurately in order to avoid confusion, e.g. between likely significant effects and adverse effects on site integrity.

Note to the Second Version (August 2012)

The second version amended Version 1.0 to cross-refer to the Habitats Regulations Appraisal Advice Sheets published by the Scottish Government (July 2012). References are provided to these where appropriate. This second version also includes additional guidance on the in-combination stages of Habitats Regulations Appraisal, including a new Appendix.

Note to the Third Version (January 2015)

The third version updates the Guidance to refer to Scottish Government Circular 6/2013: Development Planning (December 2013) which has revoked Appendix 1: The Habitats Regulations of former Circular 1/2009, and to revised Scottish Planning Policy (June 2014). It also refers and provides a link to a further HRA Advice Sheet produced by the Scottish Government on HRA and Strategic Environmental Assessment (November 2013) and amends text to conform with this. In regard to in-combination assessment, reference is added to the Scottish HRA Databank for Development Plans. In addition guidance has been added with regard to development allocations in a plan that have project consent. Finally, the guidance no longer advises that projects included in the National Planning Framework for Scotland can automatically be screened out of the HRA of other plans.

EXECUTIVE SUMMARY

HABITATS REGULATIONS APPRAISAL OF PLANS GUIDANCE FOR PLAN-MAKING BODIES IN SCOTLAND

Article 6(3) of the EC Habitats Directive requires that any plan (or project), which is not directly connected with or necessary to the management of a European site, but would be likely to have a significant effect on such a site, either individually or in combination with other plans or projects, shall be subject to an 'appropriate assessment' of its implications for the European site in view of the site's conservation objectives. The plan-making body shall agree to the plan only after having ascertained that it will not adversely affect the integrity of the site concerned, unless in exceptional circumstances the provisions of Article 6(4) are met.

This procedure is applied in Scotland through The Conservation (Natural Habitats, &c.) Regulations 1994 (as amended), and is known as the 'Habitats Regulations Appraisal' of plans.

The purpose of this guidance is to help all plan-making bodies in Scotland to undertake the Habitats Regulations Appraisal of all kinds of plans, or revisions to plans, where such plans are subject to appraisal. The guidance provides the background context for appraisal. It includes a discussion on procedural requirements and methodology; a definition of European sites; and how to carry out the appraisal in parallel with Strategic Environmental Assessment procedures.

The guidance describes and illustrates a 13 stage appraisal process that should meet the requirements of most plan-making bodies. Stage 1 advises whether the plan is one that should be checked for its effects on European sites. Stages 2 to 4 provide the evidence base for the appraisal and suggest early, but discretionary, discussions with Scottish Natural Heritage about the method and scope of the appraisal. Stages 5 to 7 systematically 'screen' all aspects of the plan. The purpose of this screening is to identify whether, and if so which, aspects of the plan should be subject to further appraisal, because they would be likely to have a significant effect on one or more European site, alone or in combination, taking account of mitigation measures which can be incorporated into the plan as part of the appraisal process.

Stages 8 and 9 are referred to in the Directive and Regulations as the 'appropriate assessment', where the implications of the plan for the European site are considered in view of the conservation objectives for the site. Again the method helps plan-making bodies to identify mitigation measures and procedures which should enable them to ascertain that the plan would not adversely affect the integrity of any site potentially affected. Stages 10 to 13 deal with consultations on a draft of the appraisal record, how to take account of changes to the plan towards the end of the plan-making process, and how to finalise the appraisal process and record.

The guidance ends with some tips on compliance, how to keep to the 'rules', and 'pitfalls' to avoid. There are five appendices providing a glossary of terms, examples of policies that may be screened in or out of the appraisal, an illustrative outline of a draft Habitats Regulations Appraisal record, the identification of plan elements for in-combination assessment, and the procedure for exceptional cases.

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SECTION 1: SETTING THE SCENE

The purpose of this guidance is to help all plan-making bodies in Scotland to undertake the appraisal of all kinds of plans, and their revisions, under the Habitats Regulations, in order to ensure compliance with the Habitats Directive, protect internationally designated nature conservation sites and to assist in achieving sustainable economic growth.

Introduction to the Guidance

1.1 Article 6(3) of the **Habitats Directive**¹ requires that any **plan or project**, which is not directly connected with or necessary to the management of a **European site**, but would be **likely to have a significant effect** on such a site, either individually or **in combination** with other plans or projects, shall be subject to an '**appropriate assessment**' of its implications for the European site in view of the site's **conservation objectives**. In the light of the conclusions of that assessment, and subject to the provisions of Article 6(4) of the Habitats Directive, the **competent authority** (i.e. in this context the **plan-making body**) shall agree to the plan or project only after having ascertained that it will not **adversely affect the integrity of the site** concerned and, if appropriate, having obtained the opinion of the general public. Article 6(4) provides that if, in spite of a negative assessment of the implications for the site, and in the absence of **alternative solutions**, the plan or project must nevertheless be carried out for **imperative reasons of overriding public interest**, the Member State shall take all **compensatory measures** necessary to ensure that the overall coherence of **Natura 2000** is protected.

1.2 These requirements of the Directive have been transposed into domestic legislation in Scotland by The Conservation (Natural Habitats, &c.) Regulations 1994, as amended. These Regulations are abbreviated in this guidance to '**the Regulations**' or '**the Habitats Regulations**', as the context requires.

1.3 The procedure referred to in this guidance is that of '**Habitats Regulations Appraisal**' (HRA) which encompasses the requirements of Article 6(3) of the Habitats Directive, as described in paragraph 1.1 above. The procedure is sometimes referred to as an 'appropriate assessment', but this can be confusing because an appropriate assessment is only one particular stage in the process of Habitats Regulations Appraisal. Not all plans undergoing Habitats Regulations Appraisal will reach the stage of appropriate assessment, because some plans would not be likely to have a significant effect on a European site.

1.4 The term 'Habitats Regulations Appraisal' is used here to encompass the decision on whether the plan should be subject to appraisal, the '**screening**' process for determining whether an 'appropriate assessment' is required, as well as any 'appropriate assessment' that may be required. It is important to remember that an appropriate assessment is only required where the plan-making body determines that the plan is likely to have a significant effect on a European site in Great Britain, or a **European Offshore Marine Site**, either alone or in combination with other plans or projects, and the plan is not directly connected with or necessary to the management of the site².

¹ EC Council Directive 92/43/EEC, of 21st May 1992 on the conservation of natural habitats and of wild fauna and flora – The Habitats Directive

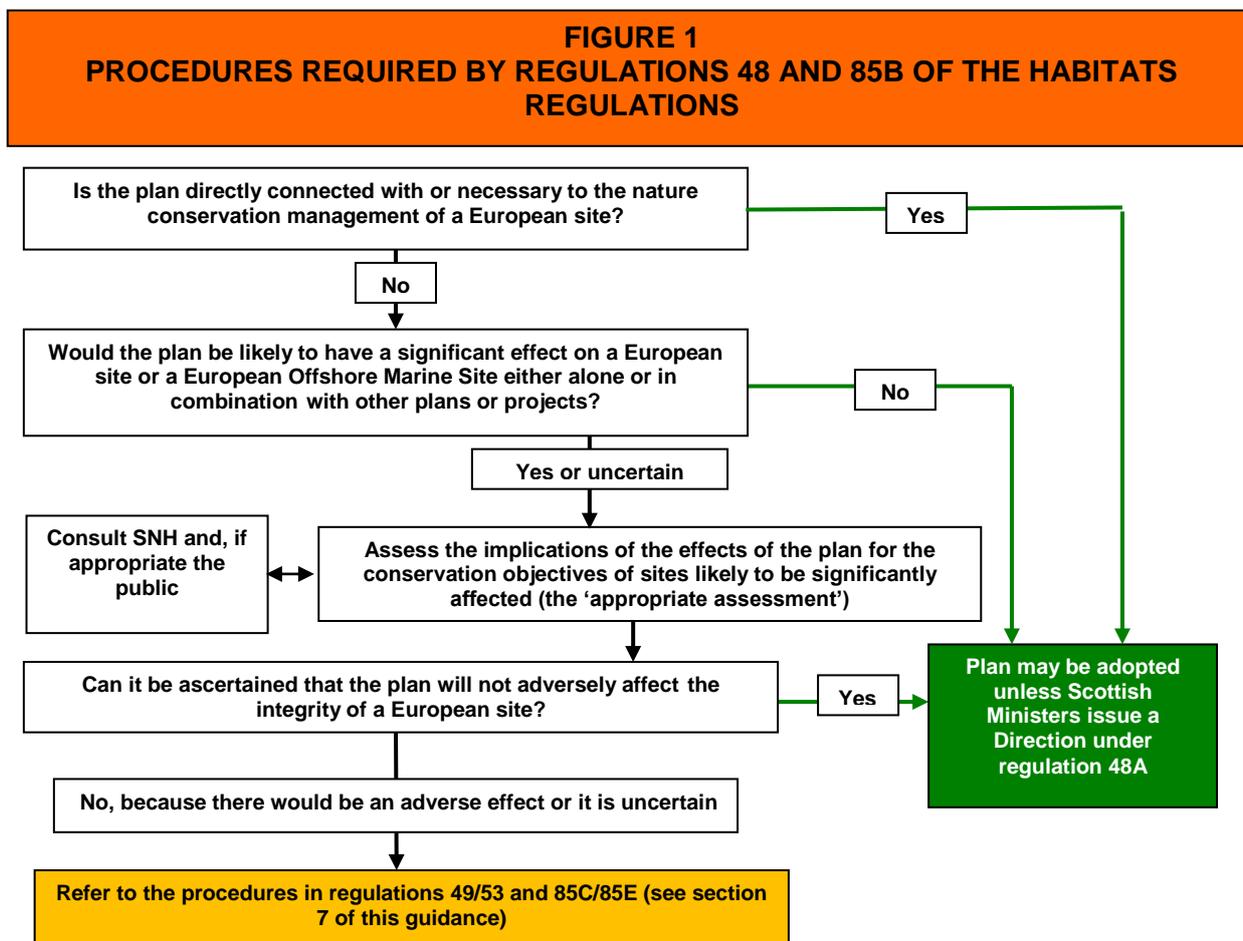
² Regulation 48(1) and 85B(1) of The Conservation (Natural Habitats, &c.) Regulations 1994 as amended

1.5 This guidance has benefitted from the comments and advice of a project steering group and draws on current good practice by local authorities in Scotland and elsewhere in Great Britain. It is intended to offer general advice and assistance on the appraisal process in Scotland, from the perspective of Scottish Natural Heritage (SNH). It is not a definitive statement of the law or Government policy, and is no substitute for legal advice when required.

Procedural requirements of the Habitats Regulations

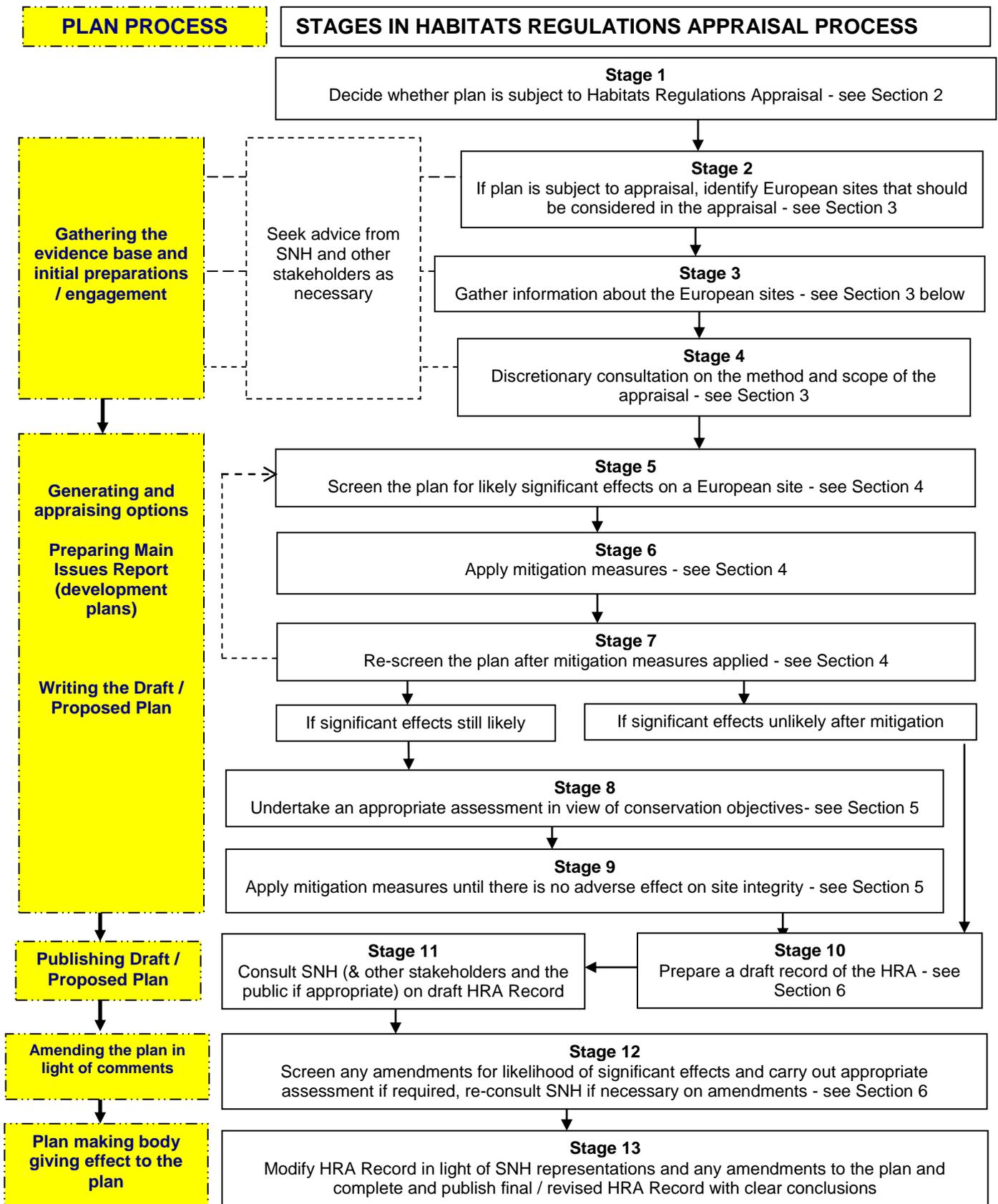
1.6 The Habitats Regulations set out a step-by-step sequence of statutory procedures to be followed. The sequence is a series of steps which are designed to test the potential effects of plans and projects on European sites. It has to be followed in the correct and particular sequence in order to comply with the requirements of the Directive. This provides quite a 'rigid' structure to the appraisal process, as shown in Figure 1 below, which has to be stitched into the plan-making process.

1.7 Figure 1 only shows the appraisal process in terms of the procedural requirements of the Regulations which implement Article 6(3) in respect of plans. This is because the Scottish Government expects that plans will only need to be subject to Article 6(4) in the most exceptional circumstances (see section 7 of this guidance).



1.8 The Regulations do not prescribe a particular methodology for carrying out the appraisal of plans, or how to report the outcomes of appraisals. SNH's recommended approach to methodology and reporting, which has been produced with the support of a steering group, is set out in detail in this guidance and is shown in outline as a series of (potentially) 13 stages in Figure 2.

FIGURE 2
13 KEY STAGES OF THE HABITATS REGULATIONS APPRAISAL PROCESS FOR PLANS



Because the appraisal is a step-by-step process, it is vital that each stage is considered in the context of the whole process. Readers of each section must cross-refer to the whole process and other relevant stages. One stage must not be completed in isolation of others.

1.9 The process of Habitats Regulations Appraisal will inform the preparation of the plan in order to avoid likely significant effects and any adverse effects on integrity of European sites. To record this process a **Habitats Regulations Appraisal Record** should be prepared. This should be the subject of consultation with Scottish Natural Heritage (SNH). Where the Habitats Regulations Appraisal has included an appropriate assessment, it is recommended that the draft record is the means by which the plan-making body consults with SNH in compliance with the Regulations³. For development plans, whether or not an appropriate assessment was carried out as part of the appraisal, the Habitats Regulations Appraisal Record should be submitted to the Scottish Ministers along with the plan and other relevant material (including any relevant correspondence from SNH) when for example submitting the plan for examination or adoption⁴.

The Habitats Regulations Appraisal should be recorded in the HRA Record which should demonstrate in a systematic manner how the plan-making body has identified if any elements of the plan are likely to have significant effects on European sites, and if so, how it is then able to be concluded that there would be no adverse effects on the integrity of European sites.

European sites

1.10 Although the Glossary in Appendix A defines the technical terms used in this guidance, it is important at the outset to define what is meant in this context by 'European sites'. In Scotland, European sites, which are to be considered in the appraisal process, are **Special Protection Areas** (SPA), classified under the **Birds Directive**⁵, **Special Areas of Conservation** (SAC), designated under the EC Habitats Directive 1992, and 'candidate' Special Areas of Conservation (cSAC). The parts of SPAs, SACs and cSACs which lie below Mean High Water Spring tide are also referred to as '**European Marine Sites**', and those in the offshore marine area are also called 'European Offshore Marine Sites' (EOMS).

1.11 Scottish Government policy affords the same level of protection to proposed SACs and SPAs which have been approved by Scottish Ministers for formal consultation. Therefore effects on these sites should also be appraised⁶. Plan-making bodies should also bear in mind the advice in respect of pSAC, cSAC and pSPA set out in paragraphs 7.3 and 7.7 at the end of this guidance. For ease of reading this guidance, all SPA, pSPA, SAC, cSAC and pSAC and all European Marine Sites and European Offshore Marine Sites, to which the procedures for appraisal apply, are referred to as 'European sites'.

³ Regulation 85B(2) of the Habitats Regulations

⁴ Paragraph 89 of Planning Circular 6/2013: Development Planning
<http://www.scotland.gov.uk/Publications/2013/12/9924>

⁵ Directive 2009/147/EC of the European Parliament and of the European Council on 30 November 2009 on the conservation of wild birds

⁶ Paragraph 210 of [Scottish Planning Policy \(2014\)](http://www.scotland.gov.uk/Publications/2014/06/5823) - <http://www.scotland.gov.uk/Publications/2014/06/5823>

Ramsar sites

1.12 Paragraph 211 of the revised Scottish Planning Policy (June 2014) refers to the fact that all **Ramsar sites** are also European sites and / or Sites of Special Scientific Interest. Where the interest features of Ramsar sites overlap with those of European sites it is Scottish Government policy to afford them the same protection. The Ramsar interests should be adequately protected by consideration of the effects of plans on the European sites defined above.

Positive planning for sustainable economic growth

The Habitats Regulations Appraisal process should not be a legal obstacle course, but an effective way of helping to protect European sites, whilst making and implementing plans for sustainable economic growth.

The appraisal process should be proportionate, practical, realistic and effective. It has to operate in a framework within which appraising the effects of a plan can rarely be as detailed and precise as assessing the effects of a specific project at consent application stage.

1.13 It is important to ensure that plans are appraised for their effects on European sites in compliance with the Directive and Regulations. Further guidance on ensuring compliance is set out in Section 7 of this guidance.

1.14 The precautionary principle is embedded in the Directive and Regulations and should be applied. However, the following points should be borne in mind. Many plans are necessarily strategic in nature. The actual or likely effects of implementing plans, especially in the absence of detailed proposals that will necessarily follow adoption of the plan, are inevitably uncertain to a greater or lesser degree. Projects that may flow from the provisions of plans will, in any event, be subject to detailed, statutory assessment for their effects on European sites, and will only be permitted if they meet the tests of the Regulations.

1.15 Nevertheless it is not appropriate merely to delegate consideration of the effects of plans on European sites to project assessment level, or to rely solely on a general policy in the plan protecting European sites.

1.16 However, the precautionary principle needs to be applied, in plan appraisal, in a way that recognises the more general nature of plans, and does not unnecessarily or unreasonably prevent or impede the adoption of plans. If the implications of uncertainty are taken to an extreme, it would be impossible for many plans ever to meet such an extreme test, simply because of their non-specific and more general nature.

1.17 Plan-making bodies should -

- follow the requirements of the Regulations;
- have regard to the potential for the plan to affect European sites, at all stages of plan making;
- take such measures as can be identified to ensure adverse effects do not occur, based on the best information available; and
- put in place plans which effectively achieve their intended purpose, whilst protecting Scotland's most important wildlife sites.

SNH believes that the appraisal process, where effectively applied, does more than just protect the European sites that may potentially be affected. It leads to better plans. It helps to enable plans to deliver economic growth that is genuinely sustainable. It improves the understanding of plan-making bodies about the possible effects of their proposals on internationally designated sites and their vital role in biodiversity conservation. Through the appraisal process, adverse effects on the integrity of European sites will be avoided and plans will set a robust framework within which proposals can be taken forward to project appraisal, fully informed as to their possible effects on such sites.

The role of Scottish Natural Heritage (SNH) in Habitats Regulations Appraisal and Development Plan preparation

1.18 A key part of SNH's realigned engagement in the Town and Country Planning system is early and active involvement in the preparation of development plans. SNH is committed to working jointly with planning authorities and other stakeholders on development plans in a collaborative manner in order to reach sustainable solutions. This includes advising planning authorities on applying HRA to the plan. SNH will therefore welcome, and respond positively to, early opportunities to discuss the content of development plans and implications for European sites, including the vision statement, spatial strategy, policies and proposals.

1.19 Planning authorities should be considering the possible effects of options for the vision, spatial strategy, policies and proposals on European sites early in the plan-making process. As the Proposed Plan represents the planning authority's settled view as to the content of the plan they wish to adopt, it is very important that this has been subject to Habitats Regulations Appraisal to ensure that the plan will not adversely affect the integrity of a European site and could therefore proceed to adoption. The appraisal should therefore be carried out before publication of the Proposed Plan⁷. The views of SNH should be sought early in the process, so that any mitigation can be built in to the plan-making process as soon as possible. Early engagement will enable SNH to advise the planning authority on options, draft policies or proposals that may have a likely significant effect on European sites and on possible mitigation measures. This will save time and effort later in the HRA process, and should result in fewer representations from SNH at the Proposed Plan stage.

1.20 It is the responsibility however of the planning authority to prepare the HRA Record and to formally consult SNH on it if this includes an appropriate assessment. If possible SNH should similarly be engaged during the planning authority's preparation of the HRA Record by being informally consulted on drafts of the document (within an agreed timescale). This will create significant benefits when any later formal consultation on the record takes place under regulation 85B(2) by limiting the need for SNH to make representations on both the record and the underlying plan.

⁷ See Figures 1 and 2 of Circular 6/2013: Development Planning - <http://www.scotland.gov.uk/Publications/2013/12/9924>

SNH welcomes early and collaborative engagement in the preparation of development plans. Planning authorities are encouraged to consider the implications of draft policies and proposals on European sites early in the plan-making process and to seek the informal views of SNH. The Habitats Regulations Appraisal should be carried out before a Proposed Plan is published. As part of its positive engagement, SNH will advise on any likely significant effects of draft policies and proposals on European sites, and on mitigation if necessary, to the extent that information in the plan at this stage enables appraisal to be carried out and advice to be given. Plan-making bodies are also encouraged if possible to informally consult SNH on drafts of the HRA Record.

Undertaking appraisal in parallel with Strategic Environmental Assessment (SEA)

1.21 Public plans that require appraisal under the Habitats Directive are also likely to fall within the scope of section 5(3) of the Environmental Assessment (Scotland) Act 2005. In particular any plan or programme which requires an appropriate assessment under the Habitats Directive is also likely to require Strategic Environmental Assessment⁸.

1.22 In order to achieve savings in resources and time, plan-making bodies can consider opportunities to combine the earlier stages of SEA and Habitats Regulations Appraisal where appropriate, even though the differing requirements mean that the two assessments cannot be fully integrated. One option is to conduct the earlier stages in parallel, such as environmental information gathering, prediction of plan effects, and some early consultation stages. For development planning, the requirement for SEA to be carried out for the Main Issues Report stage means that the early consideration of potential effects of policy options on European sites can be carried out and recorded as part of the SEA.

1.23 If the Habitats Regulations Appraisal is undertaken in parallel with SEA, it is important that the findings of both appraisals are separately and clearly documented and that the record of the Habitats Regulations Appraisal uses the correct terminology, applying them appropriately. Further advice on terminology is given in Appendix A of this guidance.

1.24 It can be borne in mind that as there is no obligation to consult the public under the Habitats Regulations, it is also not necessary to include the Habitats Regulations Appraisal Record in an Environmental Report. However, if the Habitats Regulations Appraisal Record is included in the Environmental Report it will be necessary for clarity to set it out in a separate chapter or distinct section, or appendix. It is also important in such cases that the title of the document should include reference to the Habitats Regulations Appraisal as well as to it being the Environmental Report. In practice, it is easier to set out the Habitats Regulations Appraisal in a separate record, and where appropriate provide a cross-reference to it in the Environmental Report. Some plans lend themselves to a parallel approach more than others.

1.25 Consideration of SEA and other assessments with regard to development plans is included in paragraph 6.4 of Planning Advice Note 1/2010 Strategic Environmental Assessment of Development Plans⁹. Further guidance can be found in Scottish Government HRA Advice Sheet "HRA and Strategic Environmental Assessment"¹⁰

⁸ Section 5(3)(b) of the Environmental Assessment (Scotland) Act 2005

⁹ <http://www.scotland.gov.uk/Publications/2010/03/18102824/0>

¹⁰ Available online at <http://www.scotland.gov.uk/Topics/Built-Environment/planning/National-Planning-Policy/themes/enviro-assessment/a-a/HRAAdvicesheets>

Examples where timing was a relevant factor

The '*Appropriate Assessment in support of the TACTRAN Regional Transport Strategy*', for the Tayside and Central Scotland Transport Partnership was published, in 2007, separately from the Environmental Report, partly because of the difference in timing of the appraisal processes. Conversely, the appraisal under the Habitats Regulations of the *Scottish Borders Local Plan Amendment, 2008*, was included as Appendix E in the Environmental Report, demonstrating that the two procedures had been undertaken, in parallel.

Plan making bodies may find it beneficial to integrate their SEA and HRA processes by using the early stages of SEA to inform the HRA. This can include gathering the evidence-base of European sites, identifying aspects of the plan likely to have significant effects, noting aspects of the plan needing to be considered as part of the cumulative/in-combination assessments, and considering if straightforward mitigation measures can be applied. Reporting of SEA and HRA assessments generally follow different timetables. However if the plan lends itself to including a draft HRA record within the same documentation as the SEA Environmental Report, care must be taken to ensure they are clearly distinguished, including the use of the correct terminology when referring to each.

SECTION 2: PLANS THAT SHOULD BE SUBJECT TO APPRAISAL

Stage 1: Deciding whether a plan should be subject to Habitats Regulations Appraisal

Figure 2 on page 3 shows Stage 1 in the context of the full appraisal process

2.1 For the purposes of this guidance, the first stage in the appraisal process is to establish whether the relevant plan should be subject to Habitats Regulations Appraisal. This depends in part on the type of plan and in part on its potential effects on European sites. It is not possible, categorically, to produce a list of plans that must always be subject to appraisal, and to advise that all other plans will never need to be subject to appraisal. The European Court of Justice has widely interpreted what is meant in the Directive by a 'plan or project'. EC guidance¹¹ notes that:

“...the Directive does not circumscribe the scope of either ‘plan’ or ‘project’ by reference to particular categories of either. Instead, the key limiting factor is whether or not they are likely to have a significant effect on a site”.

2.2 Guidance from the EC¹², the judgment of the European Court of Justice in EC v the UK, case C – 6/04, and the Advocate General’s opinion in that case, are helpful when considering which plans should be subject to appraisal. The court’s judgment did not hinge on whether our land use plans were ‘plans’ in the meaning of the Directive, because that was accepted in the UK’s legal submissions. Rather, the question was the extent to which the plans would be likely to have a significant effect on a European site, given that the implementation of the plans was dependent on projects which would require further permissions.

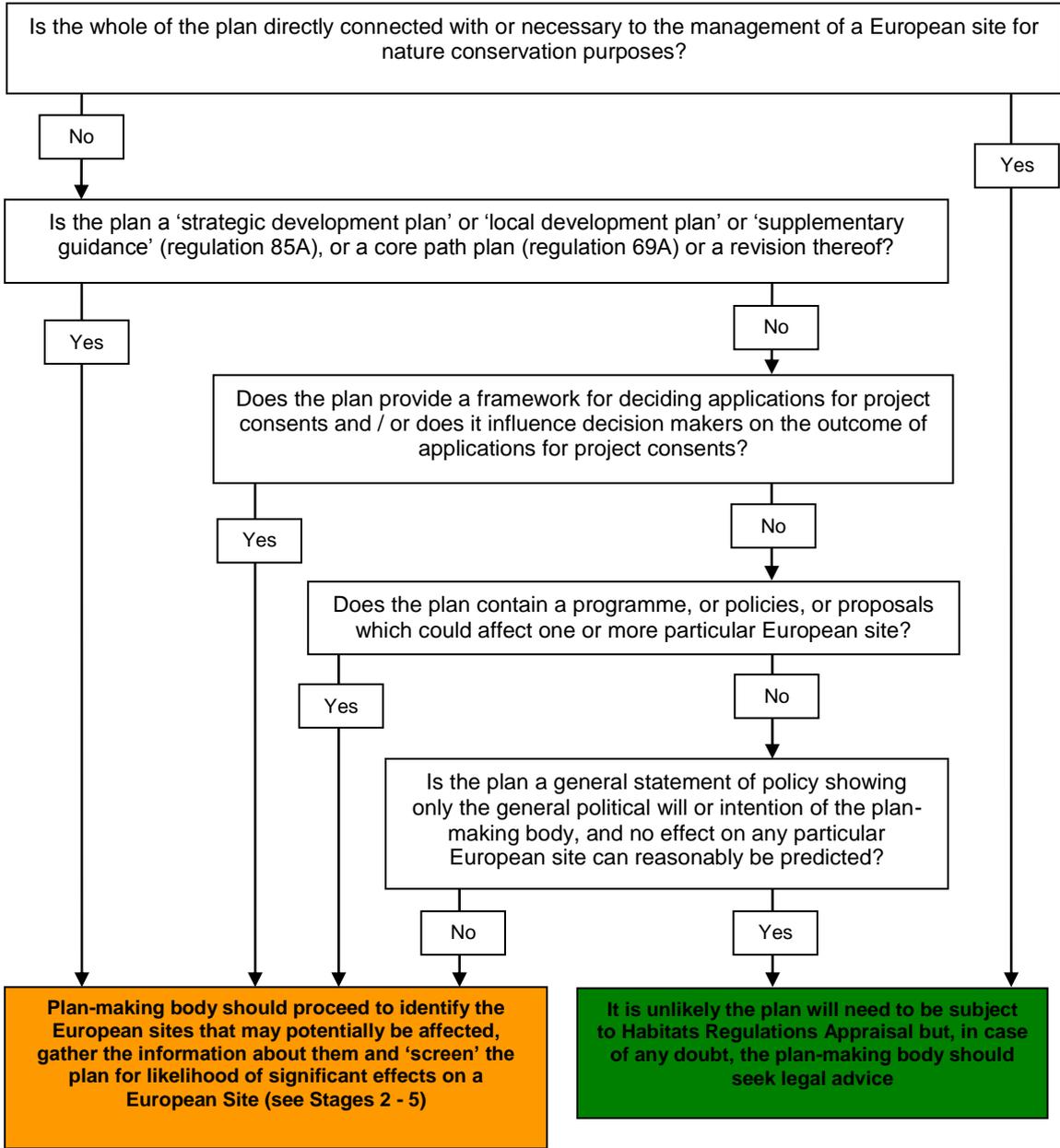
2.3 Figure 3 illustrates a set of steps that are required to determine whether a plan should be subject to Habitats Regulations Appraisal. The steps are then described in more detail after the Figure.

¹¹ EC, 2000, Managing Natura 2000 Sites: The provisions of Article 6 of the Habitats Directive 92/43/EEC, April 2000, Section 4.3

http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/provision_of_art6_en.pdf

¹² EC, 2000, Managing Natura 2000 Sites: The provisions of Article 6 of the Habitats Directive 92/43/EEC, April 2000, Section 4.3

**FIGURE 3
DECIDING IF A PLAN SHOULD BE SUBJECT TO HABITATS REGULATIONS
APPRAISAL**



2.4 Appraisal of the effects of Scottish '**land use plans**' on European sites is required by Part IVA (regulations 85A – 85E) of The Conservation (Natural Habitats, &c.) Regulations 1994 as amended¹³. These Regulations transpose into domestic legislation the requirements of the EC Habitats Directive. Part IVA covers strategic development plans, local development plans and supplementary guidance, as provided for under Part 2 of the Town and Country Planning (Scotland) Act 1997 as amended. These are prepared by strategic development planning authorities, planning authorities and National Park Authorities (regulation 85A), including plans which are jointly prepared by two or more authorities (regulation 85D). Core Path Plans are explicitly required to be subject to appraisal of their effects on European sites under regulation 69A of the Habitats Regulations.

2.5 Other types of plans, not explicitly identified in the Regulations, will need to be subject to appraisal for their effects on European sites because regulation 47(1)(b) applies the requirements to all other plans and projects not specifically cited in Part IVA of the Regulations.

2.6 Consequently, for example, where a planning authority or strategic development planning authority intends to prepare or give authorization to any other plan, including any masterplan or development brief which is not Supplementary Guidance under Part 2 of the 1997 Act and is not a land use plan under Part IVA of the Habitats Regulations, they should have regard to the generality of provisions under regulations 47 and 48 of the Regulations.

2.7 In her Opinion on case C-6/04, Advocate General Kokott said (paragraph 44) that land use plans could have likely significant effects "*if – as laid down in UK law for the plans at issue here – subsequent decisions are in principle to be in accordance with the plans*". The Advocate General advised (paragraph 44) that the objectives of the Directive could be jeopardised if the requirements for protecting a site prevailed over a plan's policies and proposals only at the last moment, as an exception to the normal course of implementation. These points were implicitly adopted in the judgment of the Court.

2.8 The EC has advised¹⁴ that "**a distinction needs to be made with 'plans' which are in the nature of policy statements i.e. policy documents which show the general political will or intention of the ministry or lower authority.**" Many aspects of plans are general statements of policy expressing a plan-making body's general policy framework, or political aspirations or general intentions. However, even if only part of a plan would be likely to have a significant effect on a European site, because of its more specific provisions, it should be subject to appraisal.

2.9 It should be borne in mind that the Scottish Ministers have the power, under regulation 48A, to require a plan-making body in Scotland to undertake an appropriate assessment of a plan in a manner which the Ministers may prescribe, if they consider that one should be undertaken and, either it has not been undertaken, or it has been undertaken in a manner which, in the opinion of the Scottish Ministers, does not comply with the Habitats Directive and Regulations.

¹³ Part IVA was inserted by The Conservation (Natural Habitats, &c.) Amendment (Scotland) Regulations 2007 (SSI 2007/80)

¹⁴ EC, 2000, *Managing Natura 2000 sites: the provisions of Article 6 of the 'Habitats' Directive 92/43/EEC* April 2000 at 4.3.2

When considering whether a plan should be subject to appraisal, take it through the flowchart in Figure 3.

Plans or parts of plans which are merely general policy statements, or which only show the general political will or intention of a public body, will not be likely to have a significant effect on a European site.

However, it is a case-by-case decision as to whether a plan should be subject to appraisal, a critical test being whether it, or any part of it, would be likely to have a significant effect on a European site. A plan-making body should seek legal advice if in doubt.

SECTION 3: GETTING STARTED AND EARLY DISCUSSIONS

Stage 2: Identifying the European sites that should be considered in the appraisal

Figure 2 on page 3 shows Stage 2 in the context of the full appraisal process

3.1 Identifying the relevant sites is not always a straightforward process. It is important to ensure all sites potentially affected are considered, but it is equally important to avoid excessive data gathering about sites that are not likely to be affected, and to keep the assessment proportional to the likelihood of significant effects. As a general guide, and subject to case-by-case analysis by an ecological adviser, as necessary, the sites described in the following list are likely to be relevant:

SELECTING EUROPEAN SITES THAT SHOULD BE CONSIDERED IN THE APPRAISAL	
Criteria	European sites to check
All plans	Sites within the plan area, including those for the criteria listed below
For plans that could affect the aquatic environment	Sites upstream or downstream of the plan area in the case of river or estuary sites
	Peatland and other wetland sites with relevant hydrological links to land within the plan area, irrespective of distance from the plan area
For plans that could affect mobile species	Sites which have significant ecological links with land in the plan area, for example, land in the plan area may be used by migratory birds, which also use a SPA, outwith the plan area, at different times of the year ¹⁵
For plans that could increase recreational pressure on European sites potentially vulnerable to such pressure	Such European sites in the plan area
	Such European sites within a reasonable travel distance of the plan area boundaries that may be affected by local recreational or other visitor pressure from within the plan area (the appropriate distance in each case will need to be considered on its merits, in light of any available evidence)
	Such European sites within a longer travel distance of the plan area, which are major (regional or national) visitor attractions such as European sites which are National Nature Reserves where public visiting is promoted, sites in National or Regional Parks, coastal sites and sites in other major tourist or visitor destinations (the appropriate distance in each case will need to be considered on its merits, in light of any available evidence)
For plans that would increase the amount of development	Sites that are used for, or could be affected by, water abstraction in or close to the plan area
	Sites used for, or could be affected by, discharge of effluent from waste water treatment works or other waste management streams serving land in the plan area, irrespective of distance from the plan area
	Sites that could be affected by transport or other infrastructure (e.g. by noise or visual disturbance)
	Sites that could be affected by increased deposition of air pollutants arising from the proposals, including emissions from significant increases in traffic
For plans that could affect the coast	Sites in the same coastal 'cell', or part of the same coastal ecosystem, or where there are interrelationships with or between different physical coastal processes.

¹⁵ See for example [Assessing Connectivity with Special Protection Areas, SNH, March 2012](http://www.snh.gov.uk/planning-and-development/renewable-energy/onshore-wind/general-advice-and-information/)
<http://www.snh.gov.uk/planning-and-development/renewable-energy/onshore-wind/general-advice-and-information/>

3.2 Bear in mind that European Offshore Marine Sites, beyond the 12 nautical miles limit of Scotland's territorial waters, could possibly be affected by some plans, including those for managing change in the marine environment.

When identifying which European sites to consider, use the list above to help you. Make sure sites which could be significantly affected are not omitted from consideration, but do not simply select every conceivable site irrespective of any possible link to the effects of the plan. Think about the possible links and avoid gathering information unnecessarily. If there is any doubt as to whether to include a European site for consideration, discuss the issue with SNH.

Stage 3: Gathering information about the European sites

Figure 2 on page 3 shows Stage 3 in the context of the full appraisal process

3.3 Information about the relevant European sites, including details of the **qualifying interests**, conservation objectives and **site condition**, can be obtained from SNH's *SiteLink*: <http://gateway.snh.gov.uk/sitelink/index.jsp>

Further site information may be obtained from the Joint Nature Conservation Committee (JNCC) at <http://www.jncc.gov.uk/page-4>

Map based information on the presence and boundaries of European sites can be obtained from SNH's *Natural Spaces*: www.snh.org.uk/snhi

3.4 SNH will assist where necessary in identifying relevant sites, including any outside the plan area, and supplying information about them. Natural England should be consulted in respect of European sites that may be affected in England. The JNCC should be consulted in respect of any European Offshore Marine Sites that may be affected. It is less likely that sites in Wales or Northern Ireland would be affected but, if so, Natural Resources Wales or the Department of the Environment (Northern Ireland) should be consulted respectively.

3.5 The qualifying interests potentially affected will vary between the different European sites, but effects should relate to these interests for the site's classification (SPAs) or designation (SACs). It will be necessary to consider how the plan's policies and proposals may affect the achievement of the conservation objectives.

3.6 Those undertaking the appraisal should find it useful to consider –

- the condition of the sites
- the pressures for change acting upon them, and
- the ways in which they may be vulnerable to changes likely to come from the plan being assessed.

Site Management Statements prepared for Sites of Special Scientific Interest (SSSI), where these are also European sites, can assist in this regard, and can be found on SNH's website. Information relating to ecology of individual species, including some of their recorded sensitivities, can also be found on websites of conservation organisations with bird interests.

It may be helpful to compile a table, or spreadsheet, to summarise this information. This will form a handy reference when assessing the various elements of the plan. A hypothetical and simplified example of such a table is given in Appendix C.

It will be necessary to acquire, examine and understand the citation (or equivalent document) and map of each European site and the conservation objectives for each qualifying interest of each site potentially affected. This information is available on SNH's web site.

Stage 4: Discretionary discussions on the method and scope of the appraisal

Figure 2 on page 3 shows Stage 4 in the context of the full appraisal process

3.7 Although there is no requirement to consult at this stage, it may be helpful to discuss with SNH, and possibly other key stakeholders, the methodology and scope of the appraisal. This could help to focus the appraisal on the key issues and effects that could potentially impede or influence the plan and avoid undertaking unnecessary work. Where plan-making bodies may find this additional discussion with SNH helpful, it need not take the form of a 'formal' consultation.

3.8 In addition to agreeing the list of European sites potentially affected (Stage 2 above), this stage could agree a general methodology, which may simply be an agreement to adopt the method in this guidance, or variations where these are considered appropriate. Early work on screening could also be agreed. For example, it may be possible to agree at an early stage a list of infrastructure projects which will not require further appraisal (see Section 4 below) or the parts of a plan which are agreed to be general statements of policy (again, see Section 4 below), and therefore unlikely to have a significant effect on a European site.

3.9 It may also be useful to discuss any range of options or alternatives that will be developed for consultation, as part of the normal plan-making process, and the scope and degree of appraisal that would be appropriate. Again this could usefully be timed to coincide with the consultation for the scoping of the SEA where relevant.

A useful opportunity to informally discuss the early stages of the Habitats Regulations Appraisal (as described in this guidance) with SNH and perhaps other key stakeholders would be at the scoping stage of the SEA for the plan, where required. Alternatively it may be in early discussions about selecting which European sites are relevant to the plan, or in the case of planning authorities, during early discussions prior to the publication of the Main Issues Report.

Development Plan Main Issues Reports

3.10 During the preparation of a Strategic or Local Development Plan, planning authorities are required to produce a 'Main Issues Report' (MIR). As this is quite early in the plan preparation process, it is unlikely to be practical to discuss the implications for European sites at any length within the MIR. This report should be easily understood, targeted and succinct, outlining the main issues and any reasonable alternatives being considered. The broad implications for European sites can be set out within the SEA Environmental Report (see also paragraphs 1.21 – 1.25) which accompanies the MIR at the main consultation stage.

3.11 This early stage of development plan preparation can benefit from identifying the potential effects of preferred options and any reasonable alternatives on European sites. As part of initial discussions with SNH regarding the MIR, relevant European sites can be identified, and reference made to how these may be sensitive to changes proposed by the plan. As alternatives must be considered reasonable¹⁶, those options that might adversely affect a European site where mitigation cannot be identified should ideally not be included within the MIR (see paragraphs 7.1 – 7.3).

3.12 Further analysis by the planning authority, including further discussions with SNH, about the effects of the plan on European sites, should inform the Proposed Plan. Therefore the recording of the Habitats Regulations Appraisal should concentrate on the contents of the Proposed Plan, including its policies, proposals and supplementary guidance.

3.13 Further guidance can be found in Scottish Government HRA Advice Sheets “Aligning Development Planning procedures with HRA requirements”, and “HRA and Strategic Environmental Assessment”¹⁷

Because the planning authority needs to avoid its plan adversely affecting any European site, it should aim to ensure that preferred options, and alternatives, that would probably adversely affect a European site are not included in the Main Issues Report. Such options and alternatives may not be considered ‘reasonable’. Sufficient preparatory appraisal work will therefore be required for the MIR to enable the potential effects on European sites to be broadly identified and to enable unreasonable options to be ruled out. Accordingly consideration of the effects of options (particularly the preferred options) on European sites should be included as part of the Strategic Environmental Assessment of the development plan. This should be documented as part of the Environmental Report to accompany publication of the MIR. A formal record of HRA will not normally be required at this stage. This should be undertaken for the policies and proposals worked up into the Proposed Plan and produced at that time.

¹⁶ Sections 9(2)(b) and 17(2)(b) of the Town and Country Planning (Scotland) Act 1997 as amended

¹⁷ Available online at <http://www.scotland.gov.uk/Topics/Built-Environment/planning/National-Planning-Policy/themes/enviro-assessment/a-a/HRAAdvicesheets>

SECTION 4: SCREENING THE PLAN FOR LIKELY SIGNIFICANT EFFECTS

Introduction to 'screening'

4.1 'Screening' is a term that is used in this guidance for convenience, to describe the initial stages of the Habitats Regulations Appraisal. It is not a term that is used in the Directive or Regulations. The screening stage described below is not necessarily a single stage in the preparation of a plan. It could be a stage that is repeated, for example, when the plan is being prepared; and perhaps again towards the end of a plan-making process, when modifications or further proposals are considered for inclusion at a late stage.

The purpose of the screening stage is to:

- a) Identify all aspects of the plan which would have no effect on a European site, so that they can be eliminated from further consideration in respect of this and other plans;***
- b) identify all aspects of the plan which would not be likely to have a significant effect on a European site (i.e. would have some effect, because of links/connectivity, but which are minor residual), either alone or in combination with other aspects of the same plan or other plans or projects, which therefore do not require 'appropriate assessment'; and***
- c) identify those aspects of the plan where it is not possible to rule out the risk of significant effects on a European site, either alone or in combination with other plans or projects. This provides a clear scope for the parts of the plan that will require appropriate assessment.***

4.2 It is important that screening is undertaken with appropriate expertise. Some Habitats Regulations Appraisals have under-estimated the potential effects of some plans. For example, it has been assumed, in some cases, that there would be no adverse effects from further development of a particular kind, in a general location, simply because it has been accepted in the past; this is not necessarily the case. Conversely some appraisals have over-estimated potential effects, leading to unnecessary or abortive work.

Interpretation of a 'likely significant effect'

4.3 A likely effect is one that cannot be ruled out on the basis of objective information. The test is a 'likelihood' of effects rather than a 'certainty' of effects¹⁸. Although some dictionary definitions define 'likely' as 'probable' or 'well might happen'¹⁹, in the Waddenzee case the European Court of Justice ruled that a project should be subject to appropriate assessment ***"if it cannot be excluded, on the basis of objective information, that it will have a significant effect on the site, either individually or in combination with other plans and projects"***²⁰. Therefore, 'likely', in this context, should not simply be interpreted as 'probable' or 'more likely than not', but rather whether a significant effect can objectively be ruled out.

¹⁸ Managing Natura 2000 sites, EC, 2000. Section 4.4.2.

¹⁹ Pearsall J., ed 2001, The New Oxford Dictionary of English

²⁰ See paragraph 45 of European Court of Justice case C-127/02 dated 7th September 2004, 'the Waddenzee ruling'

An effect that could undermine the conservation objectives would be a significant effect and the likelihood of it occurring is a case-by-case judgment, taking account of the precautionary principle and the local circumstances of the site. The judgment of 'likelihood' is in turn conducted in a very precautionary manner, taking account of the ecological circumstances of the European site.

4.4 The test of significance is where a plan or project could undermine the site's conservation objectives. The assessment of that risk (of 'significance') must be made in the light, amongst other things, of the characteristics and specific environmental conditions of the site concerned.

4.5 The competent authority should not be swayed by the notion that the likely significance of any effect of any plan or project on a site is necessarily related to the proportion or size of area affected. It is the potential effect on the ecological functioning of the site that is relevant here.

Stage 5: Screening the draft / proposed plan for likely significant effects

Figure 2 on page 3 shows Stage 5 in the context of the full appraisal process

4.6 The following paragraphs explain in detail how to undertake the screening stage. It is a series of systematic steps to eliminate, or 'screen out', elements of the plan not likely to have a significant effect on a European site, and to ensure that other elements of the plan are 'screened in' to the appropriate assessment, and therefore subject to further appraisal. The way in which **mitigation measures** can be built into the overall process of screening is illustrated in Figure 4 later in this section and in Appendix D.

The screening process has three key steps:

- ***Screening step 1: screening out general policy statements***
- ***Screening step 2: screening out projects referred to in, but not proposed by, the plan***
- ***Screening step 3: screening out aspects of a plan that could have no likely significant effect on a site, alone or in combination with other aspects of the same plan, or with other plans or projects.***

Stage 5: Screening step 1 – General policy statements

What to do

4.7 Identify and screen out general policy statements, including 'general criteria based policies', and record that they will not be likely to have a significant effect on a European site.

4.8 A general statement of policy sets out a strategic aspiration for the plan-making body for a certain issue. An example of a general policy statement is provided in Appendix B at Example Policy 1. A general 'criteria based' policy expresses the tests or expectations of the plan-making body when it comes to consider particular proposals. An example is provided at Example Policy 2 in Appendix B. Whilst these can be screened out in this step, a distinction needs to be drawn between them and more site specific criteria based policies, which should be subject to further appraisal, such as that given in Example Policy 3 in Appendix B.

As discussed in paragraph 2.8 above, policies which are no more than general statements of policy or general political aspirations can be screened out of the appraisal because they are unlikely to have a significant effect on a site.

Record of the outcome

4.9 The outcome could be a list in the screening matrix, such as the example in Appendix C, of the aspects of the plan which would not be likely to have a significant effect on a European site because they are general policy statements.

4.10 If the whole plan falls into this category of a general statement of policy, it is reasonable to record that the plan as a whole would not be likely to have a significant effect, and is not subject to further appraisal.

Stage 5: Screening step 2 – Projects referred to in, but not proposed by, the plan

What to do

4.11 Screen out any references to specific proposals for projects referred to in, but not proposed by, the plan – for example those which are identified –

- as part of national infrastructure and promoted by national government, and where the plan will play no part in its delivery
- as subject to consent directly by Scottish Ministers.

An example is provided at Example Policy 4 in Appendix B. Such elements of the plan will include, but may not be limited to, trunk road and motorway projects; major airport expansions; major transmission lines; gas and oil pipelines. An exception would be where agreement has been reached that the principle of such a project is to be established by the plan itself, or that the plan will provide further detail, including mitigation if necessary.

Example of a project that would be screened out from a local authority plan

Policy PT1 of the *Fife Structure Plan 2006 – 2026* (see Example Policy 4 in Appendix B) identifies a number of transport related developments, including the proposed Forth crossing, which will be developed by Transport Scotland. The Structure Plan addresses the spatial planning implications of the crossing, but the appraisal of the Structure Plan did not seek to assess the effects of the proposed crossing on European sites. Transport Scotland and the Scottish Ministers will be responsible for undertaking any Habitats Regulations Appraisal for the potential effects on the Firth of Forth and Forth Islands SPAs and other European sites, as the project progresses.

4.12 However, when it is necessary to consider the effects of the plan being appraised in combination with the effects of other plans or projects, the residual effects of these other infrastructure projects may be relevant and should be checked for in combination effects (see paragraphs 4.34 – 4.42).

4.13 Development proposed by the plan-making body in its own plan, which will utilise the benefit of the major infrastructure improvements discussed above, should not be screened out at this stage.

4.14 Similarly, infrastructure projects which are proposed by the plan-making body itself in its own plan, which could include other locally proposed roads, bridges, causeways, ferries etc, should not be screened out at this stage.

4.15 Other infrastructure projects, which are an inevitable consequence of development provided for by the plan, and which would not otherwise be brought forward, should be assessed, for their direct and indirect effects. For example, whether explicitly referred to in the plan or not, the implications of necessary water supply and waste, including waste water, disposal and road infrastructure should be assessed, where these could potentially affect European sites and they are proposed as part of, or an inevitable consequence of, the plan being appraised. These kinds of infrastructure projects should not be screened out at this stage unless they have already been, or will be, subject to Habitats Regulations Appraisal under procedures relating to another plan, such as a Flood Management Plan.

A useful ‘test’ as to whether a project should be screened out at this stage is to ask the question: “Is the project provided for / proposed as part of another plan or programme, by another competent authority, and would it be likely to proceed under the other plan or programme irrespective of whether this plan is adopted?” If the answer is “yes”, it will normally be appropriate to screen the project out at this stage.

Record of the outcome

4.16 The outcome could be a list in the screening matrix, such as the example in Appendix C, of the projects referred to in the plan but not proposed as part of, or as a consequence of, the plan.

Stage 5: Screening step 3 – No likely significant effects on any European site

What to do

4.17 Screen out elements of the plan that could have no likely significant effects on a European site at all. In order to answer this question it will be necessary to use the information gathered in Stages 2 to 4 above and to structure the screening process, taking each aspect of the plan individually or in sections, and considering whether any of (a) to (e) in the following paragraph apply.

4.18 There are many reasons why a particular aspect of a plan – such as a policy or proposal – would not be likely to have a significant effect on a European site. These include, but may not be limited to, aspects of the plan:

- a) **Intended to protect the natural environment**, including biodiversity, or to conserve or enhance the natural, built or historic environment, where enhancement measures will not be likely to have any negative effect on a European site;
- b) **Which will not themselves lead to development or other change**, e.g. because they relate to design or other qualitative criteria for development or other kinds of change;
- c) **Which make provision for change but which could have no conceivable effect** on a European site, because there is no link or pathway between them and the qualifying interests, or any effect would be a positive effect, or would not otherwise undermine the conservation objectives for the site;

- d) **Which make provision for change but which could have no significant effect** on a European site (and hence is a *minor residual effect*), because any potential effects would be insignificant, being so restricted or remote from the site that they would not undermine the conservation objectives for the site (see however paragraphs 4.34 – 4.42 re in combination with other aspects of the same plan, or in combination with other plans or projects);
- e) **For which effects on any particular European site cannot be identified, because the policy is too general**, for example, it is not possible to identify where, when or how the policy may be implemented, or where effects may occur, or which sites, if any, may be affected. These aspects of the plan may also be very similar to or the same as those screened out under screening step 1, relating to general policy statements.

4.19 Aspects of a plan that would be screened out in respect of (a) and (b) above are generally easy to recognise when working through the plan appraisal. Further guidance on (c), (d) and (e) is provided below. Examples are given in Example Policies 5 to 11 in Appendix B.

Further guidance on 4.18(c) – no conceivable effect on a European site

4.20 For a policy or proposal to affect a site, there has to be a link or connection between the qualifying interests of the site and the changes that a plan may cause. These may be obvious, such as direct land take, but are more likely to be indirect, with potential for changes through a ‘pathway’ to the physical, chemical, hydrological, or biological characteristics of a site.

4.21 The European Court of Justice has indicated that if the effects of a plan or project would not undermine the conservation objectives of a European site, its effects cannot be regarded as significant²¹. Thus, where a plan may affect a European site, but its effects are positive, that aspect of the plan can be screened out of assessment.

4.22 This step will therefore screen out aspects of the plan which could not have any negative effect at all on a European site, because there is no link, nor pathway, nor other relationship between the effects of the policy or proposal and any European site, including cases where the link is severed or eliminated by distance, or because any potential effects would be positive, not negative.

4.23 However, long distance alone is not necessarily sufficient to screen out a likely significant effect of a policy or proposal; there should still be no link. Thus, the source of additional water supplies for additional housing in an urban development in one plan area may lie many kilometres away, but there is a link, because increased abstraction from a SAC river, or a SPA reservoir, many kilometres distant from the development requiring the increased supply, may have an effect on the site.

Further guidance on 4.18(d) – effects which are not significant

4.24 A hypothetical example of effects under this criterion would be as follows -

²¹ European Court of Justice case C-127/02 dated 7th September 2004, usually referred to as ‘the Waddenzee ruling’

A plan provides for new development focused in existing urban or other lowland areas. There is only one European site that could possibly be affected. It is a relatively isolated, inaccessible, high, upland moorland SPA. The likelihood of such development affecting the SPA is so remote that such effects can reasonably be screened out, on the basis of objective information and rational appraisal. It is reasonable to conclude that the plan would not be likely to have a significant effect on the SPA. Indeed, the likelihood is that there would be no effect at all, or the effects would be minor residual. For example, the very small possible increase in recreational visitors to the moorlands would have a negligible effect on the birds' habitat and would not make a noticeable difference to the disturbance of the birds, even in combination with other development proposals in other plan areas.

Further guidance on 4.18(e) - very general / strategic policies

4.25 Other development or change policies may be stated in very strategic or general terms. They may be judged to be more than a general statement of policy, which would be screened out in screening step 1 above. However, they nevertheless express their promotion of change in such general terms that it is impossible to predict any effects they may have on any particular European site. Such policies may be general topic-related policies of a development plan, listing general criteria against which planning applications will be judged.

4.26 A strategic policy may provide only an overall amount of change, such as a total figure for new housing or employment provision, with no reference to location. They are implemented through later policies in the same plan, which are more specific and therefore more appropriate to assess for their effects on European sites.

4.27 These kinds of policies may be found in a plan's Strategy. For example, this may state that there is a need for a broad quantity of housing or employment development, but it makes no proposal as to how or where the development is to be provided. Rather this is delegated to the later chapters with the topic specific policies and proposals. These will be subject to appraisal as the assessor works through the plan.

4.28 However, in looking at a plan's overall level of proposed change, it will be necessary to check in some cases that the total quantity and nature of change is not so great that, no matter where it was located, it could not be delivered without affecting a European site. Such a policy should not be screened out at this step. An example may be where the only option for discharge of waste water is to a SAC river system which is already polluted, or would be polluted to a degree that would mean the additional discharges, no matter how well they were treated, would be likely to affect the site's qualifying interests.

4.29 There may also be circumstances where an aspect of a general policy clearly has an implication for a specific European site. This may be because the likely location(s) of the proposed change are limited (for example by existing infrastructure or spatial distributions) in such a way as to steer the likely location(s) towards one or more locations which may have a likely significant effect on a European site. In those circumstances it should not be screened out, and a specific policy caveat may be required.

Record of the outcome

4.30 Again, it may be convenient to collect the aspects of the plan which are screened out in this step into groups that help to explain the reasons why they have been excluded from further appraisal procedures. This helps to make the appraisal more transparent and understandable. It also helps to carry out the in-combination assessment. The record of this screening step may be summarised in a table similar to the screening summary table in Appendix C.

Concluding screening steps 1 – 3

4.31 It is likely that when the plan has been systematically screened as explained in screening steps 1 to 3 above, all the aspects of the plan that would not be likely to have a significant effect on a European site alone will have been screened out. It follows that, for the remaining aspects of the plan, without mitigation measures, it will not be possible, on the basis of objective information, to eliminate the likelihood of a significant effect on a European site.

4.32 Mitigation measures should therefore be considered for the remaining aspects of the plan, so that the likelihood of them having a significant effect on a European site can be ruled out on the basis of objective information and they too can be screened out. All aspects of the plan whose effects cannot be so mitigated at this stage will need to be 'screened in' to the 'appropriate assessment'. If, in the circumstances of a particular plan, there are other reasons why aspects of the plan would not be likely to have a significant effect on a European site, these should be recorded with sufficient explanation and added to the screening summary table with the additional reasoning.

4.33 Further guidance on Screening can be found in Scottish Government Habitats Regulations Appraisal Advice Sheet 'Screening general policies and applying simple mitigation measures'²²

Aspects of the plan which have not been 'screened out' in screening steps 1 – 3 should be considered for straightforward mitigation measures in order that they may then be re-assessed. Aspects remaining after that will need to be subject to an 'appropriate assessment' under Stage 8.

Consideration of likely significant effects in combination

See Figure 4 later in this section and Appendix D

4.34 The requirement in the Directive is to undertake an appropriate assessment of a plan if it would be likely to have a significant effect on a European site "*either individually or in combination with other plans or projects*". The Directive recognises that in some cases the effects of a plan on its own would be either unlikely or insignificant. Nevertheless, the Directive also recognises that there may be a number of plans or projects, each of which would be unlikely to have a significant effect alone, but which, if their individual effects were to be added together, by them all coming forward over time, the effects in combination would be likely to be significant. It is clear that the protective measures of the Directive could be seriously undermined if these combinations of plans or projects escaped assessment; their combined effects could be at least as likely to be damaging to a site as the effects of one large plan or project alone.

4.35 The 'in-combination' test, therefore, is about addressing 'cumulative effects'. Elements of the plan that have individually been screened out because any effects of change are likely to be minor residual (see 4.18(d) above) should also be assessed in combination to consider any possible cumulative effect. These elements of the plan should be considered in combination with any other element of the plan screened out under 4.18(d). Elements of the plan that have individually been screened out because they will have no effect at all on a European site (see 4.18 (a), (b), (c) above), or because that

²² Available online at <http://www.scotland.gov.uk/Topics/Built-Environment/planning/National-Planning-Policy/themes/enviro-assessment/a-a/HRAAdvicesheets>

element is too general in nature (see 4.18(e) above) do not require an in-combination assessment, since clearly they will also have no cumulative effect, or any cumulative effects (as for effects individually) cannot be identified. This is also the case for those elements of the plan that have been screened out because they are general policy statements, or because they are projects referred to in, but not proposed by the plan (although see para 4.12).

4.36 Cumulative effects should also be considered with other plans and projects. Only effects of other plans or projects which (like those of the plan under consideration) would not be likely to be significant alone, need to be added to this stage of the in-combination test. This in-combination test is for example relevant to plans which would have some potential effect on a site, but that effect alone would not be likely to be significant, and there are other plans or projects that would add to the plan's effects, either by making them more likely, or more significant, or both.

4.37 Appendix D illustrates the identification of plan elements for in-combination assessment through screening and appropriate assessment. The flow diagrams highlight the importance during screening of categorising policies/proposals into those with (a) no effect, (b) an effect but not significant (minor residual), and (c) likely significant effect, in order that category (b) might be considered further in combination. It also highlights the importance of recording all minor residual effects in the HRA Record to assist the in-combination assessment of later plans or projects with the plan in question.

Any element of the plan that was screened out alone as having minor residual effects should also be screened for the likelihood of significant effects in-combination arising from other elements of the same plan, or from any other plans or projects.

Identifying other relevant plans or projects for in-combination effects

4.38 Until the elements of the plan that need to be screened for 'in-combination' effects are identified through the screening steps 1 – 3, there is little point in attempting to draw up a list of the other plans and projects with which they may need to be tested for their combined effects. To try to produce a list at the outset of the Habitats Regulations Appraisal process could involve substantial abortive or irrelevant work.

4.39 The in-combination test should be alert to the combined effects of programmes that may be given consent and implemented in stages, sequentially, perhaps because of a phasing of resources or particular sequence of implementation.

4.40 The in-combination test may need to include the following types of other plans and projects:

- a) the incomplete parts of projects that have been started but which are not yet completed;
- b) projects given consent but not yet started;
- c) projects that are subject to applications for consent;
- d) projects that are subject to outstanding appeal procedures;
- e) any known unregulated projects that are not subject to any consent;
- f) ongoing projects subject to regulatory reviews, such as discharge consents or waste management licenses;
- g) development that has recently been completed but where any residual effects may not form part of the environmental baseline;
- h) policies and proposals that are not yet fully implemented in plans that are still in force; and
- i) draft plans that are being brought forward by other public bodies and agencies.

4.41 The types of plans likely to require appraisal are discussed in section 2 above and should be considered where an in-combination test is needed. The in-combination test cannot reasonably be expected to include the possible effects of projects not yet applied for (and not in another plan) or plans (or draft plans) not yet published for consultation, or main issues reports prepared for other development plans. This may mean that the first plan in a series is not subject to in-combination tests, because alone it would not have significant effects. It is the second and subsequent plans or projects that will need in-combination checks with the first and any other earlier plans or projects.

4.42 To assist in checking the HRA Records of other development plans (including supplementary guidance) as part of the in-combination assessment, the Scottish Government has established a Scottish HRA Databank for Development Plans. This is located on the Knowledge Hub and can be accessed via <https://knowledgehub.local.gov.uk/>. A guidance note for users, including details of how to register on the Knowledge Hub, is available on the Scottish Government web site.²³

Stage 6: Applying mitigation measures at screening stage to avoid likely significant effects

Figure 2 on page 3 shows Stage 6 in the context of the full appraisal process.

Figure 4 on page 28 illustrates how mitigation measures are built into this stage.

4.43 Where likely significant effects have not been ruled out by the screening steps 1 – 3 in Stage 5, the plan-making body should consider whether there are any straightforward mitigation measures that could be incorporated into the plan, so that the plan can then be screened again through Stage 5, step 3.

4.44 Examples of straightforward possible mitigation measures at this stage are:

- (a) Deletion of the policy or proposal that may cause the likely significant effect;
- (b) Changing the nature or type of a potentially damaging proposal;
- (c) Reduction in the scale of the potentially damaging provision, whether it be an overall level of growth across all or part of the plan area, or a single proposal of a specific scale or size;
- (d) Relocation or alteration of the spatial distribution of the potentially damaging provision;
- (e) Phasing or timing of a proposal so that its possible effects can be adequately managed over time;
- (f) Programming a proposal so that it is dependent on key infrastructure provision or upgrading, such as water supply or waste water treatment, being in place before it could proceed;
- (g) Requiring buffer zones to be put in place.

²³ <http://www.scotland.gov.uk/Resource/0046/00466525.pdf>

Example of (g) - a buffer zone

The Thames Basin and Dorset Heaths

In the south-east and south-west of England new housing development, close to heathland SPAs, which are classified for their populations of breeding nightjars, woodlarks and Dartford warblers, could have had significant effects on the bird populations. This is because of increased disturbance from the large numbers of additional visitors travelling from up to 5km away, as well as more local impacts of additional housing close to the heaths, such as more fires, dumping and encroachment. As mitigation, the strategic and local plans in the area have all included a 'buffer zone' policy prohibiting new housing development within 400m of the SPA boundaries.

4.45 If the likely significant effects of elements of the plan can be avoided or reduced by straightforward modifications to the plan as it evolves, these measures should be taken. Thus it may be clear during the appraisal that a relatively minor change to the option or the plan would allow the appraisal to conclude that the policy or proposal would not have a likely significant effect, alone or in combination. If this change is or can be implemented, the relevant policy or proposal should be changed as part of the iterative process of screening. Further guidance on applying straightforward mitigation measures can be found in Scottish Government Habitats Regulations Appraisal Advice Sheet 'Screening general policies and applying simple mitigation measures'²⁴. Figure 4 below illustrates how mitigating measures can be introduced into a plan during the screening process, with the purpose of enabling the plan-making body to conclude that those aspects of the plan are unlikely to have a significant effect on a site. Where this conclusion is reached, an 'appropriate assessment' of those aspects will not be required.

At any stage, as soon as likely significant effects are identified, the plan-making body should look to introduce measures to eliminate or reduce them. To carry weight, such mitigation should preferably be included in the policy wording where policies are distinguishable from other text, or in the text of the plan where policies are not distinguished from other text. However if there are doubts about the efficacy of such measures, it is likely to be necessary to consider these as part of the appropriate assessment. This is because the plan-making body will not have been able to exclude the risk of a significant effect on a European site on the basis of objective information.

One of the key reasons why Habitats Regulations Appraisal should be undertaken at the earliest stages of plan preparation is because it will be increasingly difficult to introduce mitigation measures to eliminate the likelihood of a significant effect at a late stage. This could result in the plan-making body not being able to ascertain no adverse effect on site integrity and the plan failing the further tests of there being no alternative solutions and no imperative reasons of overriding public interest.

Introducing the mitigation measures earlier would have enabled the Habitats Regulations Appraisal to be able to conclude that there would be no likely significant effects, or no adverse effects, on the integrity of sites, so enabling the plan to be adopted.

²⁴ Available online at <http://www.scotland.gov.uk/Topics/Built-Environment/planning/National-Planning-Policy/themes/enviro-assessment/a-a/HRAAdvicesheets>

Stage 7: Rescreen the plan and decide on the need for appropriate assessment

Figure 2 on page 3 shows Stage 7 in the context of the full appraisal process.

Figure 4 on page 28 illustrates how mitigation measures are built into this stage.

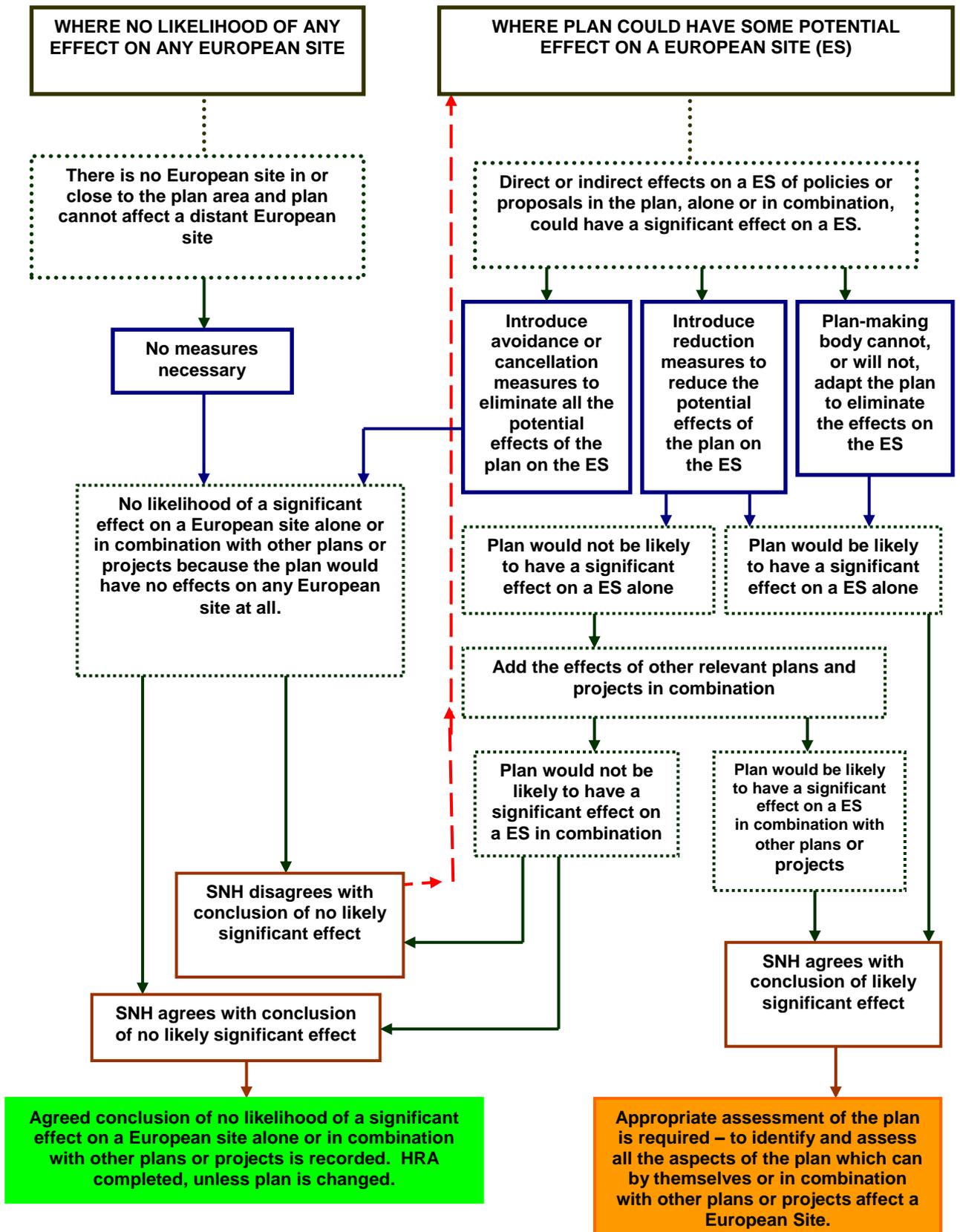
4.46 To decide whether a plan requires an appropriate assessment, it is necessary to apply the tests in regulation 85B(1) (or regulation 48(1)) as to whether there would be a likelihood of a significant effect on a European site in Great Britain, alone or in combination with other plans or projects, applying the principles in the Waddenzee case discussed in paragraphs 4.3 – 4.5 above.

4.47 Having assessed the plan's overall strategy, its options, policies and proposals, individually and in relevant combinations, and having taken account of all mitigation measures included in the plan, the plan-making body can complete the application of the tests in regulation 85B or 48 to the plan. If all elements of the plan have been 'screened out', in accordance with the advice in this section, it can be concluded that the plan would not be likely to have a significant effect on a European site either alone or in combination with other plans or projects. Whilst the Regulations do not require the plan-making body to seek agreement from SNH as to their conclusions at this stage, nevertheless they are encouraged to do so.

4.48 If there are any elements of the plan which have not been screened out, the plan-making body should undertake an appropriate assessment of the plan, as described in Section 5 below.

The plan-making body should re-screen the plan after applying all the mitigation measures necessary to avoid or reduce likely significant effects as far as possible at this stage. The objective should be to eliminate any likelihood of significant effects at the screening stage, so making an 'appropriate assessment' unnecessary. However if mitigation is of a more complex nature, those elements of the plan should be taken on to the appropriate assessment stage, with such mitigation being tested then. This reflects the precautionary nature of the appraisal process. If it cannot be concluded that the plan would not be likely to have a significant effect on a European site, either alone or in combination with other plans or projects, the Habitats Regulations Appraisal should move on to the appropriate assessment stage.

FIGURE 4 MITIGATION MEASURES AND APPLICATION OF REGULATION 48/85B



SECTION 5: THE 'APPROPRIATE ASSESSMENT'

Scoping the appropriate assessment

5.1 **'Scoping'** is a term used here for convenience, to help to explain this part of the process. It is not a term used in either the Directive or the Regulations. Scoping is not a statutory requirement, but it is recommended here to help to ensure that the assessment is focused, fit for purpose, compliant and proportional; in other words 'appropriate'.

5.2 The scope and method of an appropriate assessment could be discussed and agreed with SNH. At this stage the formal consultation period under regulation 85B(2) (or regulation 48(3)) should also be agreed with SNH, if an appropriate assessment is likely to be required. This is because a specific time period for consultation with SNH is not prescribed by the Regulations. For an appropriate assessment relating to a strategic or local development plan, the time period for formal consultation is likely to be the same as that for the accompanying plan.

5.3 A formal scoping report is unlikely to be necessary, but a written proposal would inform the discussions about the assessment. It could include a summary of the evidence base described above, including a list of sites and the elements of the plan to be considered, including options, and the schedule of site qualifying interests, their condition, vulnerabilities etc (see the outline example in Appendix C). Any background reports should also be referred to and made available, even if they are not attached to the scoping paper.

5.4 In addition to SNH, it may be beneficial to consult SEPA and non-governmental conservation organisations, which may also have valuable ecological information and expertise. If a European Offshore Marine Site may be affected by the plan, the JNCC should be consulted. If a site in England would be affected, Natural England should be consulted. Where a site affected requires consultation with both SNH and JNCC (site spans the 12 nautical miles limit of territorial waters), or SNH and Natural England (site spans the border), SNH can coordinate the consultation responses with the agreement of Natural England / JNCC as appropriate.

5.5 It is critical that the assessment is based upon a defensible evidence base and method. The assessment may be scrutinised, for example, as a production (document) at the Examination of a development plan if it relates to an unresolved representation about the plan.

Scoping the appropriate assessment is likely to involve the following:

- (a) Adopting the method in this guidance or devising and agreeing an alternative appropriate assessment methodology;**
- (b) Agreeing the evidence base about the European sites;**
- (c) Confirming the screening process, agreeing which effects on which sites can be excluded from appropriate assessment, and which effects need to be subject to appropriate assessment;**
- (d) Understanding the likely significant effects as clearly as possible and the possible mitigation measures that could avoid or reduce those effects to ensure they would not adversely affect the integrity of European sites, in light of the qualifying interests, their condition and vulnerabilities and their conservation objectives;**
- (e) Deciding on an appropriate consultation time period with SNH; and**
- (f) Considering any other conservation and environmental organizations that may need to be involved.**

Stage 8: The ‘appropriate assessment’ - site integrity, conservation objectives, consideration of in-combination effects and the precautionary principle

Figure 2 on page 3 shows Stage 8 in the context of the full appraisal process

Site integrity

The following definition of the integrity of a site is included in the Scottish Government Circular on the Habitats and Birds Directives:

The integrity of a site is “the coherence of its ecological structure and function, across its whole area, which enables it to sustain the habitat, complex of habitats and/or the levels of populations of the species for which it was classified.”

5.6 The European Commission’s guidance, although misquoting it, endorses the definition of integrity given in the box²⁵ and goes on to state that the integrity of a site clearly relates to its conservation objectives²⁶.

5.7 The integrity of the site can therefore be considered to be the structure and the functioning of its ecological systems, the features for which the site is designated (habitats and/or species) and the ability of the site to meet its conservation objectives. An adverse effect would be something that impacts the site features, either directly or indirectly, and results in disruption or harm to the ecological structure and functioning of the site and/or affects the ability of the site to meet its conservation objectives across all parts of the site.

²⁵ Scottish Government Circular 6/1995 (Revised June 2000) ‘Habitats and Birds Directives’
<http://www.scotland.gov.uk/library3/nature/habd-00.asp>

²⁶ EC, 2000, *Managing Natura 2000 Sites*, Section 4.6.3.

5.8 Another form of adverse effect on integrity would be a physical impact on the site which may indirectly affect the ecological structure and functioning of the site features or their supporting structures and/or the ability of the site to meet the conservation objectives.

5.9 The plan should remove potentially harmful policies and proposals and explicitly include measures to ensure that all development flowing from, or controlled by, the plan would not have an adverse effect on the integrity of a European site.

Conservation objectives

5.10 The appropriate assessment is undertaken under the provisions of regulations 85B(1) or 48(1). It is an assessment of the implications of the plan for the sites where a likely significant effect has been identified, in view of their 'conservation objectives' (see glossary in Appendix A). It follows that the conservation objectives (provided by SNH and available on-line: see paragraph 3.3) are critical to, and the focus of, the assessment.

5.11 It may be necessary for the plan-making body to seek further advice about the implications of the plan in light of the conservation objectives. It will be useful to identify and understand the particular sensitivities of a site, or the influences of other activities acting upon it, in order to interpret the objectives in a meaningful way.

5.12 Appendix C provides an outline example of a draft Habitats Regulations Appraisal Record, including an appropriate assessment, with a section for the implications for each qualifying interest of the European site in light of its conservation objectives.

Assessing different life stages of proposals in a plan

5.13 Proposals that are subject to appropriate assessment may have different effects on a European site at different stages in their life-cycle. For example, the effects that require assessment may occur during construction, or during the operational stage. Some effects may occur, or reoccur, at decommissioning stage.

5.14 Sometimes the effects on a site may arise indirectly - for example through ancillary or related operations such as the provision of essential infrastructure to service a development, or fluvial or marine dredging to accommodate a new marina or port development. The assessment should concentrate on all of the aspects of a plan's proposals that would give rise to significant effects, alone or in combination with each other, or with other plans or projects.

Example of effects at different stages of the life of a proposal

Finalised Draft of the Falkirk Local Plan 2007

This appraisal assessed the potential threats from an economic development allocation at both construction and operational stages. Opportunity ED.GRA 1: Kinneil Kerse – Site Safeguarding, comprised the safeguarding of 64 hectares of land for petrochemical development to fulfill the requirements of the then SPP 2. No specific proposals had been put forward, so the appraisal of the plan anticipated the kind of effects on the Firth of Forth SPA, which was located between 0m and 300m from the allocation, which may occur, including (*inter alia*):

- a) during construction: through construction noise and movement disturbance or mobilisation of contaminants and loss of habitat adjacent to the SPA; and**
- b) during operation: through increased risk of major pollution events, increase in air-borne pollution, increased boat traffic, noise, light, movement and flaring.**

Consideration of in-combination effects in the appropriate assessment

5.15 In-combination assessment at this stage is based on identifying potential cumulative impacts on the integrity of a European site resulting from combinations of minor residual effects. The in-combination assessment for the appropriate assessment of an element of the plan with minor residual effects includes consideration of potential effects on European sites from the following sources:

From screening the plan –

- a) Policies and proposals which do not have likely significant effects alone but may result in minor residual effects alone;
- b) Policies and proposals which were identified as having likely significant effects alone, and following screening or appropriate assessment mitigation result in minor residual effects alone

From other plans and projects –

- a) Minor residual effects from other relevant plans (recorded in the HRA Record if available);
- b) Minor residual effects from other relevant projects (recorded in the HRA Record if available)

The approach to identifying the elements to include in in-combination assessment for appropriate assessment is illustrated in the flow diagrams in Appendix D. The approach to in-combination assessment is discussed in relation to the screening stages of Habitats Regulations Appraisal (paragraphs 4.34 – 4.42), and this is also applicable to the appropriate assessment stage.

The precautionary principle

5.16 Subject to the exceptional circumstances described in Section 7 below, before a plan which would be likely to have a significant effect on a European site, alone or in combination with other plans or projects, may be given effect, the plan-making body must ascertain, in light of the conclusions of the appropriate assessment, that it would not adversely affect the integrity of a European site (regulations 85B(4) and 48(5)).

It is essential to appreciate that the appropriate assessment embodies the precautionary principle. It is for the plan-making body to ascertain that implementation of the plan will not adversely affect the integrity of any European site, in order for them to proceed to adopt the plan, subject to regulation 85C (or regulation 49).

Stage 9: Amending the plan until there would be no adverse effects on site integrity

Figure 2 on page 3 shows Stage 9 in the context of the full appraisal process

Introducing further mitigation measures

5.17 Introducing the same types of mitigation measures as were listed in paragraph 4.44 above can be equally applicable at this stage, in order for a plan-making body to ascertain that there would be no adverse effects on the integrity of a European site. Those measures are applicable but are not repeated here.

5.18 However, in order to ascertain no adverse effects on site integrity, other kinds of mitigation measures may be required at this stage. These are discussed below and summarised in the following box.

Further mitigation measures that may be introduced at 'appropriate assessment' stage may be:

- a) Case-specific policy restrictions;***
- b) Case-specific policy caveats;***
- c) Prescribing how adverse effects on site integrity will be avoided by mitigation measures in a lower tier plan, to be confirmed by a more detailed Habitats Regulations Appraisal at that level;***
- d) Deleting aspects of the plan that will probably fail the tests of the Directive at project application stage;***
- e) Requiring delivery of explicit and bespoke Management Plans;***
- f) Contribution to a large scale Mitigation Strategy.***

A. Case-specific policy restrictions

5.19 Where the outcome of an appropriate assessment in relation to a particular policy is uncertain because the policy provides for change which could affect a European site, if measures were not put in place to prevent such effects, the plan-making body may need to add a case-specific policy restriction.

5.20 For example, if delivery of a particular tranche of housing development in a particular location would exacerbate water pollution problems in or affecting a European site, the plan-making body could add a restriction on the policy provision for the housing which prohibited permissions being given until such time as the waste water treatment works have been upgraded. This upgrade would reduce the level of pollution and in turn provide additional capacity at the works to accommodate the additional housing without adding to the water quality problems.

5.21 There will, of course, be a further safeguard in such cases. Both the waste water treatment upgrade and the housing developments will be projects subject to regulation 48 and will need to pass those tests before they can be permitted. However the plan should not rely on this last-minute application of the Regulations. The advantage is that the plan flags up the water quality issue at a strategic level, and at an early stage, so enabling the infrastructure to be planned and delivered in a way that avoids the housing development having to be refused permission at project stage because of its effects on the European site.

To be an appropriate restriction enabling the plan-making body to ascertain no adverse effect on the integrity of a European site, the restriction must be –

- case-specific***
- explicit***
- added to the policy***

and not merely added to the explanatory text or commentary, or not merely inserted into the implementation or monitoring chapters.

5.22 The way that such a policy restriction may operate is explained in the following example. It refers to a hypothetical local development plan housing policy HOU1.

Hypothetical example of adding a case-specific policy restriction

Policy HOU1 makes provision for 1000 additional houses in the plan area to 2026. It does so by a series of site specific allocations for new housing development throughout the plan area in a schedule listed HOU1(a) to (h). However, additional housing which would be allocated under HOU1(g) would be in a particular loch catchment area and would be likely to have a significant effect on a European site, because additional discharges from waste water treatment works would increase the effects of eutrophication on the loch, which is an SPA. This would affect the capacity of the loch to support the bird populations for which it is classified. An appropriate assessment of the plan indicates that it will not be possible to ascertain that such increased discharges would not have an adverse effect on the integrity of the European site (stage 8).

However, the water company could upgrade the waste water treatment works and, by additional treatments, not only avoid additional pollution, but reduce the overall levels of pollutants from the works. This would improve the water quality of the loch whilst accommodating additional development in the catchment, including that on the proposed allocation site HOU1(g). Avoiding the adverse effects depends on the appropriate timing of the works on which the additional housing is dependent. At stage 9 of the Habitats Regulations Appraisal, therefore, a change is made to the policy wording of the plan, so that a restriction is added to the housing policy as follows:

“Additional housing development within the X Loch catchment, including the allocation in HOU1(g), will not be permitted until the ABC waste water treatment works has been upgraded to accommodate the additional development and ensure that there would be no increase in the levels of pollutants which would have an adverse effect on the integrity of the X Loch SPA”.

B. Case-specific policy caveats

5.23 Where the effects of a policy depend on how it is implemented in due course, through the development management process, there may be a possibility that if implemented in one or more particular ways, the policy could have a significant effect on a European site. Such policies cannot therefore be ‘screened out’ in Stage 5; and in the appropriate assessment the uncertainty of the policy outcome will remain unless it can be removed by an amendment to the plan.

5.24 In order for the plan-making body to be able to ascertain with confidence that the policy or proposal would not have an adverse effect on the integrity of a European site, it will be necessary to ensure that implementing the policy in ways that would affect the integrity of a European site would not be in accordance with the development plan. In order to do this, the plan-making body may need to add a specific caveat. This would remove the presumption in favour of the development (which it may otherwise enjoy by virtue of it being in accordance with the development plan²⁷) if it was implemented in a way that could, or would adversely affect site integrity.

²⁷ Under the provisions of section 25 of the *Town and Country Planning (Scotland) Act 1997* (as amended)

5.25 **It is recommended that plan-making bodies do not rely merely on a general policy in the plan aimed at protecting internationally designated nature conservation sites.** If one aspect of a plan would be likely to have a significant effect on a European site (stage 5), it is not appropriate to ascertain in stage 8 that there would not be an adverse effect on site integrity simply because there is another policy saying that such sites would be protected. The inherent tension, conflict, or contradiction between the two aspects of the plan must be resolved in a way that enables the plan-making body to ascertain that there would not be an adverse effect on the integrity of the European site, with the appropriate degree of certainty (see further the discussion in paragraphs 5.40-5.43 below).

An added caveat must be case-specific and explicit. It should say that development would not be in accordance with the plan if it cannot be ascertained that it would not have an adverse effect on site integrity. It should be added to the policy, not merely to the explanatory text.

Examples of a case-specific policy caveat

1) ***“To be in accordance with this development plan, and for permission to be granted, detailed proposals, including applications for planning permission in principle, for the [specified development] must demonstrate that [the specific aspects of the development that raise concerns in the appropriate assessment] would not adversely affect [the specified interest feature(s)] of the [specified European site(s)] either alone or in combination with other plans or projects”.***

2) ***“With regard to any proposed development at [location], planning permission will only be granted if there would be no adverse effect on the integrity of [specified European site(s)], either alone or in combination with other plans or projects”***

5.26 Further guidance on the use of policy caveats can be found in Scottish Government Habitats Regulations Appraisal Advice Sheet ‘Screening general policies and applying simple mitigation measures’²⁸

C. Adding mitigation measures in a lower tier plan

5.27 It may be difficult to assess the potential effects of ‘higher tier plans’ where there are ‘tiers’ of plan-making and higher tier plans make provisions which lower tier plans must take forward to implement in detail. However, the appraisal of lower tier plans could protect the sites that may potentially be affected before they are assessed at project application stage. The Advocate General’s opinion in ECJ case c-6/04 *EC v. the UK* confirmed the hierarchy of assessment that must take place from higher level to lower level plans. In her opinion Advocate General Kokott said (paragraph 49): *“adverse effects on areas of conservation must be assessed at every relevant stage of the procedure to the extent possible on the basis of the precision of the plan. This assessment is to be updated with increasing specificity in subsequent stages of the procedure”*. The following paragraphs set out an approach which if applied correctly will allow the appropriate assessment to be completed.

²⁸ Available online at <http://www.scotland.gov.uk/Topics/Built-Environment/planning/National-Planning-Policy/themes/enviro-assessment/a-a/HRAAdvicesheets>

5.28 In Scotland, this hierarchy of assessment could apply, for example, between a Strategic Development Plan and a Local Development Plan, or between a Local Development Plan and a Masterplan, so long as the criteria in the box after paragraph 5.30 are met.

5.29 It will be necessary to check whether policies or proposals will be subject to further and more detailed assessment, in a lower tier plan, before the proposals are subject to assessment at project application stage. If so, it will then also be necessary to check whether the later assessment can ensure that there would be no adverse effect on site integrity. This would be the case where the lower tier plan will contain details for assessment which are not available at the strategic level, and it will apply particular mitigation measures. This way of ascertaining no adverse effect on site integrity is not a way of deferring or delaying the appraisal process, but a way of securing mitigation measures in a lower tier plan where they cannot be secured in detail in the higher tier plan.

5.30 The following are proposed as criteria for the consideration of whether it would be appropriate for a higher tier plan to identify how adverse effects on site integrity will be avoided by a more detailed Habitats Regulations Appraisal, with more detailed mitigation measures, at a lower tier plan level. This will be where all three of the criteria are met. In such a case, subject to appropriate adjustments to the plan itself, the plan-making body can reasonably ascertain that there would be no adverse effect on the integrity of the European site arising from the policy or proposal in the higher tier plan.

In order to ascertain that there would be no adverse effect on the integrity of a European site, a plan-making body may only rely on mitigation measures in a lower tier plan if the following three criteria are all met:

- a) The higher tier plan appraisal cannot reasonably predict any effect on a European site in a meaningful way; whereas***
- b) The lower tier plan, which will identify more precisely the nature, scale or location of development, and thus its potential effects, retains enough flexibility within the terms of the higher tier plan over the exact location, scale or nature of the proposal to enable an adverse effect on site integrity to be avoided; and***
- c) The Habitats Regulations Appraisal of the plan at the lower tier is required as a matter of law or Government policy.***

5.31 In considering the above, the following points should be taken into account –

a) The principles may apply to the iterative assessment processes in the appraisal of a single plan as it evolves through the plan-making process. Therefore an assessment may not be possible in the early stages of a plan and assessment may need to await greater specificity in later stages or versions of the plan;

b) In terms of criterion (a) in the box above, if any specific effects can be described (even if there may be other effects), then this is unlikely to mean that the ‘appraisal cannot reasonably predict’ the effects;

c) An assessment can be ‘meaningful’ wherever it is able to inform the policies and proposals of the plan. It is not necessary to be able to undertake a full and detailed assessment to be meaningful in this context. If the HRA is able to influence even the

general nature, scale and location of proposals, it is 'meaningful' and an assessment should be made of the effects as far as is possible.

5.32 It may be possible and appropriate for the higher tier plan to specify strategic mitigation measures, which set out in broad terms what must be provided at the lower tier plan level, in order to be able to conclude that there would be no adverse effects.

5.33 A higher tier plan appraisal will not obviate the need for the lower tier plan to be subject to Habitats Regulations Appraisal. Whilst it is for the relevant plan-making body to determine what is an appropriate assessment in any particular case, it may be helpful for the Habitats Regulations Appraisal Record of the higher tier plan to indicate what further appraisal may be necessary in the lower tier plan. It may be able to provide a structure and scope for the appraisal and sources of information that would be relevant, or what further information would be needed, that may not be available in the higher tier appraisal. This would help to expedite the lower tier plan appraisal and help to illustrate why the higher tier plan appraisal cannot reasonably predict the effects on a European site. In such circumstances the Habitats Regulations Appraisal Record of the higher tier plan should be accessible alongside the approved higher tier plan, for example referenced within it, or accessed from the same web page.

Example of hierarchical mitigation

A Local Development Plan identified a number of broad effects arising from the development of a large scale development site. The planning authority concluded however that further detail on the precise location of development within the site was required before it could be established that the development would not have an adverse effect on a European site. It therefore considered whether the proposal should be screened out of the HRA in terms of criterion 5.30 (a), suggesting that further HRA would be required of the Supplementary Guidance that would be prepared for the site. However the fact that the HRA had identified likely significant effects at this level meant an appropriate assessment was required and that a policy caveat would be added at this stage to ensure that the lower tier Supplementary Guidance was developed within appropriate boundaries set by the higher level plan. Such a caveat need not be more specific than the proposal within the plan, but could reflect the broad principle of allocating the site as a whole.

Example of a hierarchy of assessment

A higher level plan included a policy which allocated a large area as a strategic location for employment-related development. A European site (SAC) was nearby and various likely significant effects were identified, relating to hydrology, air quality and recreational pressure. The higher level plan indicated that this site must be brought forward by a subsequent lower level plan. The planning authority was able to conclude that the higher level plan would not have an adverse effect on the integrity of the SAC by the policy requiring the lower level plan to demonstrate this in terms of a hydrological risk appraisal, air quality modelling and analysis, and a recreational assessment. Significantly the policy went on to state that if the results of these further assessments showed that part of the higher level plan could not be delivered without adverse effects on the SAC which could not be fully mitigated, then the lower level plan would only make provision for amount and location of development for which it could be concluded that there would be no adverse effect on the integrity of the SAC, even if this level was below that in the strategic allocation.

D. Proposals which should not be included in plans

5.34 To include proposals that would be vulnerable to failure under the Habitats Regulations at project assessment stage would be regarded by the EC as 'faulty planning'²⁹. Consequently, if at appropriate assessment stage 9, a plan-making body considers that an adverse effect on site integrity is a real possibility, and would create problems for the delivery of the proposal, the proposal should be deleted from the plan or otherwise modified to enable the plan-making body to ascertain there would not be an adverse effect on the integrity of the site.

Plans should not contain proposals that would be vulnerable to failure under the Habitats Regulations at project assessment stage, as this would be regarded as 'faulty planning'.

E. Relying on specific Mitigation Plans

5.35 There may be circumstances where the uncertainty as to adverse effects on a site could be resolved by a plan-making body requiring the pre-preparation and approval of specific types of mitigation plans, to deal with specific effects on a European site, before, during or after the construction of the proposal that could affect the site. Three examples are given below. In each case the planning authority can ascertain no adverse effect on the integrity of the site because the proposals will not be permitted unless they are satisfied that the management plans proposed will avoid an adverse effect on site integrity.

Examples of specific mitigation plans

Sutherland Local Plan (2010) - Dornoch is located adjacent to the Dornoch Firth and Morrich More SAC and the Dornoch Firth and Loch Fleet SPA. The qualifying interests of the SAC include sand dunes, while the SPA is important for wintering birds. The future growth of housing being proposed for this settlement in this Local Plan was screened in for appropriate assessment because of possible increased recreational impacts and disturbance to the dunes and the birds. As mitigation, there was added to the plan's development factor policy for Dornoch the requirement that proposals for development on the allocated sites for housing should be accompanied by a Recreational Management Plan, which should include measures for the avoidance or mitigation of any adverse effects as necessary.

Nigg Masterplan (2009) - Highland Council prepared a masterplan for the future use of the large scale former oil rig fabrication yard at Nigg, Easter Ross. A favoured option was for the assembly of offshore renewable energy generation devices. The Nigg Yard lies adjacent to (but pre-dates) the Moray Firth SAC and the Cromarty Firth SPA. The SAC is designated for the resident population of bottlenose dolphins. The appropriate assessment focused on possible disturbance to the dolphins as a result of redevelopment works at the yard (including the possible construction of a new quay), operational use for major offshore renewables engineering works, and associated vessel movements. The masterplan now sets out mitigation measures for dredging and disposal operations, and lists various management plans (e.g. covering noise from piling, construction and vibration; and boat movements) which may need to accompany applications for development.

²⁹ Opinion of Advocate General Kokott in *EC v the UK*, case C – 6/04, paragraph 48

Example of an explicit / bespoke management plan

Rural West Edinburgh Local Plan Alteration (2010) - This Local Plan Alteration by City of Edinburgh Council safeguards land for a potential second runway at Edinburgh Airport. Development to the north of the airport could have had a significant effect on the Firth of Forth SPA arising from disturbance or deterioration of water quality in the existing Almond River, which discharges into the SPA. The Almond River may be disturbed if works took place here by the diversion or culverting of the watercourse and pollution from runoff from developed surfaces. As mitigation through the appropriate assessment, the Local Plan Alteration requires a management plan to be prepared, approved and implemented for any development proposal within the safeguarded area to the north of the airport which would require the diversion or culverting of the River Almond.

Mitigation plans must be explicitly referred to in the policy of the plan, not merely in the explanatory text. They must be required to be submitted and approved before the proposal can be permitted. There must be certainty that if properly worked up and approved, the mitigation plans will avoid an adverse effect on the integrity of the European site.

The explanatory text relating to the policy referring to the mitigation plans should explicitly refer to the specified development, the specific aspects of the development that raise concerns in the appropriate assessment and the specific qualifying interest(s) of the European site(s) potentially affected.

F. Contribution to a large scale Mitigation Strategy

5.36 As part of a framework set by a plan for the requirement of developer contributions, a bespoke mitigation strategy may be established in order for the plan to avoid likely significant effects and hence adverse effects on site integrity. This may include a policy requiring all relevant development to make an appropriate financial contribution to the delivery of the mitigation strategy, which would be beyond the resources of individual projects, but if provided strategically would enable all projects to avoid likely significant effects on a site and hence adverse effects on site integrity.

The need for developer contribution towards a large scale mitigation strategy must be explicitly referred to in the policy/ies of the plan, not merely in the explanatory text. Details of the mitigation strategy must be worked up in advance and set out either in the plan or in supplementary guidance. The necessary planning agreement or planning obligation should be secured before specific proposals can be permitted. There must be certainty that if properly worked up and implemented, the mitigation strategy will avoid an adverse effect on the integrity of a European site.

The explanatory text relating to the policy relying on the large scale mitigation strategy and on developer contributions should explicitly refer to the relevant developments or proposals, the specific aspects of the developments or proposals that raise concerns in the appropriate assessment, and the specific qualifying interest(s) of the European site(s) potentially affected.

Example of a large scale mitigation strategy

The Thames Basin and Dorset Heaths

In the south-east and south-west of England new housing development, close to heathland SPAs, which are classified for their populations of breeding nightjars, woodlarks and Dartford warblers, could have had significant effects on the bird populations. This is because of increased disturbance from the large numbers of additional visitors travelling from up to 5km away, as well as more local impacts of additional housing close to the heaths, such as more fires, dumping and encroachment. As well as a 'buffer zone' policy prohibiting new housing development within 400m of the SPA boundaries, the strategic and local plans in the area have also included a requirement for all new housing developments within 5km of the SPAs to contribute a pro-rata share of the cost of a strategic 'Delivery Plan'. This will improve access and habitat management and provide suitable alternative natural green space, which will attract recreational visits that may otherwise go to the heaths. This will result in there being no net increase in visitor numbers to the heathlands and thus no increase in disturbance to the birds.

Proposals with planning permission or other development consent

5.37 Aspects of a plan might have been screened in as likely to have a significant effect on a European site, but which have an unimplemented and extant planning permission. In granting planning permission the planning authority would have had to carry out an appropriate assessment. Mitigation may have been necessary to attach to the planning permission to ensure no adverse effect on site integrity. In these circumstances, the appropriate assessment of the plan can draw upon the appropriate assessment of the consented project. The mitigation set out in the appropriate assessment of the plan can quote the mitigation measures incorporated into the planning permission, and provide for a mitigation requirement to be included in the plan that development at the allocated site should be carried out in accordance with the terms of the planning permission. Care will however be necessary if the planning permission lapses before adoption of the plan. In such a situation the allocation should be re-assessed prior to adoption of the plan to consider if any change of circumstance requires the mitigation to be amended.

5.38 Where the unimplemented but extant planning permission is a planning permission in principle (PPP), this may still be subject to applications for approval of matters specified in conditions. Such conditions may provide for more detailed mitigation information to be provided to the planning authority in regard to protection for European sites. The appropriate assessment can draw upon these, and in anticipation of such further applications for approval being submitted to the planning authority, the development plan can include the requirement for necessary mitigation information.

Hypothetical example of aspect of plan with detailed development consent

A windfall site for a small housing development was granted planning permission following an appropriate assessment. The development was adjacent to a Special Protection Area (corncrake), with likely significant effect on corncrake due to significant disturbance to breeding during construction. Permission was granted subject to a condition that no construction activity should take place during the corncrake breeding season (15 April to 31 August). A new Local Development Plan was produced soon after, with the site included as an allocation. The HRA of the LDP screened the site into the appropriate assessment, and the mitigation was able to draw upon that for the planning permission. To apply this to the LDP, reflecting the fact that the site already had planning permission, the following was inserted into the plan: 'Development should be carried out in accordance with the terms of planning permission xxxxx/2014/FUL in regard to the timing of construction works'. With development initiated as the plan was being prepared, the planning permission remained extant at the time of adoption.

Hypothetical example of aspect of plan with development consent in principle

A large housing proposal close to a loch designated as a Special Protection Area for breeding Slavonian grebe was granted planning permission in principle. Two matters specified in conditions for the further approval of the planning authority were submission of a Recreational Management Plan to avoid disturbance to breeding birds, and a Construction Method Statement to avoid disturbance and maintain water quality. Prior to such applications being made, the proposal was included in an emerging LDP, with the site screened in as part of the appropriate assessment. The matters specified for further approval were drawn upon as mitigation, and these were included as developer requirements for the allocation in the LDP. If necessary more details could be added in the LDP as to exact requirements for the Recreation Management Plan and Construction Method Statement.

Mitigation – the role of Action Programmes for Development Plans

5.39 Action Programmes accompany the production of development plans at the Proposed Plan and Adoption stages and set out –

- a list of actions required to deliver policies and proposals in the plan
- who is to carry out the action
- when the action will be delivered

The proposed Action Programme is prepared at the same time as the Proposed Plan, and it is adopted within three months of adoption of the plan to which it relates. Where specific mitigation is identified in the plan to enable a policy or a proposal to be retained (e.g. preparation of a management plan, or the upgrading of a waste water treatment works), this should be included in the Action Programme. It is important to note that the Action Programme is not part of the development plan, and so to carry the decision-making weight of the development plan, the mitigation must first be included, and assessed, within the policies/proposals of the plan. Inclusion in the Action Programme will be a useful means of achieving delivery of the necessary mitigation at the appropriate time.

Certainty in the appropriate assessment

5.40 The plan-making body must ascertain that the plan would not adversely affect the integrity of a European site. This should only be concluded if it has made certain that this is the case. In order to be certain, the plan-making body should be convinced that no reasonable scientific doubt remains as to the absence of such effects³⁰.

5.41 The Scottish court has also considered how certain a competent authority needs to be in considering whether it can ascertain that there would be no adverse effect on site integrity. In a judgment in the Court of Session in October 1998, Lord Nimmo-Smith ruled³¹ that an absolute guarantee that there would be no adverse effect on site integrity is not possible. The best that can be achieved is for the competent authority to identify the potential risks, so far as they may be reasonably foreseeable, in light of such information as can reasonably be obtained, and put in place a legally enforceable framework with the aim of preventing the risks from materialising.

5.42 The elimination of 'tension' in a plan, as described in paragraphs 5.24-5.25, is one means of ensuring certainty in the appropriate assessment. Where plans contain policies or proposals that may have an adverse effect on the integrity of a European site, at the project stage a proposer may argue that despite being unable to conclude no adverse effects on site integrity, it should be permitted. This is because it can be argued that the proposal satisfies the tests of regulation 49 of the Habitats Regulations in that inclusion in the plan itself bestows it with a case for imperative reason of overriding public interest. Restrictions or caveats of the kind described in paragraphs 5.19 – 5.26 above may help to avoid this contradiction and any resulting uncertainty.

5.43 If the plan-making body cannot ascertain that the plan will not adversely affect the integrity of a European site, either because there would be an adverse effect or because the effects are uncertain, the plan cannot be progressed to adoption unless regulations 85C and 85E (or 49 and 53) are complied with. This is briefly discussed in Section 7 below.

³⁰ See paragraph 61 European Court of Justice case C-127/02 dated 7th September 2004, 'the Waddenzee ruling'

³¹ *WWF-UK Ltd and RSPB v Secretary of State for Scotland et al* [1999] 1 C.M.L.R. 1021 [1999] Env LR 632, Court of Session, Edinburgh, 28th October 1998

SECTION 6: CONSULTATION ON THE APPROPRIATE ASSESSMENT AND RECORDING THE APPRAISAL

Stage 10: Preparing a draft of the Habitats Regulations Appraisal Record

Figure 2 on page 3 shows Stage 10 in the context of the full appraisal process

6.1 There are significant benefits in preparing a robust Habitats Regulations Appraisal Record –

- it provides the essential audit trail which demonstrates the plan-making body's compliance with its obligations under the Habitats Directive
- it enables the plan-making body to systematically work through whether any mitigation or modifications to the plan are required in order to be able to conclude that it would not lead to any adverse effects on the integrity of any European site
- for a higher tier plan which has relied on a future Habitats Regulations Appraisal of a lower tier plan in order to conclude it will not have an adverse effect on the integrity of a European site, it allows the scope and direction of the further appraisal to be specified
- in recording any minor residual effects, it assists the future in-combination assessment of the minor residual effects of other plans or projects.

The draft record of the Habitats Regulations Appraisal should contain at least the items listed in (i) to (vii) in paragraph 6.2 below.

6.2 Appendix C provides an example of an outline draft Habitats Regulations Appraisal Record for illustrative purposes. It is recommended that SNH is formally consulted on a draft of the appropriate assessment – see Stage 11 below. Prior to this, it is recommended that SNH if possible is informally consulted on a working draft of the HRA record. This will help to ensure that any agreed mitigation measures discussed beforehand are correctly included in the record and in the plan, and that the record contains all the necessary information. The draft record should include a summary of the appraisal's conclusions accurately reflecting the following:

- i. Whether or not the plan is directly connected with or necessary to the management of a European site (regulations 48(1)(b) or 85B(1)(b));
- ii. The European site(s) and qualifying interests which were considered in the screening and, where applicable, the appropriate assessment stages, which would be likely to be significantly affected. Also the conservation objectives used to assess the implications of the plan for the site (regulations 48(1) or 85B(1));
- iii. A summary record of the screening stage, in particular listing the policies and proposals in the plan that were screened out of the need for appropriate assessment, either alone or in combination with other plans or projects, brief reasons why and any mitigation measures relied upon in the screening process;
- iv. As applicable, a list of the other plans or projects with which the plan that is being considered was combined in any in-combination assessment, and the outcome of that assessment;

- v. As applicable, whether the plan would or would not be likely to have a significant effect on a specified European site, either alone or in combination with other plans or projects (regulations 48(1)(a) or 85B(1)(a)), clearly recording where minor residual effects remain;
- vi. Where relevant, an appropriate assessment of any element of the plan likely to have a significant effect on a European site, either alone or in combination with other plans or projects, with a clear conclusion as to whether it can be ascertained that that element of the plan will not adversely affect the integrity of the European site. This should include details of any additional mitigation measures that have been relied upon when deciding that it can be ascertained that the element of the plan would not have an adverse effect on site integrity. Any remaining minor residual effects should be clearly recorded;
- vii. Where relevant, whether the plan-making body is minded to conclude, pending the representations from SNH, that it can be ascertained by means of the appropriate assessment that the plan would not have an adverse effect on the integrity of a site (regulations 48(5) or 85B(4)).

Stage 11: Consultation

Figure 2 on page 3 shows Stage 11 in the context of the full appraisal process

The statutory consultation with SNH is technically a part of the ‘appropriate assessment’ and the assessment cannot therefore be finished and finally recorded until SNH’s representations have been received and the plan-making body has had regard to them.

6.3 The plan-making body will need to decide whether to consult the public and if so how³². The plan-making body may choose to give key stakeholders the opportunity to comment on the appraisal before it is finalised. If the draft HRA record is prepared to accompany a development plan Proposed Plan, formal consultation with SNH can take place at the same time.

6.4 The plan-making body must consult SNH, and have regard to its advice, under the provisions of regulations 48(3) and 85B(2) before ascertaining whether or not the plan would adversely affect the integrity of the European sites, for the purposes of the appropriate assessment.

6.5 The Habitats Regulations Appraisal cannot finally ascertain the effect on site integrity until the plan-making body has considered SNH’s representations. Earlier consultations with SNH, for example on the scope of the Habitats Regulations Appraisal, may have been at a stage that was too early to enable SNH to provide meaningful advice as to the effect on site integrity. Further consultations with SNH therefore are likely to be desirable as the appropriate assessment is undertaken.

6.6 In terms of the formal consultation with SNH under regulation 85B or 48, it is suggested that the plan-making body could prepare a draft record of the Habitats Regulations Appraisal, including an otherwise complete, but draft, appropriate assessment, and send it to SNH with any supporting documentation, reports etc, along with the Proposed/Draft Plan. This would constitute a formal consultation simultaneously with that on the plan and, where produced, the Environmental Report.

³² Regulations 48(4) and 85B(3) of the Habitats Regulations

6.7 Should SNH disagree with the conclusions of the appraisal, the Regulations require only that the plan-making body should have regard to any representations they make. In practice, plan-making bodies are advised to work with SNH to resolve any issues arising. In the English courts, the *Akester* judgment³³ found that in the circumstances of that case, unless the competent authority concluded that the advice of the appropriate national conservation body was simply wrong, it was difficult to see how it could have come to the conclusion that no doubt remained as to whether there would be adverse effects on the European sites, when Natural England advised that that was not the case. The judge found that given Natural England's role, the competent authority was bound to accord significant weight to its advice and there had to be 'cogent and compelling' reasons for departing from it.

6.8 For Strategic and Local Development Plans, where SNH remains of the view that there are fundamental problems with the conclusion(s) of the Habitats Regulations Appraisal, the formal response to the draft HRA record will be accompanied by representations to the relevant elements of the plan itself. This is because only unresolved representations to the plan can be considered as part of any subsequent examination of the plan.

SNH will provide a formal response on the draft Habitats Regulations Appraisal Record by sending a letter to the plan-making body indicating whether it agrees with the conclusions, and hence (for development plans) whether any unresolved representations remain for Examination of the plan. The plan-making body should give SNH's advice considerable weight, and should have cogent and compelling reasons for rejecting that advice when undertaking their appropriate assessment.

Stage 12: Proposed modifications

Figure 2 on page 3 shows Stage 12 in the context of the full appraisal process

6.9 If modifications to the plan are proposed after the draft Habitats Regulations Appraisal record has been submitted to SNH for consultation, it will be necessary to screen the proposed changes for the likelihood of a significant effect on a European site. Potentially this may trigger another appropriate assessment if such effects would be likely. It is possible that SNH may need to be consulted again on the record, as revised, and a second letter provided to the plan-making body.

6.10 The Habitats Regulations Appraisal Record should be modified in light of SNH's representations and any modifications that may be made to the plan at a late stage. In the case of development plans falling under Part IVA of the Regulations, the plan-making body should forward their finalised record of the Habitats Regulations Appraisal and the letter from SNH when they submit the proposed plan to the Scottish Ministers for examination³⁴.

The plan-making body may need to amend the HRA Record before it is finalised, as a result of SNH's comments. The plan may also need to be amended as a result of SNH's comments on the record.

³³ *R. (on the application of Akester and Melanaphy) v Department for Environment, Food and Rural Affairs Wightlink Ltd et al* (CO1834/2009) [2010] EWHC 232 (Admin)

³⁴ Paragraph 89 of Circular 6/2013: Development Planning - <http://www.scotland.gov.uk/Publications/2013/12/9924>

Stage 13: Modifying and completing the appraisal record

Figure 2 on page 3 shows Stage 13 in the context of the full appraisal process

6.11 The HRA Record should be finalized before moving towards the adoption of the plan, or otherwise giving effect to the plan.

6.12 For plans falling under Part IVA of the Regulations, a planning authority will normally be bound to accept the Reporter's recommendations in the report of any examination, but one of the exceptions to this rule is where a Reporter's proposed change would not, in the opinion of the planning authority, be compatible with the requirements of the Habitats Regulations³⁵.

6.13 In the case of Strategic Development Plans, where the Scottish Ministers propose to modify a SDP in the light of the Report of the Examination, the Ministers will undertake any necessary appraisal of the plan as if it were modified³⁶.

6.14 Plan-making bodies are strongly encouraged to load HRA Records at both draft and finalised stages onto the Scottish HRA Databank for Development Plans. This is hosted on the Knowledge Hub and can be accessed via <https://knowledgehub.local.gov.uk/>. This will assist other plan-making bodies in undertaking in-combination assessments for their plans. More information can be found in the Scottish Government's Guidance Note for Users (Version 2, November 2014)³⁷.

³⁵ Regulation 2, The Town and Country Planning (Grounds for Declining to Follow Recommendations) (Scotland) Regulations 2009

³⁶ Paragraph 52 of Circular 6/2013: Development Planning - <http://www.scotland.gov.uk/Publications/2013/12/9924>

³⁷ <http://www.scotland.gov.uk/Resource/0046/00466525.pdf>

SECTION 7: POSTSCRIPT: ENSURING COMPLIANCE

Exceptional Cases

The Scottish Government expects that a plan will only need to proceed by way of the tests and procedures in regulations 49 and 85C in the most exceptional circumstances.

A plan-making body should change the plan during the course of the Habitats Regulations Appraisal to ensure that it will not adversely affect the integrity of any European site.

7.1 If a plan-making body is unable to ascertain that a policy or proposal will not adversely affect the integrity of a European site, it may progress to adoption of the plan only in the closely defined circumstances set out in regulations 85C and 85E or 49 and 53 of the Habitats Regulations. Figure 5 in Appendix E summarises the procedures.

7.2 If a plan-making body continues to pursue its plan without change to adoption, despite a negative or uncertain outcome of the Habitats Regulations Appraisal, regulation 85C(5 and 6) / 49(5) requires it to notify the Scottish Ministers. It is expected that this would occur only in the most exceptional of circumstances³⁸.

7.3 The situations in which plan-making bodies may progress a plan to adoption are more restricted where the plan could have an effect on a pSAC, cSAC or pSPA. This is briefly discussed in paragraph 7.7 below.

Helping to keep to the 'rules'

7.4 Whether any particular appraisal is compliant with the Directive and Regulations is a matter which can only be determined by the courts. Plan-making bodies should take legal advice if they are uncertain as to the compliance of a particular appraisal, or the need for appraisal.

7.5 However, there are some 'rules' which, if followed, are likely to help to ensure that the appraisal process is in accordance with the statutory requirements. These are summarised below and several have been discussed earlier in this guidance:

- a) If in doubt as to whether appraisal is necessary, consider whether the plan would be likely to have a significant effect on a European site, and if uncertain as to whether appraisal is required, consider the need for legal advice
- b) Always record the outcome of the appraisal process, including if it is a decision not to subject a plan to appropriate assessment - for example, because it is not likely to have a significant effect on any European site. Record the reasons why the decision was taken
- c) Where a site may be affected, consider the effects of the plan on each qualifying interest of each site, using the conservation objectives as a guide

³⁸ Paragraph 104 of Circular 6/2013: Development Planning
<http://www.scotland.gov.uk/Publications/2013/12/9924>

- d) Make sure that all policies and all proposals and programmes are screened and assessed individually, or in suitable groups where this may save time
- e) Even if the individual policies, proposals and programmes in a plan would not have a likely significant effect on a site, check whether they would have a likely significant effect when their individual effects are added together – the ‘whole-plan in-combination perspective’
- f) Consider the possible effects on European sites outwith the plan area and its immediate surroundings in respect of connectivity between the sites and the effects of the plan
- g) Undertake an in-combination appraisal if the plan would not be likely to have a significant effect on its own, but could have some minor residual effects that if combined with the minor residual effects of other plans or projects could be likely to have significant effects
- h) Where relevant, amend the plan and take into account ‘mitigation measures’ in the decision whether the plan would be likely to have a significant effect, or whether it can be ascertained that it would not adversely affect site integrity
- i) Always make sure that any record of appraisal includes, as a minimum, the matters listed in paragraph 6.2 to the extent that they are relevant
- j) To aid any in-combination assessment within the Habitats Regulations Appraisals of other plans, clearly distinguish in the HRA Record between elements of the plan with no residual effects on European sites, and elements of the plan with minor residual effects on European sites
- k) Ensure that the peculiarities and particulars of Natura terminology are correctly understood. This should enable a logical and clear HRA Record, with the correct tests used at each stage of the process.

Possible pitfalls

7.6 From past experience it is possible to identify some potential pitfalls in the appraisal process:

- a) Do not approximate wording in the Regulations in making the record of the appraisal, but exactly match them, such as “likely to have a significant effect”
- b) Do not combine or confuse steps and tests in the appraisal process
- c) Do not apply the tests and steps in a different order to that set out in Figure 2 and the Regulations
- d) Do not ‘lump together’ the qualifying interests of a site for the purpose of assessment; each should be assessed separately unless they have very similar characteristics and would be affected in the same way by the plan
- e) Do not assess effects on a site that do not affect the qualifying interests for which it is designated

- f) Do not take account of 'compensatory measures' when deciding whether a plan would be likely to have a significant effect on a site, or whether it can be ascertained that the plan would not have an adverse effect on site integrity. Compensatory (or compensation) measures are not the same as mitigation measures
- g) Do not make assumptions about the possible effects on a site, for example that a particular type of development would be acceptable because it has been permitted in the past, without taking appropriate advice
- h) Do not rely on the presence, or subsequent insertion, of a general policy seeking to protect European sites, in order to ascertain that the plan would not have an adverse effect on site integrity, if the plan could in some way have a likely significant effect on a European site
- i) Do not ascertain that there would not be an adverse effect on the integrity of a European site unless the plan-making body has made certain there would be no such effects, this being the case where no reasonable scientific doubt remains as to the absence of such effects.

Special considerations for proposed and candidate European sites

7.7 It is Government policy to treat proposed SPAs (pSPAs) and proposed SACs (pSACs) as if they are fully designated European sites. However, as a result of judgments in the European Court of Justice, there are further considerations in respect of pSPAs, pSAC and cSAC which may need to be taken into account by plan-making bodies, where adverse effects on the integrity of such sites cannot be ruled out. Plan-making bodies are recommended to seek legal advice in such cases and to discuss with SNH how the possible effects could be avoided, because they could preclude the plan from being adopted in certain circumstances.

APPENDIX A GLOSSARY OF TERMS USED IN THIS GUIDANCE

Where the definitions include a term that is defined elsewhere in this glossary, the term is underlined.

Adverse effect (site integrity)	An effect on the <u>qualifying interests</u> of a <u>European site</u> which is negative in terms of the achievement of the <u>conservation objectives</u> for that site. The following definition of the integrity of a site has been stated by the Scottish Government. The <u>integrity</u> of the site is “ <i>the coherence of its ecological structure and function, across its whole area, which enables it to sustain the habitat, complex of habitats and/or the levels of populations of the species for which it was classified.</i> ” See further paragraphs 5.6 – 5.8.
Alternative solutions	This is a part of the tests in Article 6(4) of the Directive and regulations 85C and 49 of the <u>Habitats Regulations</u> . In any exceptional case, where regulation 85C or 49 is applied to a proposed plan, the plan-making body must first be satisfied that there are no alternative solutions. The Scottish Government expects these special provisions to be used only in the most exceptional circumstances, with plans being amended to avoid <u>adverse effects</u> on European sites, so rendering the application of the alternative solutions test unnecessary. See further paragraphs 7.1 – 7.3.
Appropriate assessment	Is one part of the <u>Habitats Regulations Appraisal</u> process which is described in this guidance. An ‘appropriate assessment’ is only required where the plan-making body determines that the plan is <u>likely to have a significant effect</u> on a <u>European site</u> in Great Britain, or a <u>European Offshore Marine Site</u> , either alone or <u>in combination</u> with other <u>plans or projects</u> , and the plan is not directly connected with or necessary to the conservation management of the site.
Birds Directive	Directive 2009/147/EC of the European Parliament and of the European Council of 30 th November 2009 on the conservation of wild birds.
Compensatory measures	Measures designed to ensure the coherence of the <u>Natura 2000</u> network is protected where <u>adverse effects</u> on <u>site integrity</u> cannot be ruled out, and in the absence of <u>alternative solutions</u> , the plan must proceed for <u>imperative reasons of overriding public interest</u> . It is important to carefully distinguish between ‘ <u>mitigation measures</u> ’ (avoidance, cancellation and reduction measures), which are relevant to regulation 85B and 48, and compensatory measures, which only become relevant under regulation 85E or 53. Compensatory measures should not be taken into account in assessing the <u>likely significant effects</u> of the <u>plan</u> on <u>European sites</u> , or in the <u>appropriate assessment</u> .
Competent authority	An expression used in the <u>Habitats Directive</u> and <u>Habitats Regulations</u> , referring to the authority that is responsible for making a decision about a project application or adopting a <u>plan</u> . Any public body or public office is capable of being a competent authority as defined by regulation 6 of the <u>Habitats Regulations</u> .
Conservation objectives	These are referred to, but not defined, in the Directive and Regulations. They are set by SNH for each <u>qualifying interest</u> of each <u>European site</u> and endorsed by Scottish Government. They form the basis of assessing the potential effects of <u>plans and projects</u> on European sites.
European marine sites	The parts of <u>European sites</u> which are marine areas; and lie below Mean High Water Spring tide. They are also known as marine SACs and marine SPAs.

European Offshore Marine Site	Defined by regulation 15 of the Offshore Marine Conservation (Natural Habitats, &c.) Regulations 2007 S.I. 2007 Number 1842, and comprise <u>Special Protection Areas</u> (SPA), <u>Special Areas of Conservation</u> (SAC), and candidate Special Areas of Conservation (cSAC) which lie beyond the 12 nautical mile limit of Scotland's territorial waters.
European site	Defined by regulation 10 of The Conservation (Natural Habitats, &c.) Regulations 1994 as amended, and may be summarised as follows: <u>Special Protection Areas</u> (SPA), classified under the <u>Birds Directive</u> , <u>Special Areas of Conservation</u> (SAC), candidate Special Areas of Conservation (cSAC) both designated under the EC <u>Habitats Directive</u> 1992. In this guidance, for convenience, <u>European Offshore Marine Sites</u> are included in the definition of 'European sites' to make the text more readable.
Habitats Directive	EC Council Directive 92/43/EEC of 21 st May 1992 on the conservation of natural habitats and of wild fauna and flora.
Habitats Regulations	The Conservation (Natural Habitats, &c.) Regulations 1994, Statutory Instrument 1994 No 2716 as chiefly amended in 1996, 1999, 2004, 2007, 2009 and 2011, abbreviated in this guidance to 'the Regulations' or 'the Habitats Regulations', as the context requires. They transpose the <u>Habitats Directive</u> into domestic law. There are some differences between these Regulations and the <i>Conservation of Habitats and Species Regulations</i> 2010 which apply in England and Wales.
Habitats Regulations Appraisal (HRA)	Is the whole procedure of plan appraisal, described in Sections 2 – 6 of this guidance, including for the purposes of this guidance deciding whether a plan is subject to the Regulations (Section 3); the ' <u>screening</u> ' process (Section 4) for determining whether an ' <u>appropriate assessment</u> ' is required; and the 'appropriate assessment' stage (Section 5) including consultation with SNH (section 6).
Habitats Regulations Appraisal Record	This is the record of the <u>Habitats Regulations Appraisal</u> process. It should set out in a concise way the reasoning for the conclusion by the <u>plan-making body</u> (as applicable) that the <u>plan</u> would not be <u>likely to have a significant effect</u> on a <u>European site</u> , either alone or <u>in combination</u> with other plans or projects and, where an <u>appropriate assessment</u> has been carried out as part of the appraisal, whether it has been ascertained that it would not <u>adversely affect the integrity</u> of a European site. It forms the means by which formal consultation with Scottish Natural Heritage takes place as part of any appropriate assessment, as well as consultation more generally with SNH at the draft/proposed plan stage over the likelihood of effects of the plan on European sites. This document is also required for submission to Scottish Ministers for development plans at the examination/approval for adoption stage (see Appendix C for example outline of a draft HRA Record).
Imperative reasons of overriding public interest	This is a part of the tests in Article 6(4) of the Directive and regulations 85C and 49 of the <u>Habitats Regulations</u> . Different criteria relate to <u>priority habitats</u> . The Scottish Government expects these special provisions to be used only in the most exceptional circumstances. Plans should be amended to avoid <u>adverse effects</u> on <u>European sites</u> , so rendering the application of the imperative reasons of overriding public interest test unnecessary. See further paragraphs 7.1 – 7.3.
In combination	The requirement in the <u>Habitats Regulations</u> is to undertake an <u>appropriate assessment</u> of a <u>plan</u> if it would be <u>likely to have a significant effect</u> on a <u>European site</u> " <i>either alone or in combination with other plans or projects</i> ". The <u>appropriate assessment</u> should take into account in combination effects where relevant. See further paragraphs 4.34 – 4.42.
Integrity of the site	See <u>adverse effect</u> (site integrity) above.

Land use plans	Strategic development plans, local development plans and supplementary guidance as defined by regulation 85A of the <u>Habitats Regulations</u> 1994 as amended.
Likely significant effect (LSE)	A likely effect is one that cannot be ruled out on the basis of objective information. The test is a 'likelihood' of effects rather than a 'certainty' of effects ³⁹ . See further paragraphs 4.3 – 4.5. Where a project is likely to undermine the site's <u>conservation objectives</u> , it must be considered likely to have a significant effect on the site. The assessment of that risk must be made in the light, amongst other things, of the characteristics and specific environmental conditions of the site concerned.
Minor residual effect	Any effect on a European site that is not significant (see ' <u>likely significant effect</u> '), but which should be considered within <u>in-combination</u> assessments.
Mitigation measures	Measures to avoid, cancel or reduce the effects of a plan on a <u>European site</u> which should be proposed as part of the plan and which the <u>plan-making body</u> will take into account in the <u>Habitats Regulations Appraisal</u> . It is important to carefully distinguish between these mitigation measures (avoidance, cancellation and reduction measures), which are relevant to regulation 85B and 48, and <u>compensatory measures</u> that only become relevant under regulation 85E or 53.
Natura 2000	The Europe-wide network of <u>Special Protection Areas</u> and <u>Special Areas of Conservation</u> , in all Member states, that is intended to provide protection for the bird species and assemblages in accordance with the <u>Birds Directive</u> , and for the species and habitats listed in Annexes 1 and 2 of the <u>Habitats Directive</u> .
Plan (or project)	A plan is not defined in the Directive or the Regulations (except to the extent that <u>land use plans</u> and core path plans are explicitly referred to in the Regulations). The European Court of Justice has widely interpreted what is meant in the Directive by a 'plan or project'. EC guidance ⁴⁰ notes that: "... <i>the Directive does not circumscribe the scope of either 'plan' or 'project' by reference to particular categories of either. Instead, the key limiting factor is whether or not they are likely to have a significant effect on a site</i> ".
Plan-making body	In the context of this guidance, any public body in Scotland which is responsible for producing a <u>plan</u> that may be subject to appraisal under the <u>Habitats Regulations</u> .
Priority habitat	A habitat that is marked with an asterisk (*) in Annex I of the <u>Habitats Directive</u> , indicating that special conservation measures are required to protect them because they are in danger of disappearance and for the conservation of which the EC has particular responsibility in view of the proportion of their natural range which falls in the EC area. In any consideration of <u>imperative reasons of overriding public interest</u> under regulations 85(C)(2) or 49(2) where the site hosts a priority habitat, such reasons must relate to human health, public safety or beneficial consequences of primary importance to the environment, or any other reasons having regard to the opinion of the European Commission.
Qualifying interests (of a site)	The habitats or species for which a site has been classified (SPA) or designated (SAC).
Ramsar site	A site listed as a wetland of international importance under the provisions of the 'Ramsar Convention'. A Ramsar site is not a <u>European site</u> as a matter of law, but all Ramsar sites in Scotland are also European sites and / or Sites of Special Scientific Interest and are protected under the relevant statutory regime.

³⁹ Managing Natura 2000 sites, EC, 2000. Section 4.4.2.

⁴⁰ EC, 2000, *Managing Natura 2000 Sites; The provisions of Article 6 of the 'Habitats' Directive 91/43/EEC* April 2000, section 4.3

Scoping	'Scoping' is a term used in this guidance for convenience, to help to explain a part of the appraisal process. It is not a term used in either the Directive or the Regulations. Scoping is not a statutory requirement, but it is recommended to help to ensure that the <u>appropriate assessment</u> is focused, fit for purpose, compliant and proportional, in other words 'appropriate'. See further paragraphs 5.1 – 5.5.
Screening	'Screening' is a term that is used in this guidance for convenience, to describe the initial stages of the <u>Habitats Regulations Appraisal</u> in the consideration of whether the policies and proposals of a plan are <u>likely to have a significant effect</u> on a <u>European site</u> , either alone or <u>in combination</u> with other plans or projects, and should thus be subject to <u>appropriate assessment</u> . It is not a term used in either the Directive or the Regulations. See further paragraphs 4.1 to 4.2.
Site condition	Site condition gives an indication of the conservation status of habitats and species at the site level. It is linked to the concept of 'favourable conservation status' which is defined in detail in Article 1 of the <u>Habitats Directive</u> ; in summary, the conservation status is 'favourable' where all that is necessary to sustain the habitats or species in the long-term is in place (please refer to the detailed definitions in Article 1).
Special Area of Conservation (SAC)	Area designated in respect of habitats and/or species under Articles 3 – 5 of the EC <u>Habitats Directive</u> . All SACs are <u>European sites</u> and part of the <u>Natura 2000</u> network.
Special Protection Area (SPA)	Area classified in respect of bird species under Article 4 of the <u>Birds Directive</u> . All SPAs are <u>European sites</u> and part of the <u>Natura 2000</u> network.

APPENDIX B

EXAMPLES OF TYPES OF POLICIES REFERRED TO IN THE GUIDANCE

This appendix provides examples of some policies and proposals in order to illustrate the screening stage of the guidance. They are based on actual policies or proposals, but may be adapted for illustrative purposes, so the origins of the policies are not stated. It is emphasised that they are illustrative only and are not endorsed as best practice. It is conceivable that what may be appropriately screened out in one plan may not be appropriate to screen out in another plan, because of the particular circumstances of the plan, the European sites, their qualifying interests, conservation objectives and likely significant effects alone or in combination with other plans or projects.

Examples of general policy statements (paragraphs 4.7 - 4.10)

Example Policy 1

A general statement of policy (screened out)

STRATEGY FOR ECONOMIC DEVELOPMENT

Promote a stronger and more diverse local economy building on the area's location and other strategic assets

Enable and safeguard land for business growth in sustainable locations

Create and maintain vital and viable town, district and local centres

Promote the leisure and tourism sector with emphasis on quality

Manage risk from major hazards, with a balance achieved between health and safety aspects and regeneration needs.

Example Policy 2

A general criteria based policy (screened out)

NEW DEVELOPMENT IN THE BUILT ENVIRONMENT

New development will be required to contribute positively to the quality of the built environment.

Proposals should accord with the following criteria:

- (1) The siting, layout and density of new development should create a coherent structure of streets, amenity space and buildings which respects and complements the site's environs and creates a sense of identity within the development;*
- (2) Streets and public spaces should have buildings fronting them, and where this is not possible, a high quality architectural or landscape treatment will be required as an alternative;*
- (3) The design of new buildings should reflect the surrounding urban fabric in terms of scale, height, massing and building line;*
- (4) Building materials, finishes and colours should be chosen to complement those prevailing in the local area;*
- (5) Existing buildings or structures which contribute to the local townscape should be retained and integrated sensitively into the layout; and*
- (6) The contribution to the townscape of important landmarks, skylines and views should be respected.*

Example Policy 3

A more specific criteria based policy (not to be screened out)

NEW ECONOMIC DEVELOPMENT

The employment sites shown on the proposals map are allocated for business, general industry, storage or distribution uses. Planning permission will only be granted where a proposal conforms to the further site specific uses and requirements set out in Appendix x and they meet the following criteria:

List of detailed criteria relating to impacts on residential amenity, transport etc not reproduced here

(Note: this policy should not be screened out because although it is a criteria-based policy, the development it promotes is specific to the allocations, and until the allocations have been checked individually for the likelihood of significant effects, the policy providing for them cannot be screened out.)

Example of proposals within a plan that are not generated by the plan subject to appraisal (paragraphs 4.11 – 4.16)

Example Policy 4 (partly or wholly screened out)

PROPOSAL PT1: TRANSPORT PROPOSALS

Transport Proposals are listed below according to whether they improve accessibility within the National/International Network or whether they relate to primarily regional or internal movements.

National/International (some deletions)

Forth replacement crossing

Light rapid transit connections between Fife and Edinburgh

Passenger rail on Dunfermline-Kinross-Alloa-Stirling line

City Region

Not reproduced here

Fife Regional

Not reproduced here

(Note: the projects listed under national / international transport proposals are referred to in the plan for completeness, and to enable the plan to take account of their spatial planning implications. However, they can be screened out of the plan's appraisal because they are proposed by, and will be assessed by, the Scottish Government and it would be inappropriate for this plan appraisal to attempt to assess their effects.)

Examples of policies with no likely significant effect on a European site because they are intended to protect the natural or built environment (paragraph 4.18(a))

Example Policy 5 (screened out)

BIODIVERSITY

The Council will promote the biodiversity of the Council area and ensure that the aims and objectives of the Local Biodiversity Action Plan are promoted through the planning process. Accordingly:

(1) Developments which would have an adverse effect on the national and local priority habitats and species identified in the Local Biodiversity Action Plan will not be permitted unless it can be demonstrated that there are overriding national or local circumstances;

- (2) *The safeguarding, enhancement and extension of the key habitats and species of conservation concern identified in the Local Biodiversity Action Plan will be given particular attention in the consideration of development proposals;*
- (3) *Development proposals should incorporate measures to promote, enhance and add to biodiversity, through overall site planning, and infrastructure, landscape and building design, having reference to the Supplementary Planning Guidance Note on 'Biodiversity and Development'; and*
- (4) *Priority will be given to securing appropriate access to and interpretation of areas of local nature conservation interest. The designation of Local Nature Reserves, in consultation with communities, local wildlife groups and statutory bodies will be pursued.*

Example Policy 6 (screened out)

HERITAGE: LISTED BUILDINGS

The Council will protect listed buildings and will have particular regard to their special architectural and historic features and, where appropriate, archaeological interest in considering proposals for their alteration, extension, or change of use. There is a presumption against the partial or total demolition of a listed building.

Example Policy 7 (screened out)

HISTORIC GARDENS AND DESIGNED LANDSCAPES

There will be a general presumption against development which would adversely affect the character or setting of sites identified in the 'Inventory of Gardens and Designed Landscapes in Scotland' and other historic gardens and landscapes of national, regional or local significance. The Council will seek to encourage sensitive management of historic gardens and designed landscapes.

Example of policy with no likely significant effect on a European site because it will not lead to development or other change (paragraph 4.18(b))

Example Policy 8 (screened out)

PROTECTION OF MINERAL RESOURCES

There will be a general presumption against significant permanent development which would sterilise mineral deposits which are likely to be capable of environmentally acceptable extraction.

(Note: although the policy protects mineral resources from sterilisation, in case they are required for extraction, it does not provide for their extraction and does not in itself provide for development or change.)

Example of policy with no likely significant effect on a European site because it promotes development that, in this context, could not have any conceivable effect on a European site (paragraphs 4.18(c) and 4.20 – 4.23)

Example Policy 9 (screened out)

RE-USE OF BUILDINGS

The Council will generally support the re-use or conversion of existing vacant buildings of architectural and townscape merit, provided that the building is structurally sound and capable of beneficial conversion, and an acceptable internal layout and level of amenity can be provided.

Example of policy with no likely significant effect on a European site because although it promotes development in specific areas (in this example the named town centres) there is no physical, ecological, hydrological, chemical or biological link or other pathway between its provisions and the qualifying interests of any European site (paragraphs 4.18(c) and 4.20 – 4.23)

Example Policy 10 (screened out)

TOWN CENTRES

Development proposals bringing about an improvement to the range and quality of retail and commercial leisure facilities in the town centres of X, Y and Z will be considered favourably. Measures for improving the environment and accessibility of town centres will be supported.

(Note: for clarification, in this case example, no river SACs flowed through or close to the town centres.)

Example of policy with no likely significant effect on a European site because although it promotes development / change, it is so general that it is not known where, when or how the aspect of the plan may be implemented, or where any potential effects may occur, or which European sites, if any, may be affected (paragraphs 4.18(e) and 4.25 – 4.29)

Example Policy 11 (screened out)

VACANT, DERELICT AND CONTAMINATED LAND

The Council will seek to reduce the incidence of vacant, derelict and contaminated land. Subject to compliance with other local plan policies, development involving the rehabilitation and reuse of derelict land will be encouraged.

(Note: it is possible that this policy may equally have been screened out in Screening Step 1, General Policy Statements)

APPENDIX C

EXAMPLE OUTLINE DRAFT HABITATS REGULATIONS APPRAISAL RECORD

This appendix provides an illustrative example of the outline of a Draft Habitats Regulations Appraisal Record. It is not a prescriptive formula and is not intended as a template for all records. Each record should be tailored to suit its purpose and the complexity of the plan's potential effects on European sites. In many cases a simpler record may be all that is needed (for example where it is concluded that no element of a plan has any effect on a European site). On the other hand, this outline may be too simplified for what is required for an HRA Record of a more complex assessment (for example where a plan area contains multiple European sites and there are multiple sensitivities for the sites). While illustrations are included below for how to record the HRA, it is essential that a robust evidence-based approach is followed in order to reach sound conclusions. This appendix should not therefore be read or applied in isolation from the rest of the guidance.

This illustrative example assumes that for some aspects of the plan an 'appropriate assessment' was necessary, whereas many plans may not need to progress to an appropriate assessment because they would not be likely to have a significant effect on a European site. For reasons discussed in the guidance, the example does not include any consideration of issues that may arise, in exceptional circumstances, under regulations 85C/85E and 49/53, in the event that the appraisal cannot ascertain that there would be no adverse effect on the integrity of a European site.

Title

This should explicitly refer to the Habitats Regulations and the plan which is being appraised.

Introduction

This should briefly refer to the background legislation and requirement for appraisal and summarise the procedural requirements, in a way that may reflect paragraphs 1.1 to 1.4 and Figure 1 of this guidance. It should briefly outline the methodology, perhaps by way of a flowchart similar to the one in Figure 2 of this guidance to the extent that it may be relevant to the appraisal. The introduction could also refer to any good practice guidance which was followed, such as a reference to this guidance, if applicable. The introduction could also include a brief explanation of why the plan is subject to appraisal (Stage 1).

Background information about European sites

The record here could include:

- A list of the European sites potentially affected and a brief summary of the reasons why they were selected (Stage 2). A checklist based on the table in section 3 could be included
- Information about the European sites potentially affected, perhaps summarised in a table or matrix such as that outlined below (Stage 3)
- A summary of any early discussions with SNH, for example, about the selection of sites and the methodology and scope of the appraisal (Stage 4)

ILLUSTRATIVE EXAMPLE OF A TABLE SUMMARISING INFORMATION ABOUT THE EUROPEAN SITES POTENTIALLY AFFECTED (see section 3)		
Information	Site 1	Site 2
Site name	River A	Loch B
Designation status	SAC	SPA
Date of designation	Designated 15/03/05	Classified 08/04/96
Qualifying interests	Otter Atlantic salmon	White-fronted goose (over-wintering)
Conservation objectives	<i>These would be inserted from the SNH web site</i>	<i>These would be inserted from the SNH web site</i>
Site condition	Otter unfavourable Atlantic salmon favourable	Favourable
Factors currently influencing the site	Otter disturbance from flood defence or other riparian engineering works, water quality and increasing recreational use. Atlantic salmon - water abstraction, water quality, river engineering, and other impediments to migration.	Changes in habitat management within the SPA and changes in agricultural practices at feeding grounds outwith the SPA.
Vulnerabilities to change / potential effects of the plan	Increased housing within 5km of river likely to increase recreational disturbance and could increase discharge of pollutants from waste water treatment works.	Potential wind energy developments in daily flight paths, in or outwith the SPA, disturbance from quarrying on edges of the SPA, loss of feeding habitat to non-agricultural uses.

Screening

1. The following table can be used to record the screening stage (Stage 5) of policies and proposals 'alone'. The table sets out the categories which can be used to screen policies and proposals (see Section 4 of this guidance):

'The following aspects of the plan would not be likely to have a significant effect alone on a European site for the reasons given' –

Aspects of the plan which would not be likely to have a significant effect on a European site alone	Relevant parts of the plan
General policy statements (Step 1)	List
Aspects excluded from the appraisal because they are not proposals generated by this plan (Step 2)	List
Aspects which protect the natural environment, including biodiversity, or conserve or enhance the natural, built or historic environment (Step 3a)	List
Aspects which will not lead to development or other change (Step 3b)	List
Aspects which make provision for change but which could have no conceivable effect on a European site, because there is no link or pathway between them and the qualifying interests, or any effect would be a positive effect, or would not otherwise undermine the conservation objectives for the site (Step 3c)	List
Aspects which make provision for change but which could have no significant effect on a European site (minor residual effects), because any potential effects would be so restricted that they would not undermine the conservation objectives for the site (Step 3d)	List
Aspects which are too general so that it is not known where, when or how the aspect of the plan may be implemented, or where any potential effects may occur, or which European sites, if any, may be affected (Step 3e)	List

2. The following screening matrix suggests a means to compare policies and proposals in the plan 'in combination' with other aspects of the same plan (Stage 5), screened out individually under Step 3d above (identified as having minor residual effects). This should be followed by a conclusion as to whether and how the effects of the plan in combination were or were not judged to be likely to be significant -

In combination	Policy A	Policy B	Proposal 1	Proposal 2	Other multiple combinations
Policy A					
Policy B					
Proposal 1					
Proposal 2					
Other multiple combinations					



Likely significant effect



No likely significant effect

3. The following screening matrix suggests an approach to in-combination assessment with elements of other plans and projects. This should include policies, proposals and projects that may have minor residual effects in order to identify whether in-combination these will have likely significant effects (Stage 5). Existing HRA Records can help to provide this information. The record should then state whether and how the effects of the plans or projects, in combination, were or were not judged to be likely to be significant -

Elements of other plans or projects to consider for in-combination effects Plan A (the plan under consideration): Elements of the plan screened out under step 3d as minor residual effect alone	Plan B: Proposal B1	Plan B; Proposal B2	Plan C; Proposal C1	Project D	Other multiple combinations
Proposal A1					
Proposal A2					
Proposal A3					
Proposal A4					
Policy A5					
Other multiple combinations					



Likely significant effect in combination



No likely significant effect in combination

4. The following table suggests an approach of listing any straightforward mitigation measures applied in screening out aspects of the plan considered post-mitigation not to be likely to have a significant effect on a European site, alone or in combination (Stage 6). This should distinguish between avoidance and reduction measures, to inform the in-combination assessment of the plan -

Aspects of the plan which it was not possible under screening steps 1- 3 to screen out as not being likely to have a significant effect on a European site, alone or in combination	Mitigation measure applied in order then to conclude that there would be no likely significant effect on a European site
<i>Distinguish between those that can be subsequently eliminated from the appraisal and those with minor residual effects still needing potential further consideration in combination</i>	

5. If applicable, the record should continue with a list of any aspects of the plan that would be likely to have a significant effect on a European site, either alone or in combination, which therefore require appropriate assessment. The following table suggests how this might be laid out with associated information -

Aspect of the plan likely to have significant effect, alone or in combination	Qualifying interest of the European site	Summary of the likely significant effect
For example the relevant policies or proposals	The site name and the qualifying interest likely to be significantly affected	The likely significant effects and whether it is an effect alone or in combination

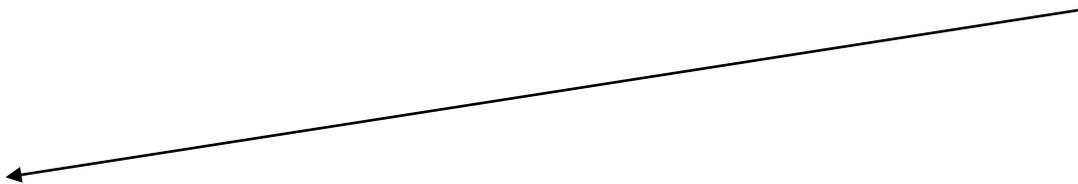
The appropriate assessment

6. This part of the HRA Record should set out the assessment of those elements of the plan likely to have a significant effect on a European site, alone or in combination, in light of their conservation objectives (Stage 8), including consideration of mitigation measures (Stage 9). The level of detail required will vary depending on the effects to be considered and the complexity of the assessment, as well as the nature of the individual plan. In essence an assessment is appropriate when it is sufficient to inform a conclusion as to whether it can be ascertained that the plan will not adversely affect the integrity of any European site, in light of the implications of the plan for the site's conservation objectives. The assessment should be fully reasoned, logically set out, with clearly identifiable conclusions. The assessment could be summarised in a table or matrix (or set of tables or matrices) as illustrated below. The record of the appropriate assessment may be more clearly and succinctly presented in the Habitats Regulations Appraisal Record by referring to a separate document that contains detailed baseline information, evidence, predictions, calculations or analysis, available on the authority's web site or otherwise to those who may wish to examine the detail.

Aspect of the plan likely to have significant effect, alone or in combination	Implications for each qualifying interest of the European site in light of its conservation objectives	Mitigation measures applied or taken into account in assessment	Whether it can be ascertained that the aspect of the plan would not adversely affect the integrity of a European site
The relevant policies or proposals	Description of nature, magnitude, timing etc of any potential negative effects in light of its conservation objectives	e.g. what has been deleted from the plan; what has been changed in the plan; what measures have been introduced; any case specific policy restrictions or caveats; whether the conclusion relies on mitigation measures in lower tier plan/appraisal	The plan-making body's initial conclusions as to adverse effect on site integrity pending SNH consultation representations as part of the assessment

7. The following two-stage table suggests an approach to recording the in-combination assessment within the appropriate assessment where minor residual effects remain (see paragraph 5.15 and Appendix D) -

Aspect of the plan with minor residual effect following mitigation within the appropriate assessment	Other aspects of the plan with minor residual effects following mitigation within the appropriate assessment	Other aspects of the plan with minor residual effects screened out as no LSE	Aspects of other plans and projects which have minor residual effects	Summary of any potential adverse effect on site integrity in-combination
				If potential adverse effect on site integrity identified, move on to table below.

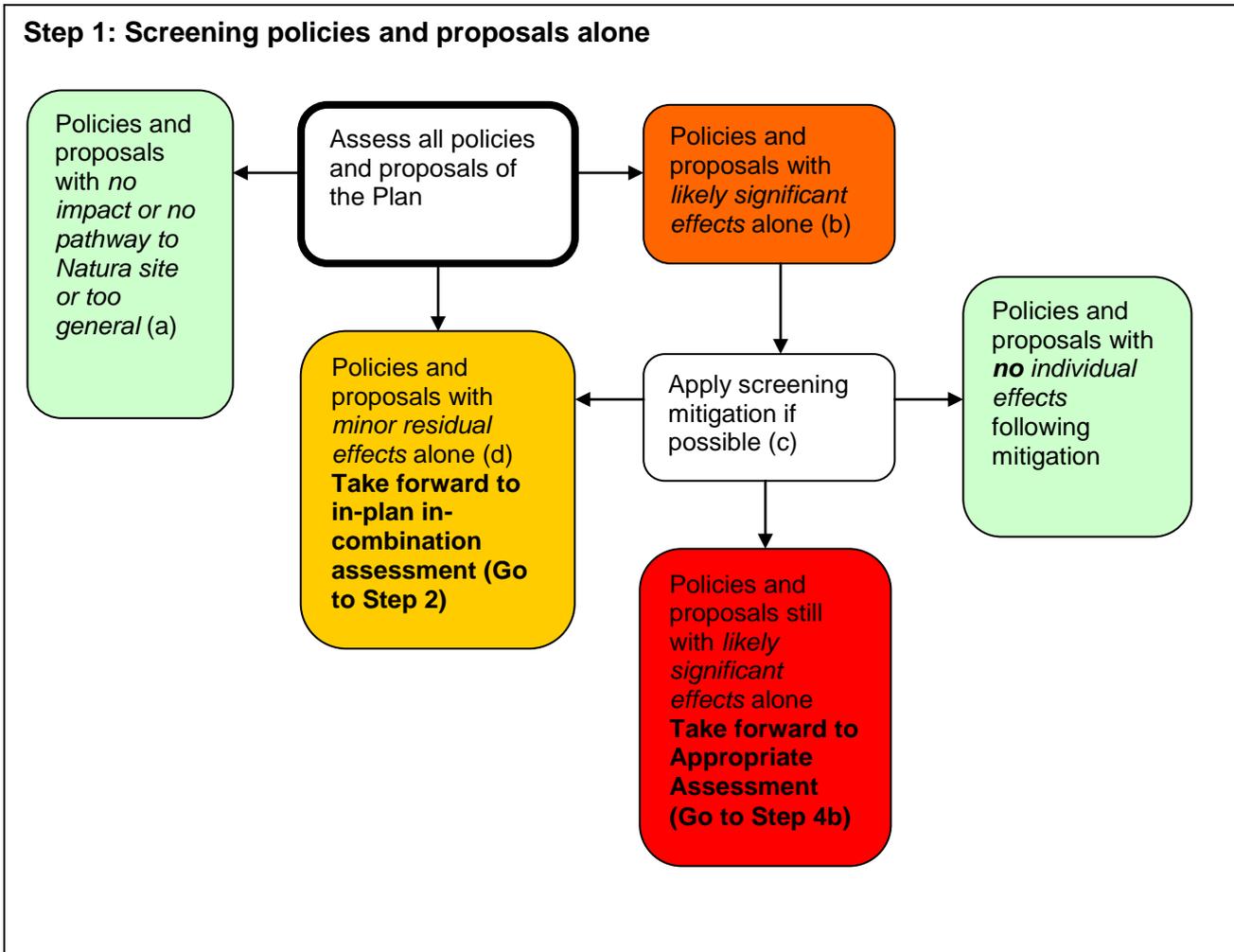


Aspect of the plan with potential adverse effect on site integrity in-combination	Implications for each qualifying interest of the European site in light of its conservation objectives	Mitigation measures applied or taken into account in assessment	Whether it can be ascertained that the aspect of the plan would not adversely affect the integrity of a European site, in-combination as well as alone
The relevant policies or proposals	Description of nature, magnitude, timing etc of any potential negative effects in light of its conservation objectives	e.g. what has been deleted from the plan; what has been changed in the plan; what measures have been introduced; any case specific policy restrictions or caveats; whether the conclusion relies on mitigation measures in lower tier plan appraisal	The plan-making body's initial conclusions as to adverse effect on site integrity pending SNH consultation representations as part of the assessment

Conclusions

8. The matters listed in paragraph 6.2 of this guidance should be included together with a summary of any other relevant information that will provide justification and transparency for the Habitats Regulations Appraisal Record.

**APPENDIX D
IDENTIFYING PLAN ELEMENTS FOR IN-COMBINATION ASSESSMENT⁴¹**

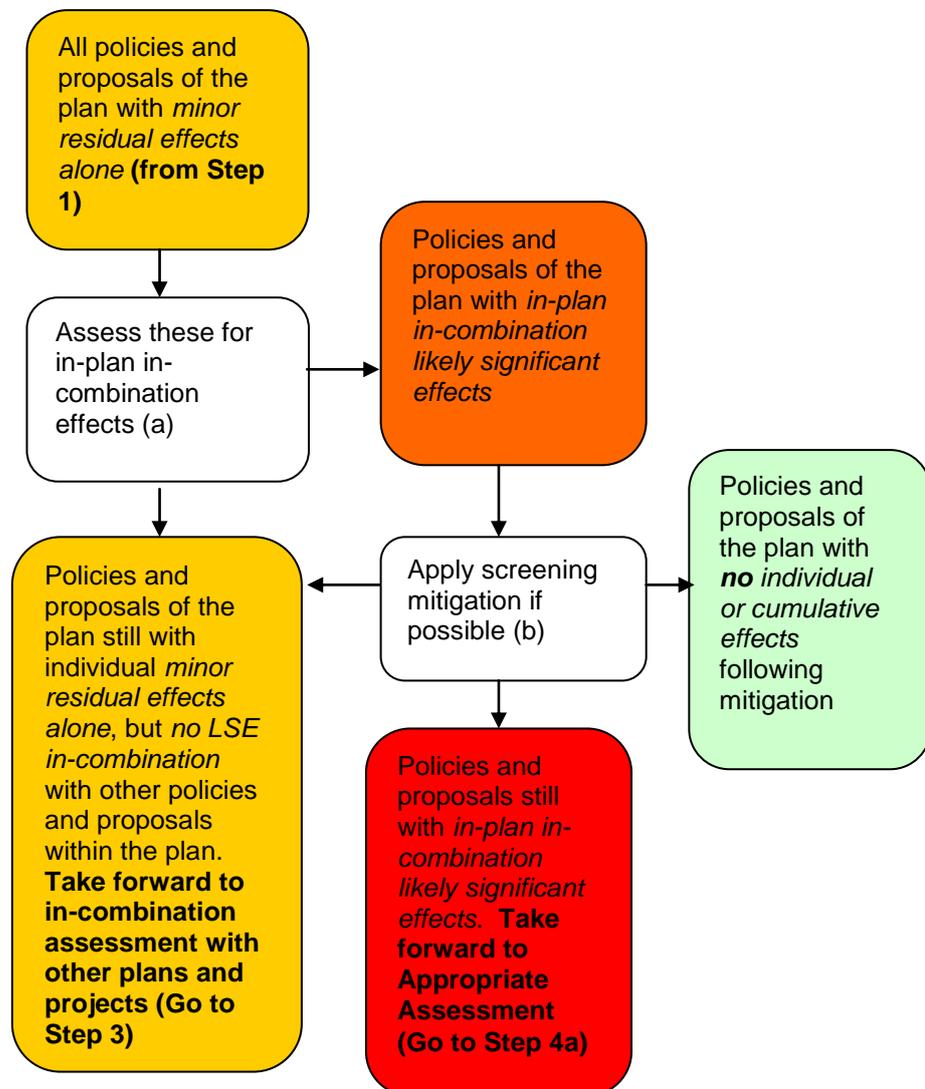


Reference to relevant section of guidance

- (a) Paragraph 4.18 a-c and e
- (b) Paragraphs 4.3 – 4.5
- (c) Paragraphs 4.43 – 4.45
- (d) Paragraph 4.18 d

⁴¹ Source: Scottish Government Environmental Assessment Team

Step 2: Screening policies and proposals for **in-plan in-combination** effects

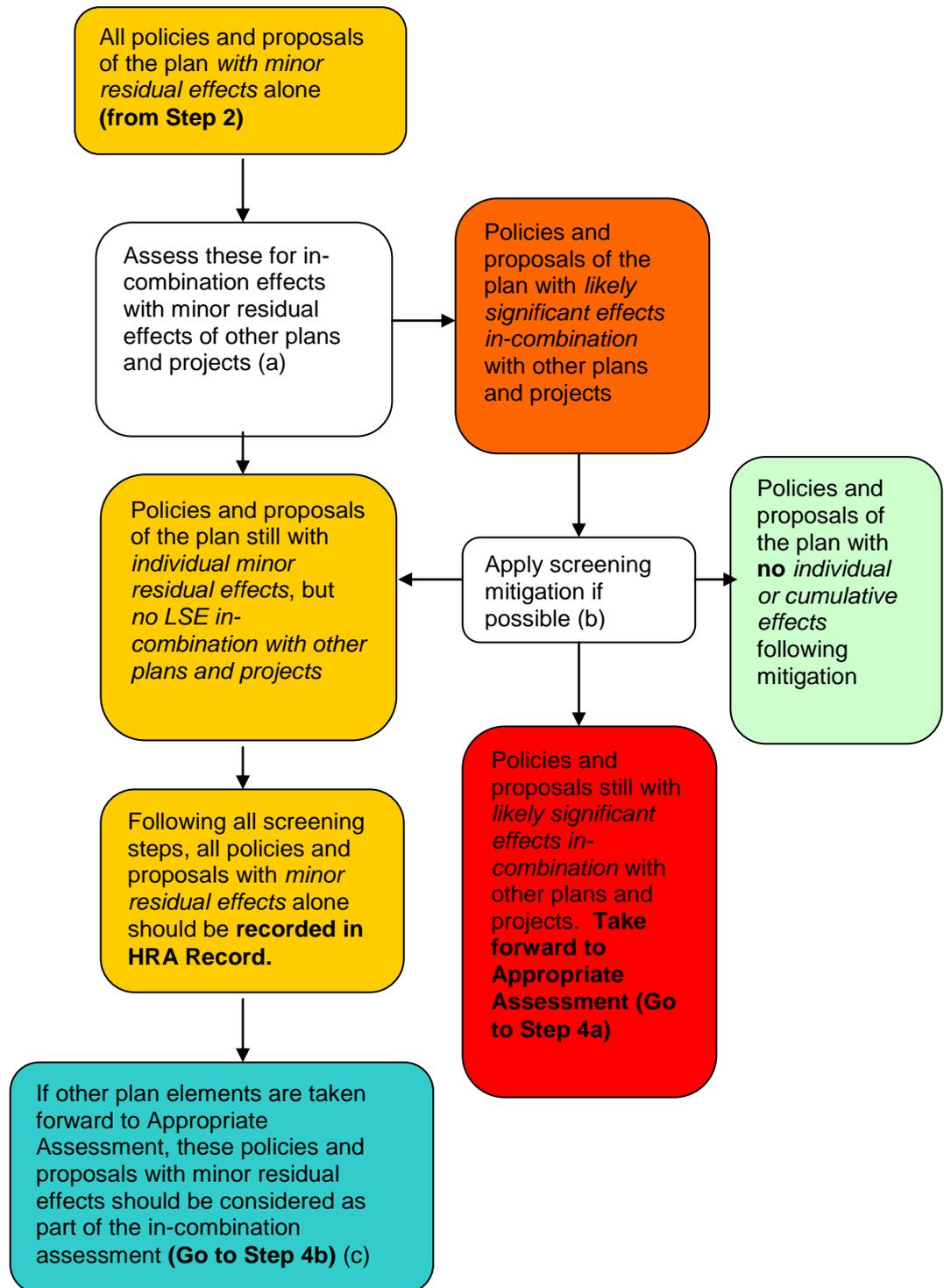


Reference to relevant section of guidance

(a) Paragraphs 4.34 – 4.35

(b) Paragraphs 4.43 – 4.45

Step 3: Screening policies and proposals for in-combination effects with other plans and projects



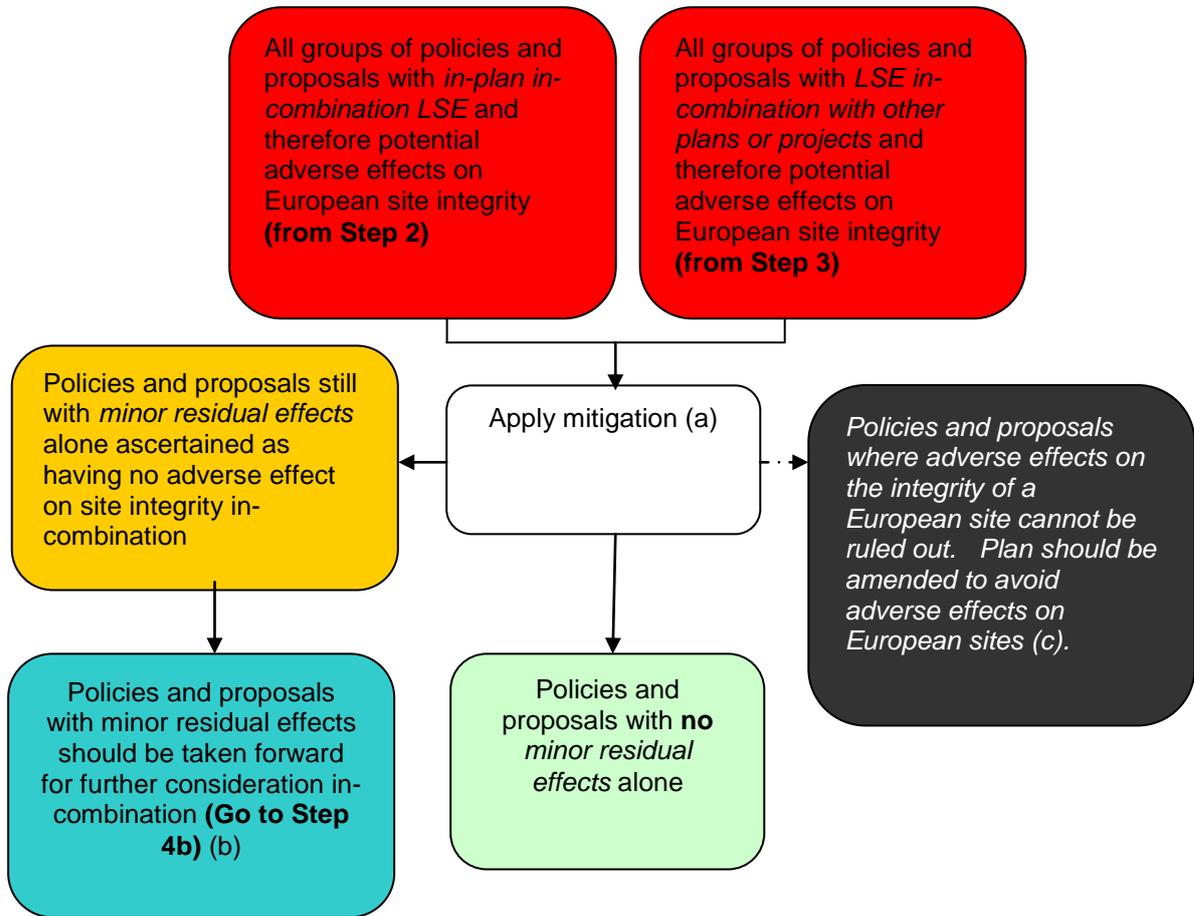
Reference to relevant section of guidance

(a) Paragraph 4.36 and paragraphs 4.38 – 4.42

(b) Paragraphs 4.43 – 4.45

(c) Paragraph 5.15

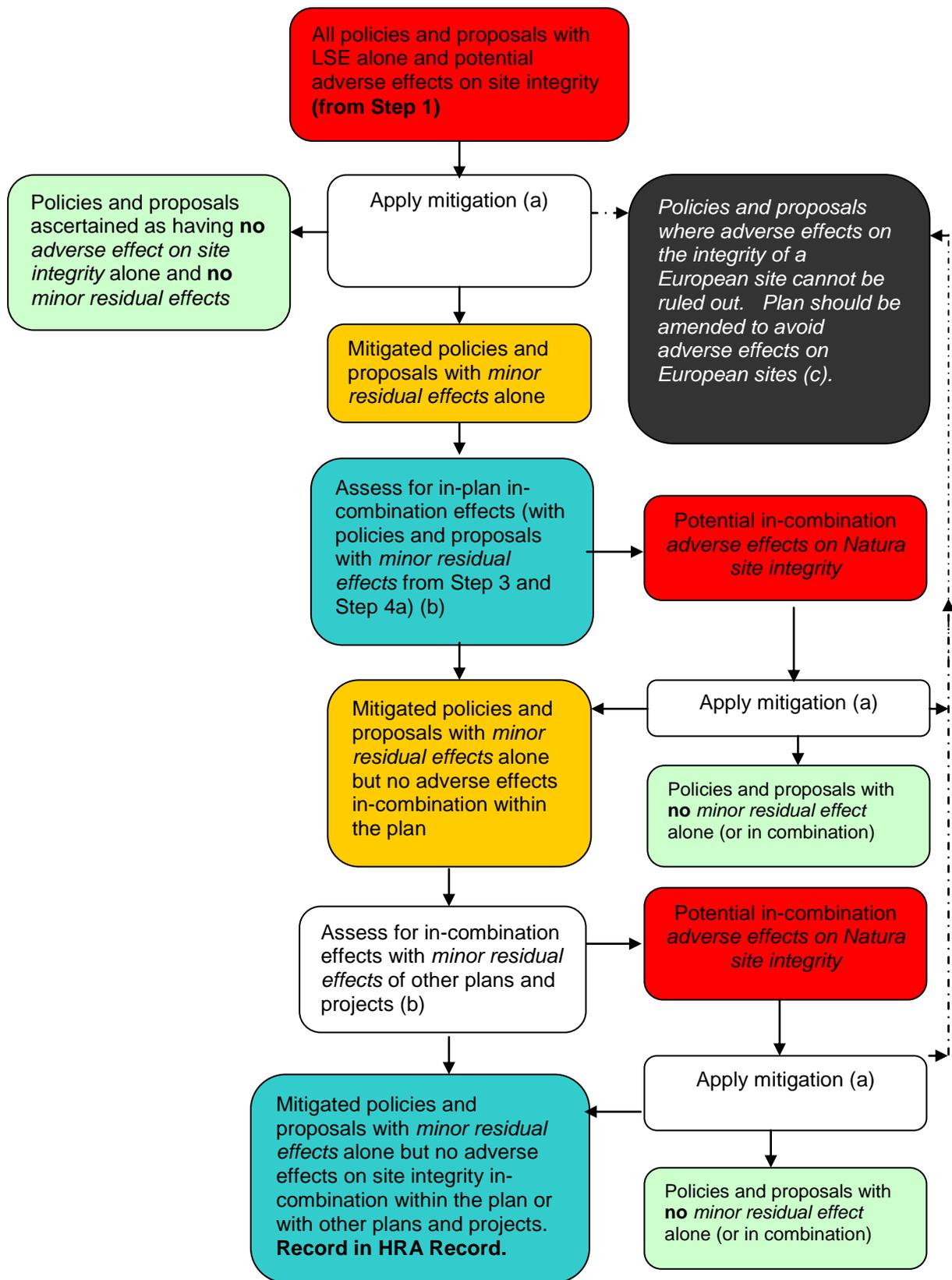
Step 4a: Appropriate Assessment of policies and proposals with LSE in-combination



Reference to relevant section of guidance

- a) Paragraphs 5.17 – 5.36
- b) Paragraph 5.15
- c) Paragraphs 7.1 – 7.3

Step 4b: Appropriate Assessment of policies and proposals with LSE alone



Reference to relevant section of guidance

(a) Paragraphs 5.17 – 5.36

(b) Paragraph 5.15

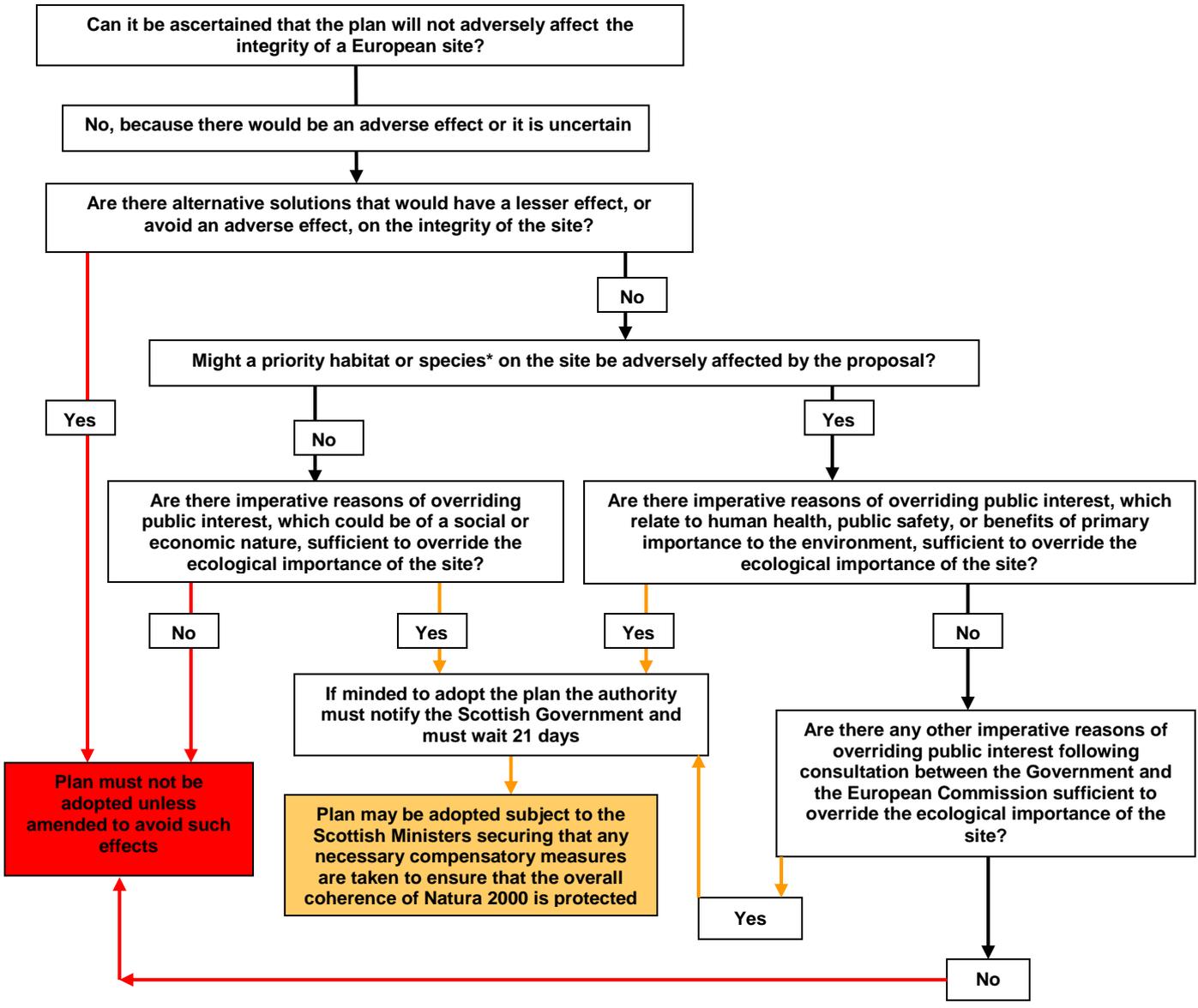
(c) Paragraphs 7.1 – 7.3

**APPENDIX E
EXCEPTIONAL CASES**

What to do if adverse effects on site integrity cannot be ruled out

If a plan-making body is unable to ascertain that a policy or proposal will not adversely affect the integrity of a European site, it may progress to adoption of the plan only in the closely defined circumstances set out in regulations 85C and 85E or 49 and 53 of the Habitats Regulations. The effect of these regulations is illustrated in Figure 5 below. In practice Scottish Ministers consider it unlikely that such circumstances would arise.

**FIGURE 5
ASSESSMENT UNDER REGULATIONS 85C/85E OR 49/53
Additional procedures where it cannot be ascertained that there would not be
an adverse effect on the integrity of a European site**



* There are currently no European sites in Scotland hosting priority species, but a number host priority habitats.