

Natura Casework Guidance: How to consider plans and projects affecting Special Areas of Conservation (SACs) and Special Protection Areas (SPAs)

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CONTENTS

<u>INTRODUCTION</u>	4
<u>I Purpose and background</u>	4
<u>II.Structure of the guidance</u>	5
<u>III.Applying the guidance</u>	8
<u>IV.Other relevant guidance</u>	10
<u>V.Where SNH staff can find further help and advice</u>	10
<u>STAGE 1: WHAT IS THE PLAN OR PROJECT?</u>	11
<u>1.0 Purpose</u>	11
<u>STAGE 2: IS THE PLAN OR PROJECT DIRECTLY CONNECTED WITH OR NECESSARY TO SITE MANAGEMENT FOR NATURE CONSERVATION?</u>	11
<u>2.0 Purpose</u>	11
<u>2.1 Definitions</u>	11
<u>2.2 Points to note</u>	12
<u>STAGE 3: IS THE PLAN OR PROJECT (EITHER ALONE, OR IN COMBINATION WITH OTHER PLANS OR PROJECTS) LIKELY TO HAVE A SIGNIFICANT EFFECT ON THE SITE?</u>	12
<u>3.0 Purpose</u>	12
<u>3.1 Definitions</u>	13
<u>3.2 Points to note</u>	14
<u>STAGE 4: UNDERTAKE AN APPROPRIATE ASSESSMENT OF THE IMPLICATIONS FOR THE SITE IN VIEW OF ITS CONSERVATION OBJECTIVES</u>	16
<u>4.0 Purpose</u>	16
<u>4.1 Definitions</u>	16
<u>4.2 Points to note:</u>	18
<u>STAGE 5: CAN IT BE ASCERTAINED THAT THE PROPOSAL WILL NOT ADVERSELY AFFECT THE INTEGRITY OF THE SITE?</u>	20
<u>5.0 Purpose</u>	20
<u>5.1 Definitions</u>	20
<u>5.2 Points to Note</u>	21
<u>5.3 When should SNH object?</u>	22
<u>5.4 Examples</u>	24
<u>STAGE 6: ARE THERE ALTERNATIVE SOLUTIONS?</u>	25
<u>6.0 Purpose</u>	25
<u>6.1 Clarifications</u>	25
<u>6.2 Points to note</u>	26

<u>STAGE 7: WOULD A PRIORITY HABITAT OR SPECIES BE ADVERSELY AFFECTED?</u>	27
<u>7.0 Purpose</u>	27
<u>7.1 Points to note</u>	27
<u>STAGE 8: ARE THERE IMPERATIVE REASONS OF OVERRIDING PUBLIC INTEREST (NON-PRIORITY HABITATS AND SPECIES)?</u>	27
<u>8.0 Purpose</u>	27
<u>8.1 Clarifications</u>	28
<u>8.2 Points to note</u>	29
<u>8.3 The process of agreement of overriding public interest</u>	29
<u>8.4 Compensatory measures</u>	29
<u>STAGE 9: ARE THERE IMPERATIVE REASONS OF OVERRIDING PUBLIC INTEREST (PRIORITY HABITATS AND SPECIES)?</u>	30
<u>9.0 Purpose</u>	30
<u>9.1 Clarifications</u>	31
<u>9.2 Points to note</u>	31
<u>9.3 Process of consideration</u>	31
<u>9.4 Compensatory measures</u>	32
<u>RELATIONSHIP BETWEEN APPROPRIATE ASSESSMENT AND OTHER ENVIRONMENTAL ASSESSMENT PROCEDURES</u>	32
<u>10.1 Relationship with a formal Environmental Impact Assessment (EIA) carried out under the EIA Regulations</u>	32
<u>10.2 Relationship with Strategic Environmental Assessment (SEA) carried out under the Environmental Assessment (Scotland) Act 2005</u>	33
<u>ANNEX 1: A SUMMARY OF THE PROVISIONS IN THE HABITATS REGULATIONS FOR CONSIDERING PROPOSALS UNDER THE ARTICLE 6.3 ASSESSMENT PROCESS (HABITATS REGULATIONS APPRAISAL)</u>	35
<u>ANNEX 2A: AUDIT TRAIL APPROACH TO BE USED IN THE CONSIDERATION OF A PROPOSAL AFFECTING A NATURA SITE (PROPOSED OR DESIGNATED SPA OR SAC)</u>	36
<u>ANNEX 2B: HABITATS REGULATIONS APPRAISAL PROFORMA</u>	38
<u>ANNEX 3: HOW TO RESPOND TO CASEWORK AFFECTING PROPOSED OR DESIGNATED EUROPEAN SITES AND RAMSAR SITES</u>	43
<u>ANNEX 4: GLOSSARY OF TERMS USED IN THIS GUIDANCE</u>	53

INTRODUCTION

I. Purpose and background

The purpose of this guidance is to help SNH staff respond to consultations over **plans and projects** that could affect Special Areas of Conservation (SACs) and Special Protection Areas (SPAs). It also applies where SNH is a **competent authority** (for example when issuing SSSI consent) and where we are considering the effect of our own plans and projects. It sets out the legal requirements, provides an explanation of the steps involved, and provides guidance on how we should apply this to casework.

It was originally written for SNH staff. The language in the guidance at times reflects this, and some links refer to other internal guidance. Now it has been made more widely available in order to:

- 1. Help others involved in *Habitats Regulations Appraisals* (HRAs) to conduct them;**
- 2. To help explain the roles that SNH have in the procedure; and**
- 3. To allow those involved to understand the basis of SNH's advice or decisions.**

- SPAs are sites classified under the European Union (EU) Birds Directive¹ to protect rare or vulnerable bird species listed in the Directive as well as regularly occurring migratory species. SACs are areas designated under the EU Habitats Directive² to help conserve certain plant and animal species listed in the Directive. If a plan or project could affect a SPA or SAC there are certain considerations that must be made before the proposal can proceed. These are set out in **Article 6(3) and 6(4)** of the Habitats Directive and are the focus of this guidance.
- The requirements of Article 6(3) and 6(4) have been transposed into law in Scotland³ principally through regulations 48 and 49 of The Conservation (Natural Habitats, &c.) Regulations 1994, as amended (the “Habitats Regulations”) (hereafter referred to as “regulation 48 and 49”).
- Other relevant UK legislation referred to in the guidance includes [The Conservation of Habitats and Species Regulations 2017](#) (the “2017 Regulations”), which is the consolidated version of the Habitats Regulations applicable in England and Wales. [The Offshore Marine Conservation \(Natural Habitats, &c.\) Regulations 2017](#) as amended (the “Offshore Regulations”) apply in offshore waters beyond 12 nautical miles. The guidance indicates where these other Regulations may be relevant.
- The legal requirements referred to above apply to classified SPAs, designated SACs, candidate SACs⁴ and candidate SACs adopted by the European Commission

¹ [Directive 2009/147/EC of the European Parliament and of the Council on the conservation of wild birds \(this is the codified version of Directive 79/409/EEC as amended\)](#)

² [Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora](#)

³ Including Scottish Territorial Waters (from the coast out to 12 nautical miles)

⁴ Sites submitted to the European Commission as Special Areas of Conservation

as Sites of Community Importance. All these sites are known as **European sites**. It is Government policy⁵ to accord the same level of protection to proposed SPAs and proposed SACs⁶. In this guidance proposed SACs, proposed SPAs and European sites are collectively referred to as “Natura sites”.

- Ramsar sites are sites listed as wetlands of international importance under the provisions of the Convention on Wetlands of International Importance (the Ramsar Convention). All Ramsar sites are either Natura sites and/or Sites of Special Scientific Interest and are protected under the relevant statutory regimes⁷.

II. Structure of the guidance

The requirements of Article 6(3) and 6(4) of the Habitats Directive can be broken down into 9 stages as reflected in the flow chart in Revised Guidance Updating Scottish Office Circular 6/1995 (SEERAD June 2000) (“Revised Circular 6/95”), Annex E, Appendix B. This flowchart, with suggested amendments to reflect this guidance, is included below in Figure 1. The guidance is laid out in the order of questions in the flowchart. The guidance gives background on the purpose of each of the stages, points to note in considering the relevant question at each stage, and an interpretation of the terms used in the legislation. The guidance reflects established Scottish Government policy and, where appropriate, relevant case law and SNH’s own legal advice.

The nine stages are:

1. What is the plan or project?
2. Is the plan or project directly connected with or necessary to site management for nature conservation?
3. Is the plan or project (either alone or **in combination** with other plans or projects) **likely to have a significant effect** on the site?
4. Undertake an **appropriate assessment** of the implications for the site in view of its **conservation objectives**.
5. Can it be ascertained that the proposal will not adversely affect the **integrity of the site**?
6. Are there **alternative solutions**?
7. Would a **priority habitat or species** be adversely affected?
8. Are there **imperative reasons of overriding public interest** (non-priority habitats and species)?
9. Are there imperative reasons of overriding public interest (priority habitats and species)?

The process of assessment required by Article 6(3) of the Habitats Directive (hereafter referred to as “Article 6(3)”) and regulation 48, and described in the first five stages above, is now widely known as ‘**Habitats Regulations Appraisal**’, abbreviated to HRA. Stages 6 to 9 are only considered in exceptional circumstances and SNH only provides advice on these stages if requested by the competent authority and Scottish Government.

⁵ See Scottish Government (2014). [Scottish Planning Policy](#)

⁶ Proposed SPAs and proposed SACs are sites which have been approved by Scottish Ministers for formal consultation

⁷ Scottish Government (2014). [Scottish Planning Policy](#) (paragraph 211).

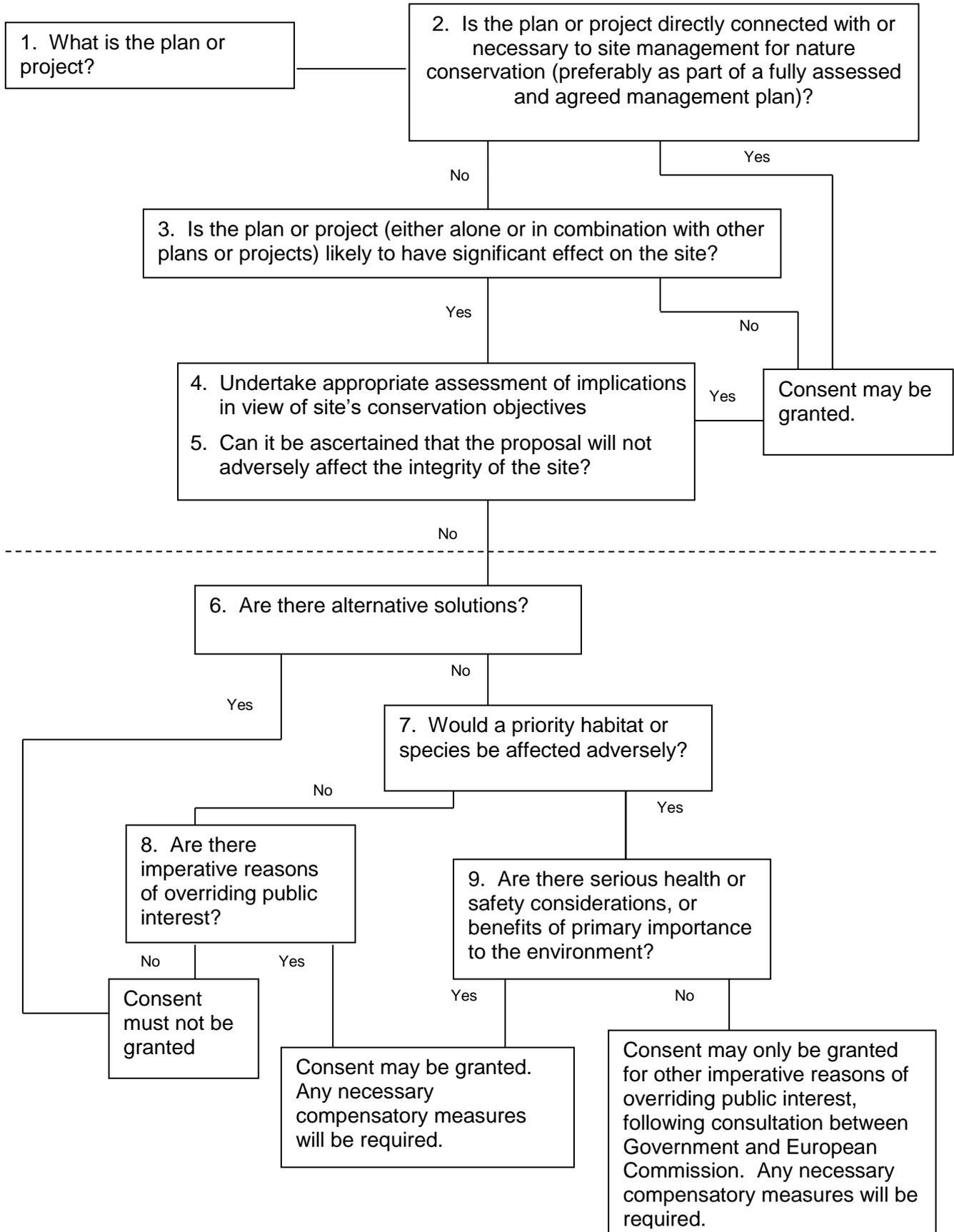
A glossary of terms used in this guidance is provided in Annex 4. The first occurrence of a term defined in the glossary is highlighted in ***bold italics***.

FIGURE 1 – HOW TO CONSIDER PLANS AND PROJECTS THAT COULD AFFECT SACS AND SPAS

From Revised Circular 6/95 with amendments

SNH advises on stages 1 to 5

SNH only advises on stages 6 to 9 if requested by the competent authority and Scottish Government



III. Applying the guidance

- III.i Proposals which would constitute a “plan or project” in the context of Article 6(3) can include a wide range of activities, e.g. from applications for planning consent or discharge consent, through to applications for consent on a SSSI, grant applications, promotional material and signage. Although the terms “**plan**” and “**project**” are not defined in the Habitats Directive, European guidance⁸ and case law⁹ support a broad interpretation. A judgement in the High Court (England and Wales)¹⁰ in 2010 concluded that if an activity could potentially have an impact on a European site then it should be considered to be a plan or project.

A summary of the specific provisions in the Habitats Regulations for considering proposals under the Article 6(3) assessment process (Habitats Regulations Appraisal) is included in Annex 1.

It is important that the correct legislation is referred to in our advice and therefore the following should be noted. For the vast majority of casework that we deal with the provisions of the Habitats Regulations will apply. However, for some proposals the provisions of the 2017 Regulations, or Offshore Regulations will apply instead.

For proposals wholly within the offshore environment (beyond 12 nautical miles of the coast) the Offshore Regulations will apply instead of the Habitats Regulations. On land and within 12 nautical miles of the coast, when considering the effect of proposals on Natura sites [the 2017 Regulations](#) apply instead of the Habitats Regulations for:

- all works under sections 36 and 37 of the Electricity Act 1989
- all works under the Pipelines Act 1962
- reserved matters (which include some Ministry of Defence activities and oil and gas exploration)

However, whether a plan or project is being considered under the Habitats Regulations, 2017 Regulations or Offshore Regulations, it is important to remember that the same nine stages referred to above apply.

SNH staff can get further advice on what specific provisions of the Habitats Regulations, 2017 Regulations, or the Offshore Regulations apply in relation to competent authority functions from the relevant Natura staff in the National Operations Unit.

III.ii SNH’s role in casework

⁸ [European Commission \(2000\). Managing Natura 2000 Sites: The provisions of Article 6 of the Habitats Directive 92/43/EEC. Office for Official Publications of the European Communities, Luxembourg](#) (paragraphs 4.3.1 and 4.3.2)

⁹ [European Court of Justice judgement in case C-127/02 “Waddenzee”](#)

¹⁰ R. (on the application of Akester) v Department for Environment, Food and Rural Affairs (Case No. CO/1834/2009) [2010] EWHC 232 (Admin) “Wightlink”

III.ii.i **When SNH is advising a competent authority**

In Stages 1-5 (see above), SNH has an important role either as the competent authority (the authority with the power or duty to determine whether or not a proposal can proceed), or as an advisor. Competent authorities are legally obliged¹¹ to consult SNH¹² and to have regard to our advice at the appropriate assessment stage. However, in practice many competent authorities seek input from SNH earlier in the HRA process and this should be encouraged as beneficial for all parties. A competent authority is not obliged to follow SNH's advice when making their appropriate assessment, but case law¹³ suggests that a competent authority should accord considerable weight to the advice of the appropriate national conservation body and have "...*cogent and compelling reasons for departing from it.*" Annex 3 provides guidance on how SNH staff should respond to requests for advice from competent authorities.

SNH does not have a major role in stages 6-9 (see above) as these considerations are primarily the responsibility of the appropriate competent authority and the Scottish Government. However, guidance based on Scottish Government policy advice is included in this document to assist staff in understanding the procedures involved.

III.ii.ii **When SNH is the competent authority**

SNH is the competent authority in a number of different circumstances where Natura sites may be affected. Examples include:

- carrying out work on our own land
- SNH NNR Management Plans
- grant-aiding the work of others
- our species licensing role
- applications for consent on SSSIs that could affect Natura sites
- SNH deer management plans
- SNH research and demonstration projects
- SNH management agreements
- SNH promotional material

SNH most often has the role of the competent authority in dealing with applications for consent on SSSIs that could affect Natura sites. In these cases the requirements of the [Nature Conservation \(Scotland\) Act 2004](#) as amended need to be met and [any relevant SNH guidance](#) followed. However when considering the application, the same tests as specified in Stages 1-5 apply, as does the guidance in Annex 3.

It is important that the same objective and proportionate approach to the HRA process is applied when SNH is the competent authority as when SNH is advising others. We need to ensure that we have a clear and transparent audit trail in place to show how we have reached our decision over a particular case. Annex 3 provides further guidance in this respect.

¹¹ Under regulation 48(3) of the Habitats Regulations

¹² In Scotland and Scottish Territorial Waters

¹³ R. (on the application of Akester) v Department for Environment, Food and Rural Affairs (Case No. CO/1834/2009) [2010] EWHC 232 (Admin) "Wightlink"

IV. Other relevant guidance

The guidance takes account of guidance in Revised Circular 6/95 and [Scottish Planning Policy \(2014\)](#), particularly as it applies to proposed SPAs and proposed SACs, Ramsar sites as well as European sites.

It is complemented by the guidance available in [Guidance Notice no 328 - Development Management and the Natural Heritage](#). The Development Management and the Natural Heritage guidance includes model replies to be used when responding to consultations on plans or projects affecting proposed or designated European sites and Ramsar sites. These model replies should be used when responding to all casework affecting Natura sites and Ramsar sites where we are advising a competent authority, not just development management. Annex 3 provides further details.

The guidance also provides links and references to other guidance sources referred to, particularly European Commission guidance.

For guidance on the Habitats Regulations Appraisal process for land use plans¹⁴ and other similar types of plan, please refer to the SNH Guidance '[Habitats Regulations Appraisal of Plans – Guidance for plan-making bodies in Scotland](#)'. There is also specific guidance available to enable SNH staff to carry out [Habitats Regulations Appraisal of NNR Management Plans](#).

V. Where SNH staff can find further help and advice

The National Operations Unit [Natura microsite pages](#) provides details of further guidance sources available. Where further advice is required this can be sought from:

- Area colleagues
- Policy and Advice Officers or Managers (including habitats and species advisors, planning advisors or Senior Casework Managers)
- Natura advisors in the National Operations Unit

If legal advice or a Scottish Government view is required, requests should be made through the relevant member of staff in the National Operations Unit.

¹⁴ A strategic development plan or local development plan or supplementary guidance as provided for in Part 2 of the Town and Country Planning (Scotland) Act 1997 as amended

STAGE 1: WHAT IS THE PLAN OR PROJECT?

1.0 Purpose

This is to establish whether the proposal is clearly defined in terms of the work to be carried out, its location, extent and timing, and any associated actions. If this information is not adequately available then seek such information as is necessary in order to be able clearly to determine the questions laid out in the flowchart in Figure 1. If further information is needed in order to consider the effect of the plan or project on a Natura site this can be requested under regulation 48(2).

STAGE 2: IS THE PLAN OR PROJECT DIRECTLY CONNECTED WITH OR NECESSARY TO SITE MANAGEMENT FOR NATURE CONSERVATION?

2.0 Purpose

This is to identify and remove from further assessment those proposals which are **clearly necessary to, or of value to, or inevitable as part of, management of the site for its qualifying interests**. It is anticipated that this will only rarely be applicable to planning consultations and will be a more important consideration for other authorisation procedures such as consents under the Nature Conservation (Scotland) Act 2004, protected species licensing, and land management plans and projects for nature conservation. It should be noted that there will be cases where conservation management proposals which benefit one qualifying interest may be at the expense of another, for example, encouraging the spread of Caledonian forest onto European dry heath. There is at present, [separate guidance on managing change on Natura sites on the Natura pages of the Intranet](#), which should be referred to in these cases. Remember that when assessing any conservation management proposals where Natura sites overlap, the effects on all the qualifying interests of all sites must be considered.

2.1 Definitions

“Necessary to” can be defined as **that which is required to achieve the conservation objectives**, for example:

- erection of a fence to prevent cattle grazing an area from disturbing ground nesting birds
- blocking of ditches to restore water tables on raised bog
- culling deer to prevent overgrazing of woodland or heathland

“Directly connected with” can be defined as **an associated operation, which needs to be carried out to achieve a necessary objective**, for example:

- use of argocat to extract deer culled to prevent overgrazing of woodland or heathland
- carrying out certain survey work to better understand the management required for the effective conservation of the qualifying interest(s) of the site (or suite of sites)
- erection of fence to control grazing where woodland regeneration is poor

2.2 Points to note

- Supporting information and **a clear rationale should be provided to justify the connection with the conservation objectives**¹⁵. Preferably this rationale should be available in a fully assessed and agreed site management plan or statement (Annex 2B provides guidance on the approach that SNH staff should follow.)
- The rationale should include sufficient appraisal to demonstrate that the proposed activities do not have greater negative effects than benefits; or that any likely negative effects have already been considered and deemed acceptable, bearing in mind the conservation objectives of the site.
- Development of a robust rationale allows the opportunity to explore any alternative (less damaging) methods of implementing the proposed conservation measures and to build in any relevant mitigation for any negative effects identified. This should ensure maximum benefit for the qualifying interests of the site while minimising any potential negative effects.
- If it is considered that the plan or project is directly connected with or necessary to the management of the site this conclusion, and its justification, must be clearly recorded as part of the 'audit trail' for the case (see Annex 2). There is no need to then proceed to stage 3 or subsequent stages. If this is not the case for all qualifying interests (including interests from overlapping Natura sites) then you will still need to proceed to stage 3 for these interests. For example, erecting a fence to allow for Caledonian pine regeneration may pass stage 2 where Caledonian pinewood is a qualifying interest of a SAC, but would not be considered directly connected with or necessary to the conservation management of capercaillie if a SPA for capercaillie overlapped this area. The plan or project would need to proceed to stage 3 for capercaillie.

STAGE 3: IS THE PLAN OR PROJECT (EITHER ALONE, OR IN COMBINATION WITH OTHER PLANS OR PROJECTS) LIKELY TO HAVE A SIGNIFICANT EFFECT ON THE SITE?

3.0 Purpose

This step acts as a screening stage, removing from the assessment process plans or projects which **clearly have no connectivity to a site's qualifying interests or those where it is very obvious that the conservation objectives for the site's qualifying interests will not be undermined despite a connection**. All other plans or projects, including those where there is reasonable doubt as to the magnitude and nature of their impact, should be passed through to the next stage (appropriate assessment). A 2004 judgement, commonly referred to as the Waddenzee case¹⁶, in the European Court of Justice (ECJ) has provided some further direction and clarity to this as discussed below.

¹⁵ It is important when dealing with any piece of casework that potential developers and the relevant competent authorities are provided with the qualifying interests and conservation objectives as early as possible. Both are freely available on the SNH web site. See Sitelink.

¹⁶ European Court of Justice judgement in case C-127/02 "Waddenzee"

3.1 Definitions

“Likely to have”

A “likely” effect is one that cannot be ruled out on the basis of objective information. European Commission guidance¹⁷ advises that the test is whether there is a ‘likelihood’ of effects rather than a ‘certainty’. Paragraph 45 of the Waddenzee judgement further states that:

“...any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site’s conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects.”

In the light of the precautionary principle 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.

“.... a significant effect....”

Paragraph 49 of the Waddenzee judgement states:

“...where a plan or project not directly connected with or necessary to the management of a site is likely to undermine the site’s conservation objectives, it must be considered likely to have a significant effect on that site. The assessment of that risk must be made in the light inter alia of the characteristics and specific environmental conditions of the site concerned by such a plan or project.”

The test of significance is therefore considering whether 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. Each proposal should be considered on a case-by-case basis, “what may be significant in relation to one site may not be in relation to another”¹⁸.

“..... either alone or in combination with other plans or projects”

Regulation 48 makes it clear that ‘in combination with other plans or projects’ is a relevant consideration at this stage. Whether the proposal in question is likely to cause a threshold of significant impact to be crossed, in combination with plans or projects already completed, underway, or actually proposed (for example, in a local development plan), needs to be addressed so that combined effects on the site, over time or space, can be considered. Thus, approval given to a plan or project considered not likely to have a significant effect alone, should not set a precedent that further plans or projects of a similar type could be approved on the same basis. Examples include houses adjacent to a coastal otter site, discharge consents to a river catchment, land claim in an estuary.

¹⁷ [European Commission \(2000\). Managing Natura 2000 Sites: The provisions of Article 6 of the Habitats Directive 92/43/EEC. Office for Official Publications of the European Communities, Luxembourg](#) (paragraph 4.4.2)

¹⁸ [European Commission \(2000\). Managing Natura 2000 Sites: The provisions of Article 6 of the Habitats Directive 92/43/EEC. Office for Official Publications of the European Communities, Luxembourg](#) (paragraph 4.4.1)

Note that some *plans or projects* will consist of a number of different elements that may not be formally proposed at the same time. In such cases, where the different elements are essential to completion of the *plan or project* as a whole, they should be considered together *in combination*. For example, a proposed new windfarm will require a connection to the national grid, but this element may not be proposed at the same time, nor by the same applicant. However, it is legitimate to take account of the grid connection *in combination* with the windfarm proposal, even prior to the formal proposal of the grid connection itself, because it is an inevitable rather than a theoretical consequence should the windfarm proposal go ahead.

In terms of the other plans and projects to consider, plans or projects which have already been completed should only be taken into account if they have continuing effects on the site which could, in combination with other plans or projects, lead to a likely significant effect. Plans or projects that have already been completed prior to the site attaining European site status should not be considered as their effects should already form part of the environmental baseline. Any ongoing negative effects of such plans or projects with potential to adversely affect site integrity should be addressed via the **review of consents** process. For further guidance see Annex 4.

3.2 Points to note

- Decisions on whether a proposal is likely to have a significant effect (LSE) on the qualifying interests of a Natura site are made by the competent authority. It is not a legal requirement to consult SNH at this stage, although we often are.
- There may be insufficient information available to reach a conclusion. If so, ask the competent authority clear questions which, if answered adequately, will provide the required information. An amendment to regulation 48(2) in 2007 enables the competent authority to request information from the applicant for this purpose. However, if it is recognised at this stage that there are a number of unknowns which will require further survey work or collation of information of a more complex nature, then this would indicate that appropriate assessment (Stage 4) might be required. Paragraph 5.3.1 of the European Commission's guidance on wind farm developments and nature legislation¹⁹ states "*It is worth recalling that the initial screening undertaken here is not the same as a full-scale Appropriate Assessment – it only requires sufficient information to be able to decide if there is likely to be a significant effect or not.*" This should be a relatively simple decision to make in most cases.
- Some initial appraisal of the available information may be needed to reach a conclusion, **but if this appraisal is proving to be extensive or detailed, then this is also a sure sign that 'appropriate assessment' is required.**

¹⁹ [European Union \(2011\). EU guidance on wind energy developments in accordance with the EU nature legislation. Publications Office of the European Union, Luxembourg](#)

- European guidance²⁰ suggests that plans or projects must be considered in all cases where they have the potential to have a likely significant effect on the qualifying interests of Natura sites, regardless of where they are located in relation to those sites. There is no geographical limit beyond which proposals are exempt from consideration. Revised Circular 6/95 directs authorities to consult SNH if they are in any doubt about whether a development outside the boundaries of a Natura site could have a significant effect on the site.
- Determining whether a proposal is likely to have a significant effect can sometimes be a difficult judgement to make. This is particularly the case where mobile qualifying species are at risk of being affected by a plan or project at some distance from the SPA or SAC to which they are connected, for example, in the marine environment. At an early stage in the consideration of a plan or project, where a connection has been established between the qualifying interests of a site and the potential impact of the plan or project, but there is little further information available, it may be helpful to think in terms of the following scenarios:
 - Likely impacts are such that there is clear potential for the conservation objectives to be undermined - conclude likely significant effect
 - Likely impacts are so minimal (either because the affected area is outwith the Natura site and not of sufficient value for the species concerned or because the risk to them is so small) that we can be confident that the conservation objectives will not be undermined – conclude no likely significant effect
 - There is doubt about the scale of likely impacts in terms of the conservation objectives – conclude likely significant effect
- Where a proposal could only have positive effects on the qualifying interests of a Natura site it is sometimes queried whether this means it is likely to have a significant effect on the qualifying interests of the site. However, in such cases a conclusion that the proposal is unlikely to undermine the site's conservation objectives and therefore unlikely to have a significant effect on the qualifying interests should be reached.
- Initial appraisal may identify possible simple modifications to the proposal, which would eliminate the likely significant effect. A decision then needs to be made as to the best way to ensure that the proposal is modified. One way would be to respond along the lines: '...If the proposal is undertaken strictly in accordance with the following [*changes/mitigation*], it will no longer be likely to have a significant effect and an appropriate assessment will not be required.' (see Annex 3 of this guidance and Annex 2 of the [Development Management and Natural Heritage guidance](#)). **This option should only be used in limited circumstances if it is very clear that these conditions do adequately avoid or mitigate identified significant effects (see Annex 3 for further advice).**
- There must be a link between the proposal's effects and the site's qualifying interests for the case to pass on to appropriate assessment. It must be reasonable to suggest that a proposal is likely to have a significant effect. Conversely, a conclusion a proposal is unlikely to have a significant effect must be demonstrable. It is equally as important to record the justification for concluding no likely significant effect, as it is to record the reasons for concluding there is a likely significant effect and therefore progressing to appropriate assessment.

²⁰ [European Commission \(2000\). Managing Natura 2000 Sites: The provisions of Article 6 of the Habitats Directive 92/43/EEC. Office for Official Publications of the European Communities, Luxembourg](#) (paragraph 4.2)

- Where multiple qualifying interests must be considered, it may be the case that a conclusion of likely significant effect is clear for one or more interests, but there is insufficient information to determine the test for other interests on the same site. In these circumstances an appropriate assessment will be required to take into account **all interests where a significant effect is likely or unknown**. There is no point in requesting additional information to determine likely significant effect on one interest while at the same time indicating that an appropriate assessment is required for another on the same site. Any additional required information can be sought to inform an appropriate assessment, which takes account of both interests. This approach should involve no additional work for the developer or competent authority but may save considerable time and confusion resulting from a ‘split response’.
- Each conclusion of ‘likely significant effect’, or ‘no likely significant effect’, and its justification, must be clearly reasoned and recorded as a necessary step in the required overall ‘audit trail’ supporting each case²¹ (see Annex 2).

STAGE 4: UNDERTAKE AN APPROPRIATE ASSESSMENT OF THE IMPLICATIONS FOR THE SITE IN VIEW OF ITS CONSERVATION OBJECTIVES

4.0 Purpose

Assessment is required to determine the impacts of a plan or project upon the Natura site qualifying interests, and specifically to provide the information necessary **to consider whether it can be ascertained that it will not adversely affect the integrity of a Natura site**. This process of determination is referred to as carrying out an “appropriate assessment”; however, it can be broken down into two distinct stages.

- 1) a scientific appraisal of the impact(s) of the proposal on the qualifying interests (Stage 4) and,
- 2) the decision making process based on this appraisal – the conclusion of the appropriate assessment (Stage 5).

When SNH is acting as a consultee of the competent authority we would either provide advice as to what needs to be covered by the appraisal to inform the decision or, in agreement with the competent authority, carry out a scientific appraisal based on the information available to inform their decision²². In the following sections, for ‘assessment’ read ‘appraisal’ when SNH is a consultee.

4.1 Definitions

- The term “**appropriate**” should be taken to mean ‘fit for the task’. There is no set formula as to what the assessment should cover, nor what format it should take. The 2004 ECJ Waddenzee judgement (see sections 3.0 and 3.1 of this guidance note) at paragraph 61 provides the following guidance, “...*all the aspects of the plan or project*”

²¹ As advised in European Commission guidance [European Commission \(2000\). Managing Natura 2000 Sites: The provisions of Article 6 of the Habitats Directive 92/43/EEC. Office for Official Publications of the European Communities, Luxembourg](#) (paragraph 4.4)

²² It should be noted that where SNH has agreed to carry out the appraisal it is still the duty of the competent authority to ensure that the developer provides all the relevant information that is required.

which can, by themselves or in combination with other plans or projects, affect the site's conservation objectives must be identified in the light of the best scientific knowledge in the field”.

- The implications of a proposal must be assessed in view of the **conservation objectives** for the site. The conservation objectives should ensure that the obligations of the Directive are met. Conservation objectives for all Natura sites in Scotland therefore include a direct link to the obligation in Article 6(2) of the Habitats Directive to avoid **deterioration or significant disturbance** of the qualifying interests. They will also ensure that the integrity of the site is maintained, or where necessary restored, and that each of the qualifying interests makes an appropriate contribution to **favourable conservation status**. The conservation objectives are available for all sites in Scotland on [SiteLink](#). The appropriate assessment should consider the effect of the proposal on each of the conservation objectives to see whether they will be met.
- **Integrity** is not defined within the Habitats Directive or the Habitats Regulations. Revised Circular 6/95 (as amended, Annex E, Appendix A) advises that 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"*. The European Commission²³ subscribes to a very similar definition.
- The integrity of the site only applies to the qualifying interests and is directly linked to the conservation objectives for the site. If all the conservation objectives are met, then the integrity of the site should be maintained; and deterioration of habitat, or habitat of species, or significant disturbance of species avoided. Conversely, if any of the conservation objectives cannot be met, then the integrity of the site would normally be adversely affected. In some **exceptional circumstances** a judgement may be made that site integrity is maintained despite an element of the conservation objectives being marginally compromised. For example, if there is potential for a tiny proportion of the qualifying habitat of an SAC or the supporting habitat within an SPA to be damaged by a proposal, and this was an area of habitat of lower or sub-optimal quality, on the margins of a site, with all other conservation objectives being maintained, it *might* be legitimate to conclude no adverse effect on site integrity. However, it is strongly recommended that if you are considering such an approach, you should seek advice from both the relevant specialist habitat or species advisor and a Natura advisor in the National Operations Unit.
- The expression 'integrity of the site' indicates that the focus of the appropriate assessment should be on the specific site affected. European Commission guidance points out that therefore "...it is not allowed to destroy a site or part of it on the basis that the conservation status of the habitat types and species it hosts will anyway remain favourable within the European territory of the Member State."²⁴
- Determining whether a plan or project will not have an adverse affect upon site integrity will always be a matter for scientific judgement that will depend on a number of factors, which will vary from case to case. Assessing the plan or project against the conservation objectives will always be a part of this process.

²³ [European Commission \(2000\). Managing Natura 2000 Sites: The provisions of Article 6 of the Habitats Directive 92/43/EEC. Office for Official Publications of the European Communities, Luxembourg](#)

²⁴ [European Commission \(2000\). Managing Natura 2000 Sites: The provisions of Article 6 of the Habitats Directive 92/43/EEC. Office for Official Publications of the European Communities, Luxembourg](#) (paragraph 4.6.3)

- In considering site integrity there must be reference to the effects on the qualifying interests of that site, either indirectly, through effects on the ecological factors on which they depend, for example, a species' habitat, a habitat's underlying hydrology; or directly, for example, through loss of qualifying habitat. The scale of such effects should be taken into account, that is, will such effects reduce the ability of the site to maintain the qualifying habitats or species?
- This legal definition of site integrity should not be confused with the concept of a site having ecological integrity (although clearly the two are related). For example, an SAC may consist of part of a machair system, the rest of the system having been degraded or lost in the past; the site therefore does not have ecological integrity in that the machair system is no longer ecologically intact. However, the SAC still has "integrity" in respect of the reasons for which it was selected in the first place, that is, as an example of machair habitat. Therefore, when assessing the impacts of a proposal, it is the integrity of the Natura site which should be considered, not the ecological integrity of the system as a whole, unless the two are linked or inseparable.
- Further detailed guidance on the application of conservation objectives in Habitats Regulations Appraisal and judgements about site integrity is available on the [Natura guidance pages](#) of the National Operations Unit microsite. The Habitats Regulations Appraisal proforma in Annex 3 also provides guidance on points that should be considered in an appropriate assessment.

4.2 Points to note:

- Appropriate assessment is quite different from formal Environmental Impact Assessment and Strategic Environmental Assessment (see below).
- Whilst the appropriate assessment (and its conclusion) is the responsibility of the competent authority, SNH must be consulted, and its advice considered (regulation 48(3)).
- Appropriate assessments must be 'made' by competent authorities. If a competent authority is relying wholly on an SNH appraisal or on information provided by consultants, it is advisable that they formally 'adopt' the appraisal provided as their appropriate assessment.
- In cases where there is more than one competent authority for a particular plan or project a coordinated approach may be the most appropriate way forward.
- The competent authority is able to seek further information from the applicant in order to carry out the assessment (regulation 48(2)).
- If there is sufficient information to determine the potential impacts of a plan or project, SNH should respond by:
 - commenting on the nature and scale of the likely impacts of the proposal on the interests;
 - suggesting any mitigating conditions necessary to avoid impacts or reduce them to a level which will not adversely affect the integrity;
 - advising whether it can be ascertained that it will not adversely affect the integrity of the site.
- If there is not sufficient information to determine the potential impacts, SNH should:
 - request further information (from the competent authority) on the proposal;

- advise on the scope and content of the appropriate assessment, including further survey/analysis necessary on the habitats/species concerned or the factors affecting them (e.g. water quality, hydrology). Factors that need to be addressed will depend on the nature of the assessment but will include direct/indirect, short/long term impacts.
- In some cases information gathering will be an iterative process. If the first identification and analysis of effects reveals that there are important gaps in knowledge, then further survey and monitoring work may need to be undertaken in order to complete the picture. It's worth noting the following comment made in relation to information gathering in the European Commission's guidance on wind energy and nature legislation²⁵. "Experience has shown that many of the delays or problems encountered during the Appropriate Assessment are caused by the fact that the information gathered for the Appropriate Assessment is incomplete or deficient. As a result, the authorities are unable to confirm that there be no adverse effects on the integrity of the site and the whole assessment process has to be put on hold whilst the missing information is being gathered."
- Regulation 48 allows that **conditions**, including modifications to the proposal and **mitigation** to avoid adverse impacts or reduce them to an acceptable level, can be considered in coming to the final conclusion of whether adverse effects can be avoided. If discussions result in modifications being incorporated, the proposal in its modified form needs to be considered again through the full assessment process. Conditions which are directly intended to avoid impacts on the qualifying interests will not need this full re-assessment as long as the competent authority, taking account of SNH's advice, ensures that measures included in such conditions do not themselves have indirect effects on the qualifying interests. In addition, **it is important to ensure that if conditions relating to other factors, e.g. landscapes, access, are included then they too are subject to appropriate assessment so as to avoid them adversely affecting the qualifying interests** (See also Stage 5).
- It is not explicit in either the Habitats Directive or the Regulations whether consideration of 'in combination' effects is required at the appropriate assessment stage. However, the Waddenzee judgement²⁶ indicates at paragraph 53 that an appropriate assessment should "...take into account the cumulative effects which result from the combination of that plan or project with other plans or projects in view of the site's conservation objectives". Guidance from the European Commission²⁷ also recognises that an 'in combination' consideration has implications at this stage and that an appropriate assessment should address any such potential effects.
- Section 5.3 below sets out the principles whereby SNH should lodge an objection in order to ensure that, where an appropriate assessment is required, the impacts are adequately addressed, the conclusions reflect the assessment, and the necessary protection is given to the site.
- The justification for SNH's advice must be clearly recorded as a necessary step in the required overall 'audit trail' supporting each case (see Annex 2). Remember that our advice may be made public and should be both fit for purpose and able to bear

²⁵ [European Union \(2011\). EU guidance on wind energy developments in accordance with the EU nature legislation. Publications Office of the European Union, Luxembourg \(section 5.5.1, page 74\).](#)

²⁶ European Court of Justice judgement in case C-127/02 "Waddenzee"

²⁷ [European Commission \(2000\). Managing Natura 2000 Sites: The provisions of Article 6 of the Habitats Directive 92/43/EEC. Office for Official Publications of the European Communities, Luxembourg](#) (paragraph 4.5.2).

detailed scrutiny. European Commission guidance²⁸ advises that an appropriate assessment should be recorded and that this should include a justification for the conclusions reached.

STAGE 5: CAN IT BE ASCERTAINED THAT THE PROPOSAL WILL NOT ADVERSELY AFFECT THE INTEGRITY OF THE SITE?

5.0 Purpose

In light of the appropriate assessment the competent authority must decide whether it can be ascertained that the plan or project in question will not adversely affect the integrity of the site. The way in which this requirement is framed means that proof of the negative is needed, and that the burden of proof for consent is on the applicant. In coming to its conclusion the competent authority should have regard to the manner in which the plan or project will be carried out, and to any conditions or restrictions subject to which consent must be granted (regulation 48(6)).

5.1 Definitions

- In making and concluding an appropriate assessment, the European Commission guidance in Managing Natura Sites²⁹ gives some useful advice to competent authorities at paragraph 4.5.1. *“In the first place, an assessment should be recorded. A corollary of the argument that the assessment should be recorded is the argument that it should be reasoned. Article 6(3) and (4) requires decision-makers to take decisions in the light of particular information relating to the environment. If the record of the assessment does not disclose the reasoned basis for the subsequent decision (i.e. if the record is simply an unreasoned positive or negative view of a plan or project), the assessment does not fulfil its purpose and cannot be considered ‘appropriate’.”*
- The requirement of proof of the negative (having to ascertain that there will be **no** adverse effect on site integrity rather than being required to determine that there will be adverse effects) reflects the degree to which the precautionary principle is written in to the Habitats Directive, and consequently, the Habitats Regulations. The Waddenzee judgement³⁰ states in paragraph 61 *“The competent national authorities, taking account of the appropriate assessment of the implications of ... for the site concerned in the light of the site’s conservation objectives, are to authorise such an activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects.”*

²⁸ [European Commission \(2000\). Managing Natura 2000 Sites: The provisions of Article 6 of the Habitats Directive 92/43/EEC. Office for Official Publications of the European Communities, Luxembourg](#) (paragraph 4.5.1)

²⁹ [European Commission \(2000\). Managing Natura 2000 Sites: The provisions of Article 6 of the Habitats Directive 92/43/EEC. Office for Official Publications of the European Communities, Luxembourg](#)

³⁰ European Court of Justice judgement in case C-127/02 “Waddenzee”

- The European Commission published guidance on wind energy developments and Natura sites in 2010³¹ which has again underlined the need for certainty as follows *“The emphasis should be on objectively demonstrating, with reliable supporting evidence, that there will be no adverse effects on the Natura 2000 site. For this reason the lack of scientific data or information on the potential risk or significance of impacts cannot be a reason to proceed with the plan or project.”*
- A decision of the Court of Justice of the European Union in *Peter Sweetman v An Bord Pleanála* (Case C-258/11) discussed what is meant by an adverse affect on site integrity in relation to a priority habitat (although there was no firm ruling in relation to non-priority habitat). It states in paragraph 46 *“Consequently, if, after an appropriate assessment of a plan or project’s implications for a site, carried out on the basis of the first sentence of Article 6(3) of the Habitats Directive, the competent national authority concludes that that plan or project will lead to the lasting and irreparable loss of the whole or part of a priority natural habitat type whose conservation was the objective that justified the designation of the site concerned as an SCI, the view should be taken that such a plan or project will adversely affect the integrity of that site”*. Paragraph 48 further states that a plan or project *“will adversely affect the integrity of that site if it is liable to prevent the lasting preservation of the constitutive characteristics of the site that are connected to the presence of a priority natural habitat whose conservation was the objective justifying the designation of the site in the list of SCIs, in accordance with the directive. The precautionary principle should be applied for the purposes of that appraisal”*.

5.2 Points to Note

- Unless the appropriate assessment ascertains unequivocally that there will be no adverse effect on the integrity of the site, approval can only be given subject to the provisions of regulations 49 and 53 of the Habitats Regulations (see Stages 6-9). In cases where there is doubt over whether a plan or project will affect site integrity, the necessary level of certainty has not been met.
- Each proposal needs to be considered on a case-by-case basis. There are no defined thresholds where effects are considered acceptable. Some examples are referred to below for information.
- In coming to a conclusion about whether adverse effects on site integrity can be avoided, the competent authority should consider the advice provided by SNH (regulation 48(3)). If minded to disagree with the advice of the nature conservation body, English case law³² suggests that the competent authority should have *“...cogent and compelling...”* reasons for doing so.
- The correct test must be applied: i.e. whether it can be ascertained that the plan or project will **not** adversely affect the integrity of a Natura site. The following are common examples where the test is **misinterpreted**:

³¹ [European Union \(2011\). EU guidance on wind energy developments in accordance with the EU nature legislation. Publications Office of the European Union, Luxembourg \(section 5.2, page 67\)](#)

³² R. (on the application of Akester) v Department for Environment, Food and Rural Affairs (Case No. CO/1834/2009) [2010] EWHC 232 (Admin) “Wightlink”, paragraph 112.

Common misconceptions	Explanation
An appropriate assessment ascertains whether a plan or project will adversely affect the integrity of a Natura site.	The requirement is not to determine whether there will be adverse effects. The test is whether it can be ascertained that there will not.
An appropriate assessment ascertains whether a plan or project will/will not have a significant effect on a Natura site	This is confusing the test of whether a plan or project is likely to have a significant effect on the qualifying interests of a Natura site (which determines whether an appropriate assessment is required) with the appropriate assessment stage. The test is whether it can be ascertained that the plan or project will not adversely affect the integrity of a Natura site
An appropriate assessment ascertains whether a plan or project will/will not have a significant adverse effect on the integrity of a Natura site	This is combining the test of whether a plan or project is likely to have a significant effect on the qualifying interests of a Natura site with the test required at the appropriate assessment stage. The test is whether it can be ascertained that the plan or project will not adversely affect the integrity of a Natura site

5.3 When should SNH object?

SNH has a duty under the Habitats Regulations (regulation 3(1)) to exercise its functions so as to secure compliance with the Habitats Directive. SNH's functions include responding to consultations from other competent authorities. With respect to development planning and development management, SNH has the ability to object to a proposal in a way which ensures that the planning authority wishing to give consent must refer the proposal to Scottish Ministers unless SNH's concerns are satisfied and our objection is removed. In addition SNH, as an agent of the Scottish Government (SG) in respect of Natura matters, has been requested by SG to lodge a objection to development management proposals likely to have a significant effect on a Natura site, unless and until an appropriate assessment has been carried out which ascertains that the proposal will not adversely affect the integrity of the site.

If SNH does not object to a development management proposal that has the potential to damage the integrity of a Natura site, there are clear risks:

- If the competent authority does not agree with SNH on the potential impacts of the proposal, they can go ahead and give consent without any need to refer to Scottish Ministers, thus putting the Government at risk of formal complaint/infraction.
- If the competent authority does agree with SNH but nevertheless wish to grant consent for other reasons, although they may be required to refer the matter to the

Scottish Ministers (see Stage 7 below) SNH's concerns may not be immediately highlighted to the Minister making the final decision.

Hence, SNH should object, and maintain its objection, where:

- There is insufficient information on the proposal or on its potential effects but there are reasons for believing that effects are likely to be significant;
- Where the proposal is likely to have a significant effect, and an appropriate assessment is required;
- The appropriate assessment has demonstrated that there are potential adverse impacts and, even taking account of mitigation to lessen or avoid impacts, the competent authority still can not ascertain that the proposal will not adversely affect the integrity of the site;
- The appropriate assessment does not provide sufficient information or analysis to allow the competent authority to ascertain that the proposal will not adversely affect the integrity of the site;
- It is clear that the proposal will result in adverse effects on the integrity of the site, which cannot be avoided.

The onus is on the competent authority to provide sufficient information to satisfy SNH's concerns. However, SNH should be prepared, and where appropriate should offer, to engage with the competent authority to identify means of resolving any inadequacies in the assessment or to establish measures which can be included to lessen or avoid identified impacts.

During the course of resolving SNH's concerns, SNH should avoid taking on what is the role and responsibility of the competent authority. However, SNH does have a key role to play in the overall process. This is highlighted in Revised Circular 6/95 (Annex E, paragraph 44), which requires planning authorities to explain the reasons for their decision "particularly if they do not decide the case in accordance with the recommendations of SNH". See also paragraph IIIii in relation to the weight that competent authorities should give SNH's advice.

When responding to consultations on plans and projects that could affect Natura sites (for both development management and non-development management casework) the model text in Table 1, Annex 2, of the [Development Management and the Natural Heritage](#) guidance should be used. This includes referring to one of SNH's corresponding response types where appropriate (advice only, holding objection, conditioned objection or outright objection). Annex 3 of this guidance provides further advice. Although only planning authorities are required to refer proposals to Scottish Ministers where they wish to give consent against the advice of SNH, we should consider copying our advice to Scottish Ministers in other cases where we feel there is a real risk to a Natura site.

5.4 Examples

There can be no hard and fast rules, and each case should be considered on its merits, although test cases may in future help to interpret the legislation. However, the following examples of specific cases (all of which were considered likely to have a significant effect on the Natura site) may act as a guide to the question of what constitutes an adverse effect on site integrity. Note that in a number of the cases mentioned below where it was concluded that adverse effects on site integrity could not be ruled out, the proposals were nevertheless consented on grounds of no alternative solutions and imperative reasons of overriding public interest. These cases were also prior to the “Sweetman” case referred to above.

- The loss of 1ha, constituting less than 1% of the total area of qualifying machair habitat of a SAC **was** considered to constitute an adverse effect on the integrity of the site.
- The loss of a small area (less than 1ha) of ground not including qualifying habitat at the edge of a machair SAC was **not** considered to constitute an adverse effect on site integrity.
- The temporary loss of 1ha of dry heath for 1-2 years was considered to be acceptable and **not** to adversely affect the integrity of the site, but the loss of an area of 1.5ha for 10-12 years **was** considered to be an adverse effect on the integrity of the site. [This is the Usk SAC in Wales, site area 1,686.4ha, of which European dry heath covers approximately 340 ha]
- The loss of 5ha of habitat within an SPA (equivalent to 0.1% of the total site area), along with 9ha of habitat outside the SPA that was also used by the Annex I birds for which the SPA was classified, **was** considered likely to have an adverse effect on site integrity. [London Gateway development affecting the Thames Estuary and Marshes SPA].
- Expansion of harbour facilities resulting in the loss of 22ha of habitat within an SPA (equivalent to 0.145% of the total site area) was considered to have an adverse effect on site integrity. [Immingham Outer Harbour affecting the Humber Flats, Marshes and Coast SPA]
- The construction of two houses in the catchment of Loch Leven was **not** considered to be an adverse affect on the integrity of the SPA only because mitigation measures would ensure that there would be no increase in phosphorus loading.
- The construction of a small slipway which would result in the loss of 45m² (0.0000774% of the site area) of important foraging habitat for waders and lead to increased access and disturbance **was** considered to adversely affect the integrity of the site. [Chichester and Langstone Harbours SPA].
- The loss of 7.9ha of qualifying oak woodland in Glen Beasdale SAC, equivalent to just under 1.6% of the total site area, **was** considered to adversely affect the integrity of the site. This case is further considered at paragraph 8.4.6

Stages 6 to 9 are generally considered only in exceptional circumstances. In the following Stages consideration is primarily the responsibility of the competent authority and Scottish Government. SNH's advice is however likely to be sought where compensatory measures are being considered. The following information, based on Scottish Government advice and informed by European guidance, is included to assist SNH staff to understand the procedures involved.

STAGE 6: ARE THERE ALTERNATIVE SOLUTIONS?

6.0 Purpose

In cases where it cannot be ascertained that a proposal would not adversely affect the integrity of a Natura site, alternative solutions must be considered by the competent authority **before** any case is put forward for proceeding with the proposal for imperative reasons of overriding public interest (Article 6(4) of the Habitats Directive/regulation 49 of the Habitats Regulations). This consideration will be undertaken by the competent authority in discussion with the developer. It is not SNH's role to suggest alternative solutions at the previous Stage 5. If alternatives are provided it may be necessary to repeat Stages 1-5 and SNH can then advise accordingly.

6.1 Clarifications

- Scottish Government guidance in Revised Circular 6/95, paragraph 14, provides some clarification. Annex E, Appendix A of the Circular gives guidance as to what might be considered as alternatives. These include:
 - suitable and available sites which are reasonable alternatives;
 - other different, practicable approaches which would have a lesser impact.
- The European Commission produced guidance in 2007 on Article 6(4) of the Habitats Directive³³ as a supplement to their earlier guidance on "[Managing Natura 2000 Sites: The provisions of Article 6 of the Habitats Directive 92/43/EEC](#)". The guidance advises that alternative solutions which "*better respect the integrity of the site in question*" should be examined. It continues "*All feasible alternatives, in particular, their relative performance with regard to the conservation objectives of the Natura 2000 site, the site's integrity and its contribution to the overall coherence of the Natura 2000 network have to be analyzed.*" The guidance suggests that alternative solutions could include:
 - alternative locations or routes;
 - different scales or designs of development;
 - alternative processes.

³³ [European Commission \(2007\). Guidance document on Article 6\(4\) of the 'Habitats Directive' 92/43/EEC \(paragraph 1.3.1, p.6\)](#)

- The Department for Environment, Food and Rural Affairs (Defra) has produced guidance on how Article 6(4) should be applied in England³⁴. It suggests that alternative solutions are “*limited to those which would deliver the [same] overall objective as the original proposal*”. It suggests that alternatives should be considered “*objectively and broadly*” and could include “*options that would be delivered by someone other than the applicant, or at a different location, using different routes, scale, size, methods, means or timing*” or “*different ways of operating a development or facility*”.
- A judgement of the European Court of Justice (ECJ) in 2006 (case C-239/04), relating to the construction of a motorway affecting the Castro Verde SPA in Portugal, found that in order to demonstrate that there was an absence of alternatives, all options capable of amounting to alternative solutions should be fully examined, even if they were liable to present certain difficulties of a social, economic or environmental nature.

6.2 Points to note

- The competent authorities should first analyse and demonstrate the need for the plan or project concerned. Therefore the zero or ‘do nothing’ option should be considered as an alternative solution at this stage.
- In considering whether or not there is an absence of alternatives, all options capable of amounting to alternative solutions should be fully examined.
- Whichever types of alternatives are considered, inherent in the Scottish Government guidance provided is the theme that alternatives should be **reasonable** and **practicable**. This is likely to depend on a variety of factors and will vary with individual circumstances.
- In assessing the relative merits of alternative solutions, other assessment criteria, such as economic criteria, cannot be seen as over-ruling ecological criteria (European Commission guidance³⁵).
- If there are alternative solutions to the proposal, then there is no need to move on to assess whether or not imperative reasons of overriding public interest apply. In refusing consent for the Lewis Wind Farm proposal in 2008, Scottish Ministers did not consider imperative reasons of overriding public interest because they were satisfied that there were alternative solutions to the proposal.

³⁴ Defra (2012). [Habitats and Wild Birds Directives: guidance on the application of article 6\(4\) - Alternative solutions, imperative reasons of overriding public interest \(IROPI\) and compensatory measures](#). Defra, London

³⁵ [European Commission \(2007\). Guidance document on Article 6\(4\) of the ‘Habitats Directive’ 92/43/EEC](#) (paragraph 1.3.1, p.7)

STAGE 7: WOULD A PRIORITY HABITAT OR SPECIES BE ADVERSELY AFFECTED?

7.0 Purpose

This question has to be asked because priority habitats and species (as defined in the Habitats Directive) are given a greater level of protection under the Article 6 process than other Annexed habitats and species. It is logical to ask this question at this stage of the assessment. If the answer is “No”, then Stage 8 applies; if “Yes”, then Stage 9 applies.

7.1 Points to note

- The Birds Directive does not refer to ‘priority’ species and therefore there are no ‘priority’ bird species in SPAs.
- There are no qualifying priority species in any Scottish SACs.
- Priority habitats and species in the context of the Habitats Directive should not be confused with habitats and species that are prioritised in Biodiversity Action Plans (BAP) or listed as Priority Marine Features (PMF) – they are not the same thing.
- There has been confusion over the use of the word ‘host’. The Habitats Directive appears to use the word to mean ‘present on a site’. However, the European Commission has now clarified this matter and only **qualifying interest(s)** as listed on the SAC data form³⁶ are considered relevant.
- The question here should thus be taken to refer **only to priority qualifying SAC interests**, effects on which are part of the potential adverse effects on the site’s integrity. For the majority of sites hosting a priority habitat, a proposal adversely affecting the site’s integrity would also be adversely affecting the priority qualifier. However, on a large multi-interest site (for example, the Cairngorms) it is possible that a proposal could threaten the site’s integrity but not in fact adversely affect any of the priority qualifying habitats. In such a case, even though the site does indeed contain a priority qualifier, since this is not affected by the proposal, the next stage would be consideration of Stage 8 rather than Stage 9.

STAGE 8: ARE THERE IMPERATIVE REASONS OF OVERRIDING PUBLIC INTEREST (NON-PRIORITY HABITATS AND SPECIES)?

8.0 Purpose

The purpose of this stage is that, where no priority interest is affected adversely, there may be certain instances where a case can be made that a specific plan or project should proceed despite there being “a negative assessment of the implications for

³⁶ Note that habitats and species graded ‘D’ on SAC data forms are **not** qualifying interests of the site – they are present but not significant.

the site” (regulation 49(1)). That is, it has not been possible to ascertain that the proposal will not adversely affect the integrity of the Natura site. In such cases, and where there are no alternative solutions, the proposal would have to demonstrate imperative reasons of overriding public interest which could include matters of a socio-economic nature.

8.1 Clarifications

- Paragraph 15 of the Revised Circular 6/95 gives detailed information on imperative reasons of overriding public interest. For non-priority habitats and species these include:
 - the need to address a serious risk to human health and public safety;
 - the interests of national security and defence;
 - the provision of a clear and demonstrable direct environmental benefit on a national or international scale;
 - a vital contribution to strategic economic development or regeneration;
 - where failure to proceed would have unacceptable social and/or economic consequences.
- The Revised Circular 6/95 (paragraph 15) states that "*whilst projects of more local significance are not ruled out it is less likely that their potential benefits will be considered to override the nature conservation value of the sites*".
- The Commission’s guidance on Article 6(4) clarifies that "*...only public interests, irrespective of whether they are promoted by public or private bodies, can be balanced against the conservation aims of the Directive. Thus, projects developed by private bodies can only be considered where such public interests are served and demonstrated*"³⁷.
- Not every kind of public interest of a social or economic nature is sufficient to meet the requirements of Article 6(4) – it must be overriding. The Commission’s guidance on Article 6(4) also states that "*In this context, it seems also reasonable to assume that the public interest can only be overriding if it is a **long-term interest**; short-term economic interests or other interests which would only yield short-term benefits for the society would not appear to be sufficient to outweigh the long-term conservation interests protected by the Directive*"³⁸.
- Defra guidance on Article 6(4)³⁹ suggests that when a competent authority is identifying whether imperative reasons of overriding public interest exist they should consider the different elements of the term as follows:
 - "*Imperative: it must be essential (whether urgent or otherwise), weighed in the context of the other elements below, that the plan or project proceeds*
 - "*Overriding: the interest served by the plan or project outweighs the harm (or risk of harm) to the integrity of the site as identified in the appropriate assessment*

³⁷ [European Commission \(2007\). Guidance document on Article 6\(4\) of the ‘Habitats Directive’ 92/43/EEC \(paragraph 1.3.2, page 7\)](#)

³⁸ [European Commission \(2007\). Guidance document on Article 6\(4\) of the ‘Habitats Directive’ 92/43/EEC \(paragraph 1.3.2, page 8\)](#)

³⁹ Defra (2012). [Habitats and Wild Birds Directives: guidance on the application of article 6\(4\) - Alternative solutions, imperative reasons of overriding public interest \(IROPI\) and compensatory measures](#). Defra, London

- *Public Interest: a public benefit must be delivered rather than a solely private interest.*"

8.2 Points to note

- Projects meeting the criteria for imperative reasons of overriding public interest are very narrowly defined and have to present a compelling case.
- Revised Circular 6/95 Annex E, Appendix A states "...such reasons would need to be sufficient to override the ecological importance of the classification".
- Each case will need to be considered on its merits.

8.3 The process of agreement of overriding public interest

The Habitats Regulations prescribe the process by which intent to apply overriding public interest will be pursued as follows:

- A competent authority (other than the Scottish Ministers) proposing to agree to a proposal which has a negative assessment for a Natura site must notify the Scottish Ministers before doing so (regulation 49(5)).
- Having notified the Scottish Ministers the competent authority is not permitted to agree to such a proposal before the end of the 21 day period after they are informed that the Scottish Ministers have received the notification - unless the Scottish Ministers notify that they can do so before the end of this period (regulation 49(5)).
- The Scottish Ministers may give directions prohibiting the authority from agreeing the proposal either indefinitely or during any such period specified in the direction (regulation 49(6)).

8.4 Compensatory measures

Should Scottish Ministers agree to the proposal to undertake a plan or project where an adverse effect on the Natura site cannot be ruled out, they have a duty to secure any **compensatory measures** necessary to ensure the overall coherence of Natura 2000 is protected (regulation 53 of the Habitats Regulations). This is an area that, if applied by ministers, SNH's advice is likely to be sought.

Revised Circular 6/95 provides further guidance on this aspect at paragraph 17. The Commission's guidance on Article 6(4) also covers the topic in some detail.

In summary, compensatory measures "...aim to offset the negative impact of a project and to provide compensation corresponding precisely to the negative effects on the species or habitat concerned"⁴⁰. They are likely to include:

- designation of an alternative site;
- extension of the same or another site to include habitat equivalent to that lost or damaged;

⁴⁰ [European Commission \(2007\). Guidance document on Article 6\(4\) of the 'Habitats Directive' 92/43/EEC \(paragraph 1.4.4, page 11\)](#)

- restoration of non-qualifying habitat to qualifying standard on this or another site:

In considering appropriate measures, the goal should be to achieve a benefit at least equivalent to the loss or damage incurred by the site's qualifying interests. The European Commission's guidance⁴¹ points out that compensatory measures must not include measures that are required for the normal implementation of the Directive, for example, implementing a management plan, or designation of a new site that is already proposed. The guidance also states that the results of compensatory measures should normally be in place before damage occurs to the site.

Mitigation measures should be an integral part of the specifications of a plan or project, and are designed to reduce or remove negative impacts; whereas compensatory measures are independent of the project and are intended to offset remaining negative impacts in cases where it has not been possible to conclude no adverse effect on site integrity. Mitigation can be taken into account in an appropriate assessment (stage 4 and 5), and when considering whether a proposal is likely to have a significant effect (stage 3). However compensatory measures can only be considered if it proposed that a plan or project is to proceed for imperative reasons of overriding public interest. Guidance has recently being drafted to help explain [the differences between mitigation and compensation](#).

To date there has only been one case in Scotland where compensatory measures were required and that is the upgrading of the Fort William to Mallaig A830 trunk road through Glen Beasdale SAC, mentioned in paragraph 5.4 (last bullet point). In this case the road improvements resulted in a loss of approximately 7.9ha of qualifying oak woodland within the SAC, equal to around 2.5% of the total area of qualifying oak woodland habitat within the site and just under 1.6% of the total site area. An area of compensatory habitat has been identified adjacent to the SAC, covering approximately 14ha. Much of this area does not currently support oak woodland of qualifying standard, but the agreed compensatory measures include management prescriptions to address the main problems, including damage by deer and invasive rhododendron, and so bring the habitat up to qualifying standard.

STAGE 9: ARE THERE IMPERATIVE REASONS OF OVERRIDING PUBLIC INTEREST (PRIORITY HABITATS AND SPECIES)?

Are there serious health or safety considerations, or benefits of primary importance to the environment?

9.0 Purpose

The only instances where plans or projects which have a negative assessment for a Natura site's qualifying priority interest may be allowed to proceed by the Member State - there being no alternative solutions - are where exceptional health, safety or environmental benefits result, or where, following referral to the European Commission, the Commission agrees that there are other imperative reasons of overriding public interest.

⁴¹ [European Commission \(2007\). Guidance document on Article 6\(4\) of the 'Habitats Directive' 92/43/EEC \(paragraph 1.4.1, page 10\)](#)

9.1 Clarifications

Paragraph 15 of Revised Circular 6/95 outlines some of the kinds of plans or projects that might fit the definition of overriding public interest and only require Scottish Ministers approval:

- the need to address a serious risk to human health and public safety;
- the provision of a clear and demonstrable direct environmental benefit on a national or international scale.

Subject to European Commission approval examples of arguments which may also be permissible include:

- the interests of national security and defence;
- a vital contribution to strategic economic development or regeneration;
- where failure to proceed would have unacceptable social and/or economic consequences.

9.2 Points to note

- The European Commission may agree that there are reasons other than health, safety or environmental benefits of primary importance that allow a priority habitat to be affected adversely (regulation 49(2)(b)). It is thus possible for cases where socio-economic or other factors are involved to be passed to the Commission for their confirmation that the case exhibits 'other imperative reasons of overriding public interest' (Habitats Directive Article 6(4)) and their permission for the proposal to proceed.
- Such proposals would have to prove clearly that these exceptional circumstances were in existence.
 - Cases meeting these criteria will be exceptional and extremely narrowly defined.
 - A compelling argument would need to be put forward.

9.3 Process of consideration

The Habitats Regulations prescribe the process by which intent to apply overriding considerations to sites where priority habitats or species are affected may proceed as follows:

- A competent authority (other than the Scottish Ministers) proposing to agree to a proposal having a negative assessment for a Natura site for reasons of human health or safety, or environmental benefits (see 9.2.1 above) must notify the Scottish Ministers before doing so (regulations 49 (1A), 49(5)).
- Having notified the Scottish Ministers the competent authority is not permitted to agree to such a proposal before the end of the 21 day period after they are informed that the Scottish Ministers have received the notification - unless the Scottish Ministers notify that they can do so before the end of this period (regulation 49(5)).

- The Scottish Ministers may give directions prohibiting the authority from agreeing the proposal either indefinitely or during any such period specified in the direction (regulation 49(6)).
- Where the competent authority wishes to seek the opinion of the European Commission on whether other imperative reasons of overriding public interest can be applied they must:
 - submit a request to the Scottish Ministers in writing
 - accompany this with any supporting documentation or information (regulation 49(3))
- The Scottish Ministers may on receipt of such a case if they think fit seek the opinion of the Commission, and upon receiving it shall transmit it to the competent authority.

9.4 Compensatory measures

This is exactly the same as for sites not hosting priority habitats or species - see section 8.4.

RELATIONSHIP BETWEEN APPROPRIATE ASSESSMENT AND OTHER ENVIRONMENTAL ASSESSMENT PROCEDURES

10.1 Relationship with a formal Environmental Impact Assessment (EIA) carried out under the EIA Regulations

An appropriate assessment is not the same as an EIA (see also Scottish Government [EIA](#) website):

- The requirement for an EIA applies only in certain cases, i.e. for major projects as listed in Annex I of the EIA Directive and, if requested by the competent authority, for other projects listed in Annex II of that Directive which “are likely to have significant effects on the environment...”.
- In contrast, an appropriate assessment is required for all plans or projects “likely to have a significant effect” on a Natura site.
- The appropriate assessment applies only to the qualifying interests of the Natura site.
- In many but not all cases, plans or projects which are the subject of an appropriate assessment will need an EIA; there will also be cases where an EIA is requested or required but not an appropriate assessment because impacts on the Natura site’s qualifying interests are considered not likely to be significant.
- Unlike an EIA (which is the responsibility of the developer), it is the responsibility of the competent authority to carry out an appropriate assessment. The competent authority may need to seek additional information from the developer to allow an adequate appropriate assessment to be carried out.

- An appropriate assessment does not exempt developers from obligations under the EIA Regulations (which transpose the EIA Directive into domestic law), and likewise an EIA does not exempt competent authorities from obligations under the Habitats Regulations.
- Where an EIA is required, the information compiled by the developer for the EIA can also be used by the competent authority for the appropriate assessment but the EIA may not provide all the information required for the appropriate assessment, e.g. if the EIA relates to a planning application for outline consent. Also the burden of proof is different in that, notwithstanding stages 6-9 above, a development can not be given permission unless it can be ascertained that it will not adversely affect the integrity of the site. This level of proof is not required in an EIA. In all cases the competent authority must reach its own conclusions.
- The appropriate assessment need not be publicly advertised, and is not a public document, in contrast to the EIA Regulations' requirement for publication of an Environmental Statement. In practice though, appropriate assessments are commonly made public.
- An appropriate assessment may be very brief, but could be as complex as any EIA.
- In the case of an EIA, the conclusions, although influential, are not binding on the competent authority in reaching its decision; in the case of an appropriate assessment, a negative assessment of the implications for the Natura site means that the competent authority cannot agree to the proposal unless there are exceptional circumstances (Stages 6-9).

10.2 Relationship with Strategic Environmental Assessment (SEA) carried out under the Environmental Assessment (Scotland) Act 2005

An appropriate assessment is not the same as an SEA. (See SNH guidance on the [SEA microsite](#) and also [Scottish Government's SEA Toolkit](#)):

- Section 1(5)(9)(b) of the Environmental Assessment (Scotland) Act 2005 requires an SEA to be undertaken for any plans, programmes or strategies which, in view of likely significant effects on Natura sites, have been determined to require an appropriate assessment. [Note that 'plans, programmes or strategies' in the context of SEA are not the same as 'plans or projects' as referred to in the Habitats Directive]. Directive 2001/42/EC of the European Parliament and Council 'on the assessment of the effects of certain plans and programmes on the environment' (known as the SEA Directive) allows for a combined procedure to be adopted provided it fulfils both the requirements of the SEA Directive and the Habitats Directive. Where plans or programmes relate to UK or cross-border issues, or concern reserved matters, SEA is covered by UK Regulations (the Environmental Assessment of Plans and Programmes Regulations 2004).
- An SEA is carried out by the responsible authority, that is, the authority preparing the plan, programme or strategy. The responsible authority may be the same as the competent authority where an appropriate assessment is required.

- An appropriate assessment does not exempt developers from obligations under the Environmental Assessment (Scotland) Act 2005 or the UK Regulations relating to SEA, and similarly an SEA does not exempt competent authorities from obligations under the Habitats Regulations.
- Appropriate assessment and SEA can be undertaken in parallel utilising common stages such as information gathering, prediction of plan effects, and consultation processes. If the Habitats Regulations Appraisal is undertaken in parallel with the SEA, it is important that the findings of both appraisals are separately and clearly documented.
- The SEA Environmental Report is a public document, unlike an appropriate assessment where there is no formal requirement for publication. In practice though, appropriate assessments are commonly made public.
- As with EIA, the conclusions of an SEA may be influential but are not binding on the responsible authority in reaching its decision.

Table 1: Summary of differences between EIA, SEA and appropriate assessment

	Environmental Impact Assessment	Strategic Environmental Assessment	Appropriate Assessment
When is it required?	Applies to all Schedule I and significant Schedule II projects	Applies to all significant public sector programmes	Applies to all plans and projects likely to have a significant effect on a Natura site
What is being assessed?	Covers a wide range of environmental issues	Covers a wide range of environmental issues	Considers effects on the qualifying Natura interests only
Who carries it out?	Carried out by the developer	Carried out by the public sector proponent	Carried out by the competent authority
What is the purpose?	Informs the decision	Informs the decision	Binding on the decision

A SUMMARY OF THE PROVISIONS IN THE HABITATS REGULATIONS FOR CONSIDERING PROPOSALS UNDER THE ARTICLE 6.3 ASSESSMENT PROCESS (HABITATS REGULATIONS APPRAISAL)

Please note the following when considering which part of the Habitats Regulations confers the requirement for consideration of proposals under the Article 6.3 assessment process (Habitats Regulations Appraisal).

- Regulations 48-53 of the Habitats Regulations outline the procedures which must be carried out when considering **all** plans or projects.
- Regulation 47 of the Habitats Regulations outlines specific functions detailed in regulations 53A-85 which must also be considered when dealing with:
 - Control of operations requiring consent (regulation 53A)
 - Grant of planning permission and review (regulations 54-59)
 - Permitted development (regulations 60-63)
 - Highways, roads and cycle tracks (regulations 69-70)
 - Core and other paths (regulation 69A)
 - Transport and works (regulations 79-82D)
 - Authorisations under Part I of the Environmental Protection Act 1990 (regulation 83)
 - Waste management licences (regulation 84)
 - Permits under the Pollution Prevention and Control (Scotland) Regulations 2000 (regulation 84A)
 - Abstraction works (regulation 84B)
 - Discharge consents (regulation 85)
- Regulations 85A-E of the Habitats Regulations outline the specific provisions for assessment of all land use plans (specifically defined in these regulations as strategic development plans, local development plans, and associated supplementary guidance). The statutory requirement to consider these plans was introduced by The Conservation (Natural Habitats, &c.) Amendment (Scotland) Regulations 2007. For guidance on the Habitats Regulations Appraisal process for plans, particularly land use plans, please refer to the SNH Guidance [‘Habitats Regulations Appraisal of Plans – Guidance for plan-making bodies in Scotland’](#).
- Regulation 47(1)(b) of the Habitats Regulations, which was introduced by The Conservation (Natural Habitats, &c.) Amendment (No.2) (Scotland) Regulations 2007, means that authorities must make the same considerations, as are specified in regulation 48 and 49, to “all other plans and projects.”

For further advice on what specific provisions of the Habitats Regulations, 2017 Regulations, or the Offshore Regulations apply in relation to competent authority functions please contact the National Operations Unit.

AUDIT TRAIL APPROACH TO BE USED IN THE CONSIDERATION OF A PROPOSAL AFFECTING A NATURA SITE (PROPOSED OR DESIGNATED SPA OR SAC)

It is important that all appraisals undertaken and decisions made, between consultation and response, be **logged fully** and in a **systematic manner**. The benefits of such an approach include:

- there is provision of a formal record of the steps taken, and the factors which influenced each step;
- the structured, step-by-step approach is more likely to produce a response which is consistent with SNH policies and practices, and which is 'correct' (i.e. has a rational basis);
- the handling of the case can be more readily reviewed (e.g. should there be a later query as to either the outcome or any of the factors considered);
- lessons learned can be more easily abstracted and applied to other cases; and
- continuity is more efficiently achieved should there be staff changes.

The above requires that advice sought and received, informal discussions, all meetings and all important phone calls, and all draft letters commented on should be **well documented**. This in turn requires the back-up of an **efficient filing system**.

For each case the following should be filed:

- consultation information
- site information
- proposal information
- consideration of stages 1- 9, as relevant, as in the guidance note
- internal/external advice sought and received, with appraisal of advice received
- memos etc. including internal approval
- identification and appraisal of mitigation measures and conditions
- conclusions/decisions
- draft letters plus comments (if not saved as part of the response letter audit trail in objective)
- response letter
- follow up correspondence, memos etc.

The proforma at Annex 2B should be used to record how you have dealt with any individual items of casework involving Natura sites. This also sits as a standalone document on the National Operations Unit microsite⁴² and can be added to the Casework Management System (CMS) as a supporting document for the relevant case. There is also [a version available via the SNH dashboard](#) which can be completed as an alternative and added to the CMS as a supporting document. A [quick guide](#) is available to help you do this. Experience with the Dashboard proforma has shown that this version is best-suited to more straightforward pieces of Natura casework. Consideration is currently being given to how we can better integrate the Dashboard proforma with the CMS and feedback from users is

⁴² [Natura guidance, proformas, and publications](#)

always welcome – please contact Crispin Hill. **Both proformas provide a useful checklist of what needs to be considered in a systematic way**, and it should help staff to come to a considered opinion which fulfils the requirements of the Habitats Regulations. It also provides a transparent audit trail which is becoming increasingly important.

HABITATS REGULATIONS APPRAISAL PROFORMA

This proforma should be used to record SNH's Habitats Regulations Appraisal when SNH is a competent authority. It should also be used to record SNH's appraisal of a plan or project when SNH is providing advice to a competent authority.

The proforma is available in [an alternative form on the SNH Dashboard](#). The Dashboard version is particularly suited to dealing with more straightforward Natura casework.

NB: There is orange text in some of the boxes: this is summary guidance, and is included for convenience. Reference to the main text of the Natura Casework Guidance should be made where clarification is needed. The orange text should be deleted as the proforma is completed.

APPRAISAL IN RELATION TO REGULATION 48 OF THE CONSERVATION (NATURAL HABITATS, &C.) REGULATIONS 1994 AS AMENDED⁴³ (HABITATS REGULATIONS APPRAISAL)

Casework Management System Ref.

NATURA SITE DETAILS

Name of Natura site(s) potentially affected:

Name of component SSSI if relevant:

Natura qualifying interest(s) & whether priority/non-priority:

Conservation objectives for qualifying interests:

STAGE 1: WHAT IS THE PLAN OR PROJECT?

Proposal title:

Name of consultee:

Name of competent authority:

Details of proposal (inc. location, timing, methods):

STAGE 2: IS THE PLAN OR PROJECT DIRECTLY CONNECTED WITH OR NECESSARY TO SITE MANAGEMENT FOR NATURE CONSERVATION?

The following points should be considered:

- i) Has the effect on all qualifying interests been considered?*
- ii) Is the proposal part of a fully assessed and agreed management plan?*
- iii) Is there a clear rationale to justify the connection with the conservation objectives?*
- iv) If there is a clear connection with the conservation objectives will any benefits arising from the proposal outweigh any negative effects?*

⁴³ Or, where relevant, under regulation 63 of The Conservation of Habitats and Species Regulations 2017, or regulation 25 of The Offshore Marine Conservation (Natural Habitats, &c.) Regulations 2007 as amended.

v) Have any alternative methods of implementing the proposal been explored to demonstrate that this is the least damaging option?

vi) Give a YES/NO conclusion in terms of whether the plan or project is considered directly connected with or necessary to site management for nature conservation.

- If **YES** for all elements of a plan or project, for all the Natura qualifying interests (preferably as part of a fully assessed and agreed management plan), then consent can be issued. The rationale should be detailed below and no further appraisal is required (no need to proceed to stage 3 or 4).

- If **No** for all Natura qualifying interests then proceed to stage 3.

- **If a plan has multiple elements (e.g. a range of policies or management objectives)**, elements of the plan considered directly connected with or necessary to site management for nature conservation should be discussed below and a rationale given for this conclusion. No further appraisal is then required for those elements. All other elements of the plan must proceed to stage 3.

The following text is included for guidance but should be deleted once considered as is not part of the audit trail

This test is to identify and remove from further assessment those proposals which are clearly necessary to, or of value to, or inevitable as part of, management of the site for its qualifying interests.

Supporting information and a clear rationale should be provided to justify the connection with the conservation objectives. Preferably this rationale should be available in a fully assessed and agreed site management plan or statement. If not, then further consideration or supporting information will be required.

The rationale should include sufficient detailed information to demonstrate that the benefits from the proposed activities outweigh any negative effects.

Provide details on any alternative (less damaging) methods of implementing the proposed conservation measures and, where appropriate, build in any relevant mitigation to offset any effects identified. This should ensure maximum benefit for the qualifying interests of the site while minimising any potential negative effects.

Remember that where Natura sites overlap, the effects on all the qualifying interests of both sites must be considered when assessing any conservation management proposals.

STAGE 3: IS THE PLAN OR PROJECT (EITHER ALONE OR IN COMBINATION WITH OTHER PLANS OR PROJECTS) LIKELY TO HAVE A SIGNIFICANT EFFECT ON THE SITE?

Each qualifying interest should be considered in relation to their conservation objectives. The following points should be considered:

i) Briefly indicate which qualifying interest could be affected by the proposal and how; if none, provide a brief justification for this decision, and then proceed to v), otherwise continue;

ii) refer to other plans/projects with similar effects/other relevant evidence;

iii) consider the nature, scale, location, longevity, and reversibility of effects;

iv) consider whether the proposal contributes to cumulative or incremental impacts in combination with other plans or projects completed, underway or proposed;

v) Where the impacts of a proposal are the same for different qualifying interests these can be considered together however a clear conclusion should be given for each interest

vi) give Yes/No conclusion for each interest.

- **If yes, or in cases of doubt**, continue to stage 4.

- **If potential significant effects can easily be avoided**, record modifications required below.

- **If no for all features**, a consent or non-objection response can be given and recorded below (although if there are other features of national interest only, the effect on these should be considered separately). There is no need to then proceed to stage 4.

The following text is included for guidance but should be deleted once considered as is not part of the audit trail

The test of Likely Significant Effect (LSE) is a simple screening stage to determine whether or not an appropriate assessment is required. **Keep as brief as possible** and deal with similar interests together wherever possible to avoid repetition.

Consider whether there is connectivity between the proposal and any of the qualifying interests i.e. are there processes or pathways by which the proposal may influence the site's interests? Conclude no LSE only if there is no connection, or it is obvious that the proposal will not undermine the conservation objectives despite a connection. The potential for negative effects on the qualifying interests may be immediately obvious, in which case conclude likely significant effect and move straight to the next step.

Types of effects which **in all cases** are likely to be significant and indicate an obvious need for appropriate assessment include:

- Causing reduction in the area of habitat or of the site.
- Causing direct or indirect change to the physical quality of the environment, hydrology or habitat within the site.
- Causing ongoing disturbance to qualifying species or habitats.

Refer to any advice obtained.

If there is not a clear cut case for concluding either LSE or no LSE, it may be possible to clarify by seeking basic additional information. For example, if the timing of a proposal is unknown but crucial to the determination of its effects, this fact might easily be obtained. However, if more detailed information or complex analysis is required, such an appraisal should not be included in the consideration of LSE; instead it should form part of the appropriate assessment stage.

If in doubt about LSEs but the potential exists, conclude likely significant effect and move to the appropriate assessment stage (stage 4).

Mitigation or modifications required to avoid a likely significant effect & reasons for these:

<i>Mitigation:</i>	<i>Reason:</i>
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STAGE 4: UNDERTAKE AN APPROPRIATE ASSESSMENT OF THE IMPLICATIONS FOR THE SITE IN VIEW OF ITS CONSERVATION OBJECTIVES

(It is the responsibility of the competent authority to carry out the appropriate assessment. The competent authority must consult SNH for the purposes of carrying out the appropriate assessment. SNH can provide advice on what issues should be considered in the appropriate assessment, what information is required to carry out the assessment, in some circumstances carry out an appraisal to inform an appropriate assessment and/or provide comments on an assessment carried out. Where we are providing advice to a competent authority our appraisal of the proposal should be recorded here.)

The following points should be considered:

- i) Describe for each qualifying interest the potential impacts of the proposal detailing which aspects or effects of the proposal could impact upon them and their conservation objectives.*
- ii) Evaluate the potential impacts, e.g. whether short/long term, reversible or irreversible, and in relation to the proportion/importance of the interest affected, and the overall effect on the site's conservation objectives. This should be in sufficient detail to ensure all impacts have been considered and sufficiently appraised. Record if additional survey information or specialist advice has been obtained.*
- iii) Each conservation objective should be considered and a decision reached as to whether the proposal will affect achievement of this objective i.e. whether the conservation objective will still be met if the proposal is consented to.*

The following text is included for guidance but should be deleted once considered as is not part of the audit trail

An '*appropriate assessment*' consists of two parts: a scientific, reasoned **appraisal** (stage 4) and a **conclusion** (stage 5). Consider the proposed plan/project, its impact on the qualifying interests assessed against their conservation objectives, and take account of any possible in combination effects with other plans or projects.

Identify the **potential impacts on**, and likely consequences for the conservation objectives of the qualifying interests.

- For each impact assess the **probability** of it undermining the conservation objectives.
- For each impact assess the **magnitude, duration & reversibility** of the effects.
- Consider mitigation proposed and its potential to be effective in removing or reducing impacts.
- Record any assumptions made and evidence or advice used.

You should give sufficient detail to allow you to conclude whether the plan or project **will not adversely affect site integrity for the qualifying interests of the Natura site** – or otherwise. It need not be complex, particularly where the impacts are clear. It is essential, however, that the assessment should be fully reasoned, and any decisions arrived at clearly recorded along with reference to any advice obtained.

Where an EIA or SEA has been undertaken under other legislation, it can inform the appraisal component of *appropriate assessment*. It is however a **Competent Authority (CA)** that must always reach a formal conclusion as to whether there are no adverse effects from the proposal on *site integrity*, for an *appropriate assessment* to be complete.

STAGE 5: CAN IT BE ASCERTAINED THAT THE PROPOSAL WILL NOT ADVERSELY AFFECT THE INTEGRITY OF THE SITE?

In the light of the appraisal, ascertain whether the proposal will not adversely affect the integrity of the site for the qualifying interests. Conclusions should be reached beyond reasonable scientific doubt. If more than one SAC and/or SPA is involved, give separate conclusions. If mitigation or modifications are required, detail these below.

The following text is included for guidance but should be deleted once considered as is not part of the audit trail

Conclude whether it can be ascertained that **site integrity** will not be adversely affected.

If SNH is the CA (e.g. for Operations Requiring Consent on a SSSI) a final conclusion can be stated – otherwise briefly state what our advice to the CA is – e.g. **“SNH considers that it has not been ascertained that the proposal will not adversely affect the integrity of the site”**

Mitigation or modifications required to ensure adverse effects are avoided, & reasons for these.

<i>Mitigation:</i>	<i>Reason:</i>
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ADVICE SOUGHT

Include here details of or clear reference to, advice sought from PAD staff, Natura team, Ops staff, Area colleagues etc. If no advice sought, give brief reasons/justification.

CONCLUSION/ADVICE IN RELATION TO PLAN OR PROJECT

When SNH is the competent authority

In view of the appraisal above outline below whether the plan or project can be consented/approved/undertaken.

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When SNH is advising the competent authority

In view of the appraisal above outline below the corresponding Natura model response position that will be used when advising the competent authority. Also include the response type from the [Development Management and the Natural Heritage](#) guidance as appropriate (see [Development Management and the Natural Heritage](#), Annex 2, Table 1 and guidance in Annex 3 of the Natura Casework Guidance)

Natura model response position:

Enter the response from the appropriate model response type

Development management response type:

Enter the response type from the Development Management and the Natural Heritage guidance as appropriate
--

Appraised by	
Date	
Checked by	It is recommended that the proforma is checked by an appropriate member of staff e.g. the relevant Operations Manager, particularly when cases are complex or contentious, or where the appraiser is relatively inexperienced.
Date	

HOW TO RESPOND TO CASEWORK AFFECTING PROPOSED OR DESIGNATED EUROPEAN SITES AND RAMSAR SITES

Before you respond to a piece of casework that could affect a Natura site you need to ensure that you understand the steps described in stages 1 to 5 above (and be aware of the steps outlined in stages 6 to 9). This is to ensure that we apply the steps correctly and we respond appropriately and consistently to Natura casework within SNH.

The Habitats Regulations Appraisal Proforma should be used to help you consider the effects of a plan or project (see Annex 2). This will record your thinking on the steps described in stages 1 to 5 above and record your conclusions. You should seek advice from the relevant Policy and Advice Officer or Manager, and Area colleagues where necessary. The finalised proforma can then be used to write your response letter.

When SNH is advising a competent authority

The response types and model wording outlined in Table 1 (Annex 2) of the [Development Management and the Natural Heritage](#) guidance should be used for all SNH responses to consultations on plans and projects affecting proposed or designated European sites, or Ramsar sites (when we are not the competent authority). The model wording is not repeated here to avoid duplication and version control problems when guidance is being updated. A summary flowchart is however provided in Figure 2.

The [Development Management and the Natural Heritage](#) guidance also provides guidance on how to structure response letters (see section 6.2). The key section on appraisal of impacts should identify the Natura site(s) and qualifying interest(s), refer to the legislative and/or policy requirements for European/Ramsar sites (either hyperlinked or in an Annex), and provide an appraisal of the implications of the proposal on the European/Ramsar site in accordance with these requirements. Although there is increasing awareness of the requirements of the Habitats Directive and Regulations, they are still widely confused and misunderstood. In order that SNH's advice is clear, consistent and complete, it is therefore important that the requirements and implications of a proposed or designated European/Ramsar site's status are clearly set out in all responses, attached either as an Annex, or included via a hyperlink to our website.

The basic format set out in the model responses should be appropriate for most consultations. However, local circumstances may occasionally require some minor modifications or additions to the model letters in order to accurately reflect a particular situation, especially if it is unusual or complex. In these cases it is essential that the actual references to the requirements of the Directives and Regulations are not amended, even slightly, as these elements of the wording of the model replies have been very carefully constructed to avoid misinterpretation and the possibility of challenge. For example, use of a phrase such as 'significant adverse effect,' which confuses the wording of two separate tests under regulation 48 ('likely significant effect' and 'adverse effect on site integrity'), has the potential to invalidate SNH's position so that it is not defensible should we be challenged.

The following points should be noted when using the model wording:

Legislative and Policy Requirements

Table 1 in Annex 2 of the [Development Management and the Natural Heritage](#) guidance includes model wording to be used in all Natura responses. There are two options to choose from depending on whether a proposed or designated European site could be affected.

The [legislative requirements for European sites](#)⁴⁴ are laid out fully in a separate document that is available on the [SNH website](#). The model wording to be used, where a candidate SAC, designated SAC or classified SPA could be affected, includes a hyperlink to this document. For most plans and projects, the 1994 Regulations are applicable in Scotland and Scottish Territorial Waters. The 2017 Regulations apply in Scotland only in relation to consultations under section 36 and 37 of the Electricity Act 1989, the Pipelines Act 1962, and to other reserved matters (which include defence, and oil and gas). If further advice is needed please contact a member of the National Operations Unit – Natura team.

Where a proposed SPA or SAC⁴⁵ could be affected, [the Scottish Government policy for proposed SACs and proposed SPAs](#) applies. The model wording to be used where a proposed SPA or proposed SAC could be affected again provides a hyperlink to this document.

Responses where there are different levels of impact on different qualifying interests on the same site

Determination of whether a proposal is likely to have a significant effect is made on the basis of individual qualifying interests. In cases where a likely significant effect is determined for one interest and not for another on the same site, it is clear that an appropriate assessment will be required to take into account impacts on the first interest and not on the second. The model reply is selected on the basis of the interest requiring appropriate assessment and it should be made clear in the letter that no further consideration of the second interest is required. However, if a likely significant effect is determined for one interest, but is inconclusive for another, the situation is less straightforward.

Although it may seem logical, an approach which uses a combination of two different responses (i.e. indicating a requirement for appropriate assessment for one interest and also a requirement for additional information to determine whether a proposal is likely to have a significant effect for another interest on the same site) should in most cases be avoided. An exception might be in circumstances where a likely significant effect can be very easily determined by requesting simply obtained information.

⁴⁴ Either under the Conservation (Natural Habitats, &c.) Regulations 1994, as amended, or under the Conservation of Habitats and Species Regulations 2017.

⁴⁵ A proposed SAC (pSAC) is a site that has been approved for consultation by the Scottish Government, but is yet to be submitted to the European Commission as a candidate SAC (cSAC). A proposed SPA (pSPA) is a site that has been approved for consultation by the Scottish Government but is yet to be classified.

However, mixed responses in more complex cases can be confusing and may introduce unnecessary delays. In these situations a practical solution is to request the information required to determine effects on both interests as part of the same exercise to inform the appropriate assessment. In practice this will not involve any extra work for the applicant and will save them time.

Responses for use in limited circumstances

Natura model response 3 (insufficient information to determine whether a likely significant effect) must only be used where the question of whether a proposal is likely to have a significant effect can be simply resolved by the provision of easily obtainable information. For example, a relevant scenario is one in which a proposal may affect an SPA for wintering geese, but the only concern is possible disturbance to the birds during the proposed works and the timing of these works is unknown. Timing and duration of the proposed works may be easily and quickly ascertained and may make the difference between a conclusion of likely significant effect or not. **Response 3 must not be used if detailed information or analysis is required to determine the scale of the impact of a proposal.** In these circumstances, where a connection has already been established between the proposal and the qualifying interests, you should conclude that the proposal is likely to have a significant effect and ask for additional information to inform an appropriate assessment using responses 6a or 6b.

Natura model response 4 (likely significant effect that can be avoided) must only be used where a likely significant effect can be easily avoided by the use of a simple condition or modification. For example, using the same scenario of an SPA for wintering geese as described above, a suitable condition would be to limit the proposed works to a specified period over the summer months. **Response 4 should not be used where the required conditions or modifications are complex or onerous, or there are multiple changes required to the original proposal, or legal agreements are necessary to ensure the protection of the site.** These circumstances indicate that the risk to the site may be too high to be screened out at this early stage, and a conclusion that the proposal is likely to have a significant effect should be determined. This will allow all the issues to be explored properly in an appropriate assessment and if there is sufficient information to conclude that (with conditions) the site will not be adversely affected, response 5b should be used.

Pairs of responses

The two pairs of responses 6a&b and 7a&b are very similar to each other but reflect the position where SNH has agreed to carry out the appraisal on behalf of the competent authority by local agreement. In these cases (6b&7b) SNH is appraising the information supplied by the applicant; SNH is not responsible for obtaining this information as it is up to the competent authority to ensure that the applicant supplies any required information.

Ramsar sites

[Scottish Planning Policy 2014 sets out current Scottish Government policy on Ramsar sites in paragraph 211](#) as follows: "All Ramsar sites are also Natura sites and/or Sites of Special Scientific Interest and are protected under the relevant statutory regimes."

In the majority of cases in Scotland, Ramsar sites fully overlap with Natura sites and the interests of the different designations are either the same or are closely aligned.

In January 2019 Scottish Government provided [guidance](#) on how the Scottish Government expects its policy on the protection of Ramsar sites to be implemented. It states “where Ramsar interests coincide with Natura qualifying interests protected under an SPA or an SAC, as the case may be, the interests are thereby given the same level of (legal) protection as Natura sites”. For this reason, consideration of the Natura qualifying interests will normally be sufficient to ensure the protection of the Ramsar site interest. There is no need to give details of impacts on Ramsar sites separately in consultation responses but the response should refer to the fact that the Ramsar interests have been addressed as part of the Natura site appraisal.

The guidance goes on to say that “where Ramsar interests are not the same as Natura qualifying interests but instead match SSSI features, these receive protection under the SSSI regime”.

Please contact a member of the Protected Areas and Nature Reserves Unit – Natura team if you need further advice.

European Protected Species

Guidance on [European Protected Species \(EPS\)](#) is provided in [Development Management and the Natural Heritage](#) and on the SNH website. Where the EPS concerned is also a qualifying interest of an SAC (for example, otter), it must be addressed both as a qualifying interest of the site and separately as an EPS.

When SNH is the competent authority

The introductory section of this guidance (at paragraph III.iii) outlines some situations where SNH is a competent authority. As discussed above, before we can undertake or issue any consent/permission/or other authorisation for a plan or project that could affect a Natura site we need to carry out a Habitats Regulations Appraisal. It is recommended that we use the Habitats Regulations Appraisal proforma (see Annex 2B, or the Dashboard HRA proforma) to record our appraisal. The outcome of this appraisal will inform whether consent can be issued or, for our own plans or projects, whether a proposal can be undertaken. Table 2 provides a summary of possible HRA outcomes and what that means in terms of the plan or project under consideration.

Table 2 – Summary of possible HRA outcomes, and the implications for the plan or project, when SNH is the competent authority

HRA outcome	Can proposal be undertaken or consent/permission/other authorisation be given?
Proposal is necessary for conservation management purposes (it is considered directly connected with or necessary to site management for nature conservation)	Yes – with modifications if necessary
No likely significant effect	Yes
Insufficient information to determine whether likely significant effect. Proposal could have a significant effect on the qualifying interest(s) of a Natura site*	No – request information needed
Likely significant effect that can be avoided*	Yes - with modifications
Likely significant effect but appropriate assessment shows that it will not adversely affect the integrity of the site	Yes
Likely significant effect but appropriate assessment shows that the effect on integrity can be avoided with changes/mitigation	Yes - with modifications
Likely significant effect but insufficient information to carry out appropriate assessment	No – request information needed
Appropriate assessment has not demonstrated that there will not be an adverse effect on the integrity of the site	No

* For use in limited circumstances only – see above for further advice

Table 3 provides model wording that can be included in our response to applicants seeking consent/permission/or other authorisation from SNH. **Although some of the wording is very similar to that in the Development Management guidance it has been adapted for use when SNH is the competent authority and should only be used for this purpose.** Depending upon the nature of the consultation, the detailed form of wording in Table 3 may not be appropriate in all circumstances. For example, a simplified form of wording has been agreed for cases where we are responding to applications for SSSI consent. This wording has been incorporated into [the template SSSI response letters](#). Please contact a member of the National Operations Unit – Natura team if you need further advice about the appropriate wording to use.

Table 3 - Model wording that can be included in our response to applicants when SNH is the competent authority

Conventions used in the tables

[*Alternate wording*] – choose one or more options as appropriate to the case

Replace with exact wording e.g. site name or qualifying feature name

Use this wording in all relevant Natura responses to introduce your appraisal of effects on a candidate SAC, designated SAC or classified SPA. These sites have legislative protection:

“The proposal [*lies within/ is close to/ could affect*] **Name of site** [*candidate Special Area of Conservation (cSAC) selected for its List qualifying interest(s)/ Special Area of Conservation (SAC) designated for its List qualifying interest(s)/ Special Protection Area (SPA) classified for its List qualifying interest(s)*].

The site’s status means that the requirements of the Conservation (Natural Habitats, &c.) Regulations 1994 as amended (the “Habitats Regulations”) apply. Consequently, Scottish Natural Heritage is required to consider the effect of the proposal on the [cSAC/SAC/SPA] before it can be consented (commonly known as Habitats Regulations Appraisal). The SNH website has a summary of the legislative requirements.

<https://www.nature.scot/sites/default/files/2017-06/A423286%20-%20Legislative%20requirements%20for%20European%20Sites.pdf>

Only include the following sentence if a Ramsar site may be affected. For Ramsar sites that have features which do not have an equivalent Natura qualifying interest, please check with National Operations Unit about wording.

Name of site Ramsar site may also be affected but any concerns about the interest of this designation are fully addressed as part of the following consideration of the European site(s).

Use this wording in all relevant Natura responses to introduce your appraisal of effects on a proposed SAC or proposed SPA. These sites have policy protection:

“The proposal [*lies within/ is close to/ could affect*] **Name of site** [*proposed Special Area of Conservation (pSAC) selected for its List qualifying interest(s)/ proposed Special Protection Area (pSPA) selected for its List qualifying interest(s)*].

The Scottish Government has a policy of protecting such sites as if they were designated as set out in Scottish Planning Policy. The legal protection afforded to designated European sites is set out in the Conservation (Natural Habitats, &c.) Regulations 1994 as amended (the “Habitats Regulations”). Consequently, Scottish Natural Heritage is required to consider the effect of the proposal on the [pSAC /pSPA] before it can be consented (commonly known as a Habitats Regulations Appraisal). The SNH website has a summary of the Scottish Government policy.

<https://www.nature.scot/sites/default/files/2017-12/Scottish%20Government%20Policy%20for%20proposed%20SACs%20and%20proposed%20SPAs%20-%20updated%20November%2030th%202017%20%28A1395582%29.pdf>

Wording relevant to different scenarios with regard to the Natura tests following the text above.

You should only consider including wording related to scenario a and b if the applicant is claiming, or is likely to claim in the future, that the proposal is necessary for conservation management purposes.

a. Proposal is necessary (in our view) for conservation management purposes

Model Wording Natura response a

“In our view, from the information available, it appears that in this case the proposal is [*either/ both*] directly connected with [*and/ or*] necessary for the conservation management of the site for its qualifying interest(s) **list qualifying interest(s)** in order to **add objective of management**. An appropriate assessment is not therefore required.”

b. Proposal not necessary (in our view) for conservation management purposes

Position relates to one of the scenarios below.

Model Wording Natura response b

“In our view, from the information available, it appears that in this case the proposal is not connected with or necessary for the conservation management of the site. Hence, further consideration is required.” [Continue letter with one of the responses below]

Note: For the following scenarios, the proposal is not connected to conservation management of qualifying interest(s)

No likely significant effect

Model Wording Natura response

“In our view, it is unlikely that the proposal will have a significant effect on any qualifying interests either directly or indirectly. An appropriate assessment is therefore not required.”

[Provide brief reasons to support this decision – this is particularly important for proposals within sites and for large-scale activities/proposals adjacent to sites]

Insufficient information to determine whether likely significant effect. Proposal could have a significant effect on the qualifying interest(s) of a Natura site

For use in limited circumstances only – see above for further advice

Model Wording Natura response

“In our view, there is insufficient information to determine whether the proposal is likely to have a significant effect on **name of qualifying interest(s) of site**. In order for this to be determined, the following additional information should be provided.”

Provide details or summary of the information required

[if required] “Annex X contains full details and reasoning of these requirements.”

Likely significant effect that can be avoided

For use in limited circumstances only – see above for further advice

Model Wording - Natura response

“In our view, this proposal is likely to have a significant effect on [name of qualifying interest\(s\)](#) of [site](#). Consequently, Scottish Natural Heritage is required to carry out an appropriate assessment in view of the site’s conservation objectives for its qualifying interest(s). If the proposal is undertaken strictly in accordance with the following [*changes/ mitigation*], it will no longer be likely to have a significant effect and an appropriate assessment will not be required.”

[Provide details or summary of the changes/mitigation needed](#)

[if required] “Annex [X](#) contains full details and reasoning of these recommendations.”

Likely significant effect but appropriate assessment shows that it will not adversely affect the integrity of the site**Model Wording Natura response**

“In our view, this proposal is likely to have a significant effect on [name of qualifying interest\(s\)](#) of [site](#). Consequently, Scottish Natural Heritage has carried out an appropriate assessment in view of the site’s conservation objectives for its qualifying interest(s). The appropriate assessment has ascertained that the proposal will not adversely affect the integrity of the site.

Likely significant effect but appropriate assessment shows that the effect on integrity can be avoided with changes/ mitigation**Model Wording Natura response**

“In our view, this proposal is likely to have a significant effect on [name of qualifying interest\(s\)](#) of [site](#). Consequently, Scottish Natural Heritage has carried out an appropriate assessment in view of the site’s conservation objectives for its qualifying interest(s). The appropriate assessment has ascertained that an adverse effect on site integrity can be avoided by the following [*changes/mitigation*]:

[Provide detail or summary of the changes/ mitigation needed](#)

Likely significant effect but insufficient information to carry out an appropriate assessment**Model Wording Natura response**

“In our view, this proposal is likely to have a significant effect on [name of qualifying interest\(s\)](#) of [site](#). Consequently, Scottish Natural Heritage is required to carry out an appropriate assessment in view of the site’s conservation objectives for its qualifying interest(s). To enable us to carry out the appropriate assessment, the following information is required: [provide detail or summary of the information required](#)”

[if required] “Annex [X](#) contains full details and reasoning of these requirements.

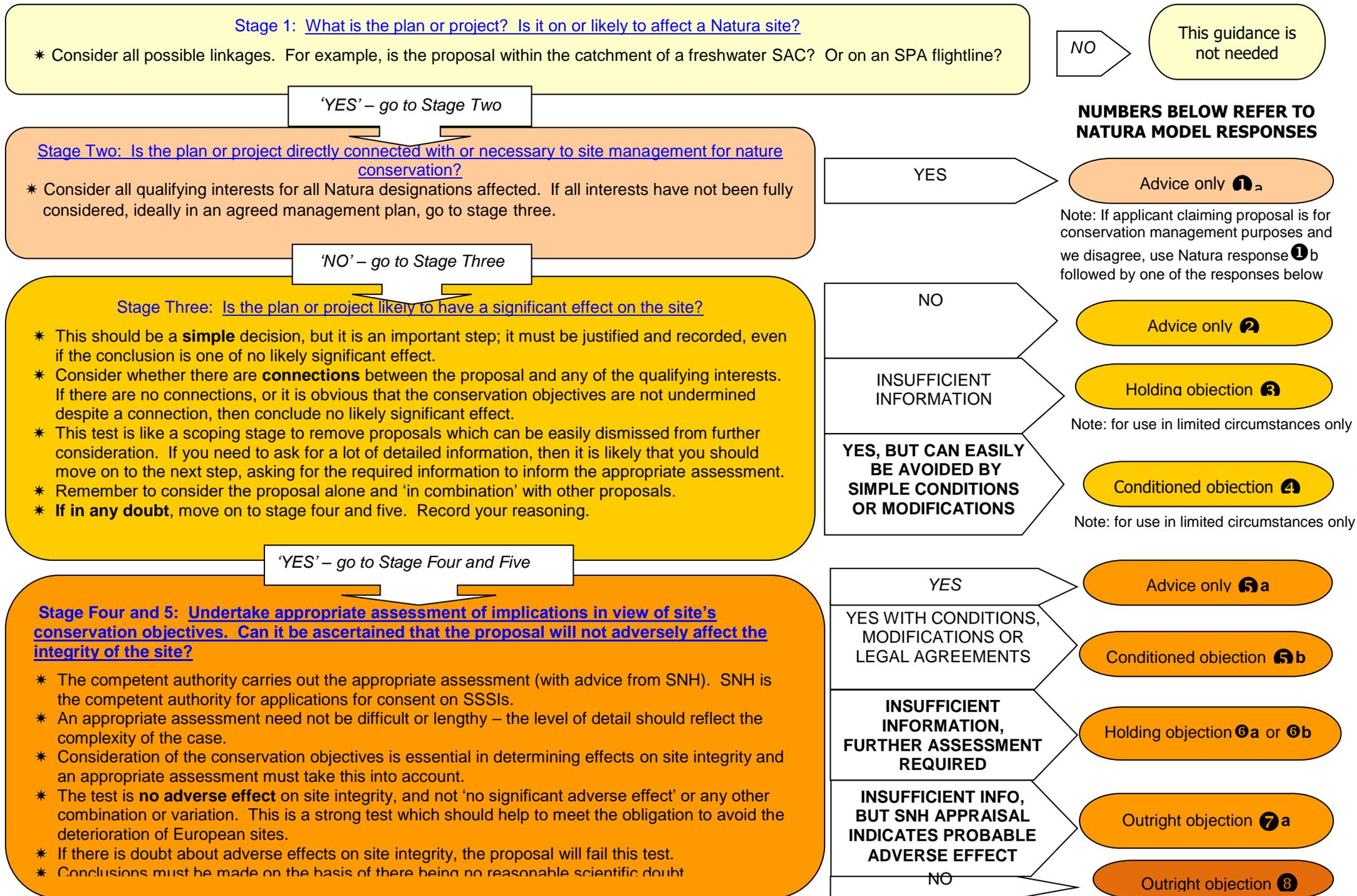
Once this information has been provided, we will be able to give further consideration to this proposal”

Appropriate assessment has not demonstrated that there will not be an adverse effect on the integrity of the site

Model Wording Natura response

“In our view, this proposal is likely to have a significant effect on [name of qualifying interest\(s\)](#) of [site](#). Consequently, Scottish Natural Heritage has carried out an appropriate assessment in view of the site’s conservation objectives for its qualifying interest(s). The appropriate assessment has not ascertained that the integrity of the site will not be adversely affected and we therefore do not [*consent to/permit/authorise*] the proposal. [Give specific details of factors covered highlighting where an adverse effect on integrity is expected or where it is not possible to ascertain that there will be no adverse effect.](#)”

Figure 2 - How to respond to casework affecting proposed or designated European sites when SNH is advising a competent authority



GLOSSARY OF TERMS USED IN THIS GUIDANCE

Where the definition includes a term included elsewhere in the glossary the term is given in italics.

Alternative solutions *Article 6.4 of the Habitats Directive and regulation 49 of the Habitats Regulations makes provision for certain *plans or projects* to proceed despite them having an adverse effect on the *integrity* of a *European site*, in the absence of *alternative solutions*, for *imperative reasons of overriding public interest*.*

European Commission guidance⁴⁶ advises that the 'zero option', i.e. the thorough revision or withdrawal of the *plan or project* adversely affecting the *integrity* of a site, must first be considered at this stage, especially in cases where there are negative effects on *priority habitats and/or species* protected under the Habitats Directive or globally endangered bird species listed on Annex I of the Birds Directive. Subsequently, the *competent national authorities* should examine *alternative solutions* which might involve alternative locations or routes, different scales or designs of development, or alternative processes.

All feasible alternatives should be analysed, particularly their relative performance with regard to the site's *conservation objectives*, its *integrity* and its contribution to the overall coherence of the Natura site network. Such solutions should normally have already been identified within the framework of the initial assessment carried out under *Article 6.3*.

In assessing the relative merits of *alternative solutions*, *competent authorities* must focus principally on aspects concerning the conservation and maintenance of the site's *integrity* and its ecological functions. At this stage, other assessment criteria, such as economic concerns, cannot be seen as over-ruling ecological criteria.

Appropriate assessment *Article 6.3 of the Habitats Directive requires that "any *plan or project* ... likely to have a significant effect ... shall be subject to *appropriate assessment* of its implications for the site in view of the site's *conservation objectives*". This requirement applies to all Natura sites and is carried through into the Habitats Regulations⁴⁷.*

An '*appropriate assessment*' consists of two parts: an appraisal and a conclusion. It considers the proposed *plan or project* and its impact on the qualifying interests, taking into account any possible effects *in combination* with other *plans or projects*. An *appropriate assessment* must reach a conclusion as to whether it can be ascertained that the *plan or project* will not adversely affect the *integrity* of the site in view of the site's *conservation objectives*. See definitions under stage 4 and stage 5 of this guidance.

⁴⁶ [European Commission \(2007\). Guidance document on Article 6\(4\) of the 'Habitats Directive' 92/43/EEC](#)

⁴⁷ For reserved matters, including consents under the Electricity Act 1989, The Conservation of Habitats and Species Regulations 2017, as amended, apply in Scotland.

Article 6(3) This states “Any *plan or project* not directly connected with or necessary to the management of the site but *likely to have a significant effect* thereon, either individually or *in combination* with other *plans or projects*, shall be subject to *appropriate assessment* of its implications for the site in view of the site's *conservation objectives*. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the *competent national authorities* 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, after having obtained the opinion of the general public”.

Article 6(4) This states “If, in spite of a negative assessment of the implications for the site and in the absence of *alternative solutions*, a *plan or project* must nevertheless be carried out for *imperative reasons of overriding public interest*, including those of a social or economic nature, the Member State shall take all *compensatory measures* necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the *compensatory measures* adopted”.

Compensatory measures Where a *plan or project* must be carried out (in the absence of *alternative solutions*) for *imperative reasons of over-riding public interest*, the Member State must take appropriate *compensatory measures* to ensure that the overall coherence of the Natura network is maintained (*Article 6.4* and regulation 53 of the Habitats Regulations⁴⁸). *Compensatory measures* should only be considered in this context. *Compensatory measures* are distinct from aspects of *mitigation* arising from the effects of *plans and projects* within a site.

The intention is that any loss or impairment of extent or function on a site (that is, an adverse effect on *site integrity*) arising from a *plan or project* which proceeds (in the absence of *alternative solutions*) on grounds of *over-riding public interest* shall be compensated by measures taken elsewhere, normally (but not always) outwith the site, to ensure that the coherence of the Natura network and contribution to *favourable conservation status* are maintained. These measures are independent of the *plan or project* and could include, for example, the creation of substitute habitat, or the addition of a new site to the network (although not one which should have been included in the first place). These measures should be in place **before** the *plan or project* proceeds, they should relate specifically to the negative impacts on the habitat or species concerned, and they should be of **at least the same extent or standard** as the areas which will be lost or damaged. It is anticipated that the areas created as *compensatory measures* will become new Natura sites or extensions to existing sites, thus ensuring the coherence of the network. See section 8.4 of this guidance.

Competent authority The term derives from the Habitats Regulations and relates to the duties which the Regulations impose on public bodies and individuals.

⁴⁸ For reserved matters, including consents under the Electricity Act 1989, The Conservation of Habitats and Species Regulations 2017, as amended, apply in Scotland. Regulation 66 is the equivalent provision in these cases.

Regulation 6(1) defines *competent authorities* as "any Minister, government department, public or statutory undertaker, public body of any description or person holding a public office". In the context of a *plan or project*, the *competent authority* is the authority with the power or duty to determine whether or not the proposal can proceed.

The duties of *competent authorities* are specified in other parts of the Regulations. For example, all *competent authorities* have specifically articulated duties under regulation 48 of the Habitats Regulations, as applied by regulation 47. In addition to these specific duties, all *competent authorities* are bound by the requirement in regulation 3(3) to exercise their functions with regard to the requirements of the Habitats and Birds Directives.

Conservation objectives

Article 6.3 of the Habitats Directive requires any *plan or project* to be assessed "in view of the site's *conservation objectives*". *Conservation objectives* thus have a legal status as set out in Article 6.3. The term also appears in the Conservation (Natural Habitats, &c.) Regulations 1994, as amended.

The *conservation objectives* should ensure that the obligations of the Directive are met; that is, there should not be *deterioration or significant disturbance* of the qualifying interests from their condition at the time the site is first given formal Ministerial approval. This will also ensure that the *integrity* of the site is maintained and that each of the qualifying interests makes full contribution to *favourable conservation status*. Where an interest or its supporting processes require restoration to meet these obligations then the *conservation objectives* should also set this out.

Since *conservation objectives* relate to legal obligations that must be met, aspirational targets can **not** be incorporated, nor can other non-Natura concerns (for example objectives relating to non-qualifying interests, landscape, access, interpretation, etc.) be included.

Deterioration and disturbance

Article 6.2 of the Habitats Directive sets out a fundamental obligation on Member States to take appropriate steps in relation to sites, to avoid "the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant". Articles 6.3 and 6.4 set out a process for assessing new *plans and projects* designed to help achieve this obligation. The obligation also relates to ongoing activities which, if likely to cause *deterioration or significant disturbance*, may require modification. *Conservation objectives* should be designed to achieve, as a minimum, the obligation in Article 6.2.

The baseline for assessing '*deterioration*' is normally the condition of the interest at time of formal identification of the site. However, for both natural and man-induced reasons, fluctuation in the population levels of qualifying species on sites very often occurs, particularly for birds. In these circumstances *deterioration* would be considered in relation to the contemporary population, while using the population at the time of the site's formal identification as a reference point and to judge trends. Although qualifying habitats are less liable to significant short-term

fluctuation in terms of their extent, the same approach is valid. The key components of an interest which require maintenance to avoid *deterioration* are helpfully defined by the components of *favourable conservation status* as incorporated in the conservation objectives.

What is 'significant disturbance'? Note that this particular factor is qualified by "significant". Not all disturbance will be significant and therefore the test is whether the disturbance is serious enough to adversely affect the species present, in particular their numbers, distribution, and capacity to maintain themselves on the site. Disturbance which is trivial, short term, or easily reversible will not be significant.

European site A *European site* is not a term found within either the Birds or Habitats Directives. It relates to the Habitats Regulations and is defined in regulation 10 (as amended) as:

- a Special Area of Conservation (SAC);
- a Special Protection Area (SPA);
- a site of community importance (SCI) agreed by the Commission under Article 4.2 of the Habitats Directive;
- a site included in a list of sites proposed under regulation 7(1) (known as candidate SACs in the UK); or
- a site hosting a *priority habitat* where, in exceptional cases, the Commission has found that a national list has omitted a site containing an outstanding *priority habitat type or species* and has initiated bilateral discussion with the Member State over this site.

The definition does not include proposed Special Protection Areas (pSPA), proposed Special Areas of Conservation (pSAC) or Ramsar sites. The main importance of *European site* status is that virtually all of the Habitats Regulations relating to sites are activated by a site reaching this stage. Prior to sites becoming *European sites* the majority of Regulations do not apply in Scotland and therefore a number of the actions required under the Directive are achieved for pSPA and pSAC through Government policy and guidance rather than by application of the Regulations. Note that some aspects of the Regulations cannot be applied through policy (e.g. removal of permitted development rights, amendment of existing consents) and are dependent on the site becoming a *European site*. However, it is sometimes possible to achieve similar results for pSAC and pSPA through other existing legislation.

Favourable conservation status (FCS) *Favourable conservation status (FCS)* is identified within the Habitats Directive in the following main areas:

Article 1 provides a definition of *FCS* for both habitats 1(e) and species 1(i).

Article 2.2: "Measures taken pursuant to this Directive shall be designed to maintain or restore at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest."

Article 3.1: "A coherent ... network of special areas of conservation shall be set up under the title of Natura 2000. This network, ... shall enable the natural habitat types and the species' habitats concerned to be maintained or where appropriate restored at a favourable conservation status in their natural range."

The term *favourable conservation status* is not employed in the Birds Directive. Instead there is a requirement in Article 2 that Member States "shall take the requisite measures to maintain the population of the species referred to in Article 1 at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level". Article 3.1 of the Birds Directive goes on to oblige Member States, in the light of the requirements of Article 2, to "take the requisite measures to preserve, maintain or re-establish a sufficient diversity and area of habitats for all the species of birds referred to in Article 1." [Article 1 refers to all naturally occurring birds in the wild state in the European territory of the Member States].

What is 'favourable conservation status'? *FCS* is achieved when a habitat or species throughout the European Union is maintained in size and range and the conditions for its long-term existence are in place. Where these are not met then restoration may be required

FCS is clearly intended to apply at the European Union level (see Article 1(e) for habitats; 1(i) for species). It is also apparent that the status of a habitat or species on each site will contribute to the coherence of the site network and to the status of the interest overall within the European Union.

At the site level, Article 6.2 (which applies to SPAs as well as SACs) sets out a clear requirement for sites that *deterioration and significant disturbance* of qualifying interests should be avoided. If this is achieved then coherence of the site network and contribution to *FCS* overall will be maintained. The Commission have indicated in their guidance⁴⁹ that a useful linkage between Article 6.2 and *FCS* can be made by using the parameters of *FCS* (defined in Article 1(e) for habitats and 1(i) for species) as a basis for determining *deterioration* or *disturbance*.

While *FCS* is not a term used in the Birds Directive, since SPA and SAC will come together to form a coherent network of Natura sites, then the interpretation of the ecological components of Article 2, and also Article 3.1, of the Birds Directive may usefully be informed by the more detailed definitions of *FCS* in the Habitats Directive.

The relevance of *FCS* to the Birds Directive is reinforced by the Environmental Liability Directive⁵⁰ which specifically relates the concept of *FCS* to species, among others, listed in the Birds Directive and their supporting habitats. The definition of 'environmental damage' in the

⁴⁹ [European Commission \(2000\). Managing Natura 2000 Sites: The provisions of Article 6 of the Habitats Directive 92/43/EEC. Office for Official Publications of the European Communities, Luxembourg](#)

⁵⁰ [Directive 2004/35/CE on environmental liability with regard to the prevention and remedying of environmental damage](#)

Environmental Liability Directive includes any damage to protected species and natural habitats that "...has significant adverse effects on reaching or maintaining the *favourable conservation status* of such habitats or species". The definition of 'protected species and natural habitats' includes species listed in Annex I of the Birds Directive, or mentioned in Article 4.2 of the Birds Directive (regularly occurring migratory species), and the supporting habitats of those species.

Imperative reasons of overriding public interest

Article 6.4 of the Habitats Directive (and regulation 49 of the Habitats Regulations) makes provision for certain *plans or projects* to proceed despite them having an adverse effect on the *integrity* of a *European site* (both SAC and SPA) and where there are no *alternative solutions*. Such plans can only proceed if there is a valid argument of "imperative reasons of over-riding public interest, including those of a social or economic nature". Where *priority* qualifying interests are involved these reasons can only relate to human health, public safety, or to beneficial consequences of primary importance for the environment. Other *imperative reasons of overriding public interest* may be considered in these circumstances, subject to an opinion from the European Commission. See stages 8 and 9 of this guidance for further details.

Habitats Regulations Appraisal

The term commonly used to describe the process of assessment under *Article 6(3)* of the Habitats Directive and regulation 48 of the Habitats Regulations.

In combination

Article 6.3 requires that "Any *plan or project ... likely to have a significant effect... either individually or in combination* with other *plans or projects* shall be subject to an *appropriate assessment*". This applies to all Natura sites, both SAC and SPA. This requirement is carried through into the Habitats Regulations.

While an individual project is self-explanatory, it is less clear what factors can be taken into account when determining '*in combination with*'. The European Commission gives helpful guidance⁵¹ in this matter. They advise that the underlying intention of this provision is to take account of cumulative impacts. Cumulative impact can consist of projects undertaken over a period of time or several *plans or projects* all at the same time, or both.

Integrity of a site

Article 6.3 of the Habitats Directive requires that any proposed *plan or project* can only be agreed by national authorities after having ascertained "that it will not adversely affect the integrity of the site concerned". See definition in section 4.1 of this guidance.

⁵¹ [European Commission \(2000\). Managing Natura 2000 Sites: The provisions of Article 6 of the Habitats Directive 92/43/EEC. Office for Official Publications of the European Communities, Luxembourg](#)

Likely significant effect	See definition given under stage 3 of this guidance. In essence this means that where there is doubt over whether a significant effect is likely or not, and there is clear connectivity between the proposed <i>plan or project</i> and the qualifying interest(s) of the Natura site in terms of the <i>conservation objectives</i> , an <i>appropriate assessment</i> should be carried out.
Mitigation	The term ' <i>mitigation</i> ' does not occur either in the Directives or the Habitats Regulations. ' <i>Mitigation</i> ' relates to the consideration of <i>plans and projects</i> under <i>Article 6.3</i> of the Habitats Directive and regulation 48 of the Habitats Regulations. Where a <i>plan or project</i> is <i>likely to have a significant effect</i> upon qualifying interests or an adverse effect upon the <i>integrity</i> of a site, but this can be eliminated by modifications to the proposal, or by insertion of conditions (for example, timing of implementation), then these fall under the term of ' <i>mitigation</i> '. Such <i>mitigation</i> can occur within or outwith the site. Not to be confused with <i>compensatory measures</i> . See section 8.4 of this guidance.
Plan or project	<p>The European Commission guidance⁵² and caselaw⁵³⁵⁴ indicates that the definition of a <i>plan or project</i> should be given a broad interpretation. The Habitats Directive does not limit the scope of either <i>plan or project</i> by reference to particular categories.</p> <p>The term '<i>project</i>' should be taken to include both construction works and other interventions in the natural environment. For example, a significant intensification of agricultural use could constitute a <i>project</i> under this interpretation.</p> <p>Similarly, the term '<i>plan</i>' has a very broad meaning. Of obvious relevance are land use plans, both those which have direct legal effects for the use of land, and those which are applied indirectly. An example of the latter would be a regional spatial plan which could form the basis for more detailed plans, or serve as a framework for development consents.</p> <p>Sectoral plans, such as transport network plans, waste management plans and water management plans, also come within the scope of <i>Article 6.3</i>, again in so far as they are <i>likely to have a significant effect</i> on a Natura site.</p> <p>General policy statements should not generally be considered as plans or projects, especially if any initiatives deriving from such statements must pass through the intermediary of a land use or sectoral plan. However, where the link between the content of such an initiative and <i>likely significant effects</i> on a Natura site is very clear and direct, <i>Article 6.3</i> should be applied.</p>

⁵² [European Commission \(2000\). Managing Natura 2000 Sites: The provisions of Article 6 of the Habitats Directive 92/43/EEC. Office for Official Publications of the European Communities, Luxembourg](#)

⁵³ European Court of Justice judgement in case C-127/02 "Waddenzee"

⁵⁴ R. (on the application of Akester) v Department for Environment, Food and Rural Affairs (Case No. CO/1834/2009) [2010] EWHC 232 (Admin) "Wightlink",

Priority habitats and species

Article 1 of the Habitats Directive sets out the purpose of the Directive. It identifies at 1(d) *priority* natural habitat types as those "in danger of disappearance ... and for the conservation of which the Community has particular responsibility". *Priority* species are also defined in Article 1(h) as endangered species for the conservation of which the Community has particular responsibility.

Article 6.4 of the Habitats Directive and regulation 49 of the Habitats Regulations set out a process whereby a *plan or project* which will have an adverse effect on a Natura site may be carried out for *imperative reasons of over-riding public interest*. The Article states that where a site hosts a *priority* habitat or species, the only considerations which may be raised relate to human health or public safety; beneficial consequences to the environment; or other imperative reasons agreed with the European Commission.

Please note that there are major typographical errors in the Scottish Executive guidance on the Implementation in Scotland of the Habitats and Birds Directives⁵⁵ which identifies erroneously a number of habitats and species as '*priority*' which are not. It should be noted that there are **no *priority* species** occurring as qualifying interests of any SAC in Scotland; species such as otter, wild cat, and bottlenose dolphin are all non-priority. **No bird species**, including those listed on Annex I of the Birds Directive, has *priority* status in the context of the Habitats Directive. [A list of *priority* habitats which are qualifying interests on sites in Scotland is available on the SNH website](#)⁵⁶. See stage 7 of this guidance for further details.

Review of consents

This is not a specified requirement of the Directives. However, given the obligation upon Member States in Article 6.2 of the Habitats Directive, there may be certain ongoing activities which were permitted prior to the site being identified which, if allowed to continue, are likely to adversely affect the *integrity of a site*. Accordingly, the Habitats Regulations make provision for *review of consents* in certain circumstances.

All *competent authorities* are required to review consents for which they are responsible. The main duty to review existing decisions and consents is set out in regulation 50 of the Habitats Regulations.

⁵⁵ Nature Conservation: Implementation in Scotland of EC Directives on the Conservation of Natural Habitats and of Wild Flora and Fauna and the Conservation of Wild Birds ('The Habitats and Birds Directives') (Revised Guidance Updating Scottish Office Circular No.6/1995), Scottish Executive, June 2000. Not presently available.

⁵⁶ eRDMS reference is [here](#).