

Development, Natura sites and Habitats Regulations Appraisal (HRA)



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Protected Areas and Surveillance Activity Team

Outline

- Background
 - What is Natura?
 - Why is it important?
 - Who has responsibilities?
 - What are they?
- HRA & Casework
 - Sources of essential information
 - Preparation
 - The HRA process – from screening to appropriate assessment



Background to Natura

EU Directives

Birds Directive (originally 1979) – **SPAs**

Habitats Directive (1992) – **SACs** (and **EPS**)

Creates a Europe-wide network of protected areas and was implemented due to recognition that:

- Many natural habitats are deteriorating;
- Species are threatened; and
- Problems are often trans-boundary

Protect only the most valuable areas of ecological importance.



SPAs: Birds

Approximately **160** SPAs in Scotland.

Selection was mainly based on:

numbers of birds of a species (or a group of species such as *waterfowl* or *seabirds*) **using an area regularly** (either in summer for breeding, and/or winter for ‘overwintering’).

Bird species protected by this Directive will have one or more sites where they are a ‘**qualifying feature**’ (QF) of that site.



SACs: Habitats and species

Approximately **240** SACs in Scotland.

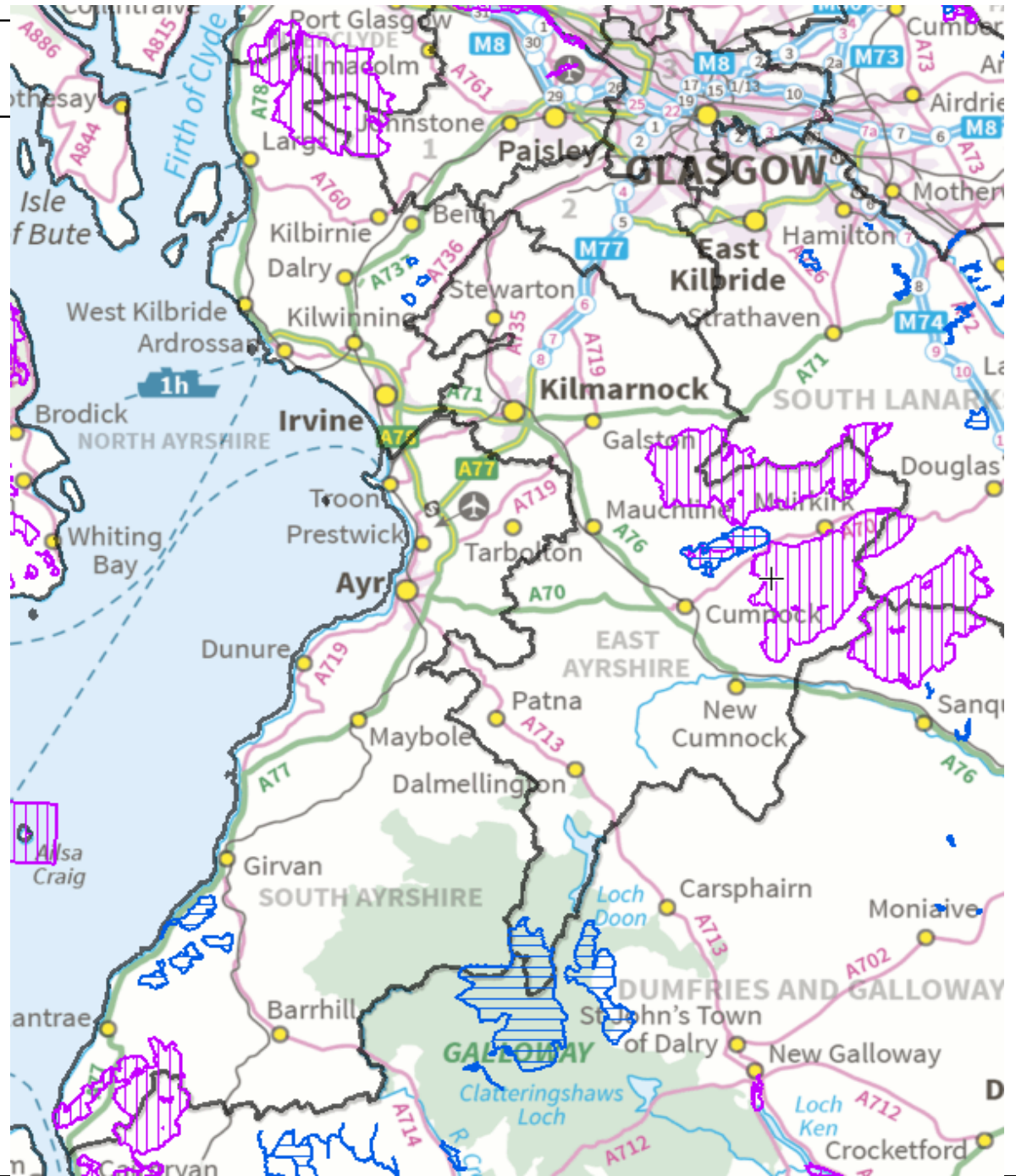
Protects **56 habitat types**: e.g. bogs, heath, mudflats, rivers; and

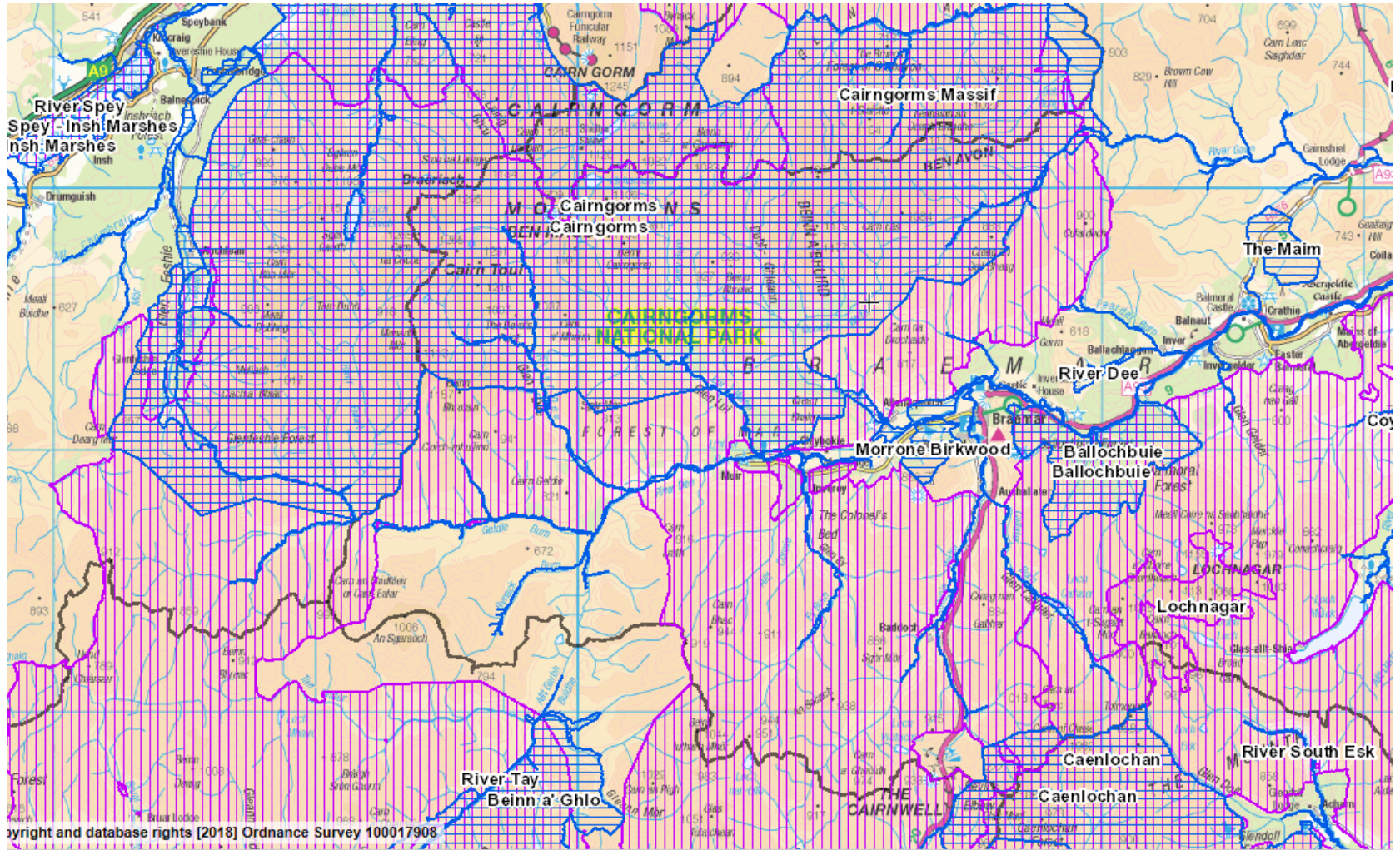
18 species: e.g. mosses, butterflies, fish, otter





Scottish Natural Heritage





Points to note

All QFs are treated as equally important.

Sea lamprey or Killarney fern are as important as golden eagles or bottlenose dolphins.



Conservation Objectives

(Essential central component of the procedure)

To avoid deterioration of the habitats of the qualifying species (listed below) or significant disturbance to the qualifying species, thus ensuring that the integrity of the site is maintained; and

To ensure for the qualifying species that the following are maintained in the long term:

- Population of the species as a viable component of the site
- Distribution of the species within site
- Distribution and extent of habitats supporting the species
- Structure, function and supporting processes of habitats supporting the species
- No significant disturbance of the species



A rigorous process...

- No artificial/automatic geographical limits
- Embedded **precautionary principle** in the legislation
- Applies to **all** plans and projects (PD suspended)
- Overrides balancing duties
- **Reverses** the usual planing presumption in favour of development
- Requires the competent authority to be **certain** about a lack of effects when making decisions
- AA conclusion is **legally-binding**



Who does what and why?

Any authority – national or local – which is empowered to consent a proposal, or to carry out work which may affect a Natura site is a **Competent Authority**.

It includes **all**:

- Government departments
- Public or statutory undertakers
- Public bodies of any description
- Or person holding a public office



Competent Authorities' role

Regulation 3(3)

“... every competent authority in the exercise of any of their functions, shall have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions.”

Regulation 48(1)

“A competent authority, before deciding to undertake or give any consent... for a plan or project which:

- (a) Is likely to have a significant effect on a European site (either alone or in combination...) and*
- (b) Is not directly connected with or necessary to the management of the site*

Shall make an appropriate assessment of the implications for the site in view of that site's conservation objectives.”



Applicant's role

Developers / proposers are required to provide sufficient information to the CA.

Regulation 48(2)

“A person applying for any such consent... shall provide such information as the competent authority may reasonably require for the purpose of the assessment.”

EC guidance on wind energy (para 5.1)

*“Delays during the decision-making process are often caused by the **lack of information, or poor quality assessments** that do not allow the competent authority to make a clear judgement.”*



SNH's roles

- 1. To advise competent authorities** – legally required to be consulted at appropriate assessment stage and legally required to provide advice to the competent authority.
- 2. Sometimes act as a competent authority** – e.g. SSSI consents.

Regulation 3(1)

SNH must “*exercise their functions... so as to secure compliance with the requirements of the Directives.*”



HRA jargon

Peculiar, precautionary and precise...

‘**Likely**’ does not mean ‘probably’

‘**Significant**’ does not mean ‘notable’ or ‘of importance’

Appropriate assessment test is precise – is there ‘no
adverse effect on site integrity’

Do not approximate, adapt or change HRA phrases

Don’t combine or mix jargon of the two main phases of
assessment (the LSE and appropriate assessment stages)



The HRA procedure

3 sequential tests for all plans and projects

1. Is the proposal directly connected with the conservation management of the site?
2. **Is it likely to have a significant effect (LSE) on a Natura site (alone or in-combination)?**
3. Can it be ascertained that it will not adversely affect the integrity of the site?



Likely Significant Effect (LSE)

Checking for LSE

1. The full test is ***“alone, or in-combination”***
2. Plans and projects outside the area in question often need considering
3. Record all decisions and your reasoning
4. Every site should be treated individually – “significance” varies between sites, between QFs and according to the details of the proposal.



LSE: (mis)understanding it

Is the proposal ‘likely to have a significant effect’ on a Natura site, alone or in combination?

1. 1st real HRA stage to deal with
2. A misunderstood, sometimes messy stage
3. It is a relatively simple, but very precautionary screening of the potential impacts of a proposal
4. It's *raison d'être* is to remove proposals which have no ecological connection to a Natura site



LSE: (mis)understanding it

CJEU Waddenzee case

“any plan or project is to be subject to an Appropriate Assessment... **if it cannot be excluded** on the basis of objective information that it will have a significant effect on that site, either alone or in combination”

“where a plan or project... is likely to undermine the site’s conservation objectives, it must be considered likely to have a significant effect on that site”



LSE: (mis)understanding it

CJEU Sweetman case

“... in the English-language version... the words ‘likely significant effect’ may immediately bring to mind the need to establish a degree of probability... The expression used in other language versions is weaker”

“Each of those versions suggests that the test is set at a lower level and that the question is simply whether the plan or project is capable of having an effect. It is in that sense that the English ‘likely to’ should be understood”



LSE: (mis)understanding it

Sweetman case contd.:

“It follows that the *possibility* of there being a significant effect on the site will generate the need for an appropriate assessment... There is no need to *establish* such an effect; it is, as Ireland observes, merely necessary to determine that there *may* be such an effect”

Commission guidance on Natura and wind energy (5.3.1)

“... it is worth recalling that the initial screening... 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”

Summary of (mis)understandings

1. Deciding that there is a LSE is **not a calamity**
2. It should be a relatively **simple**, precautionary decision
3. The screening provides **scope** for any appropriate assessment
4. The **COs** should help: e.g. 'significance'
5. ~~Check to see if any mitigation measures could remove the possibility of the effect~~



‘In-combination’

- Recognises that multiple proposals coming forward over time, that do not have LSE alone, might have an LSE together.
- Combinations of many small effects (whether insignificant, or unlikely, or both), can be as damaging as one large proposal. **Minor Residual Effects (MRE).**
- The protective measures in the Directive could be seriously undermined if these effects escaped appraisal.

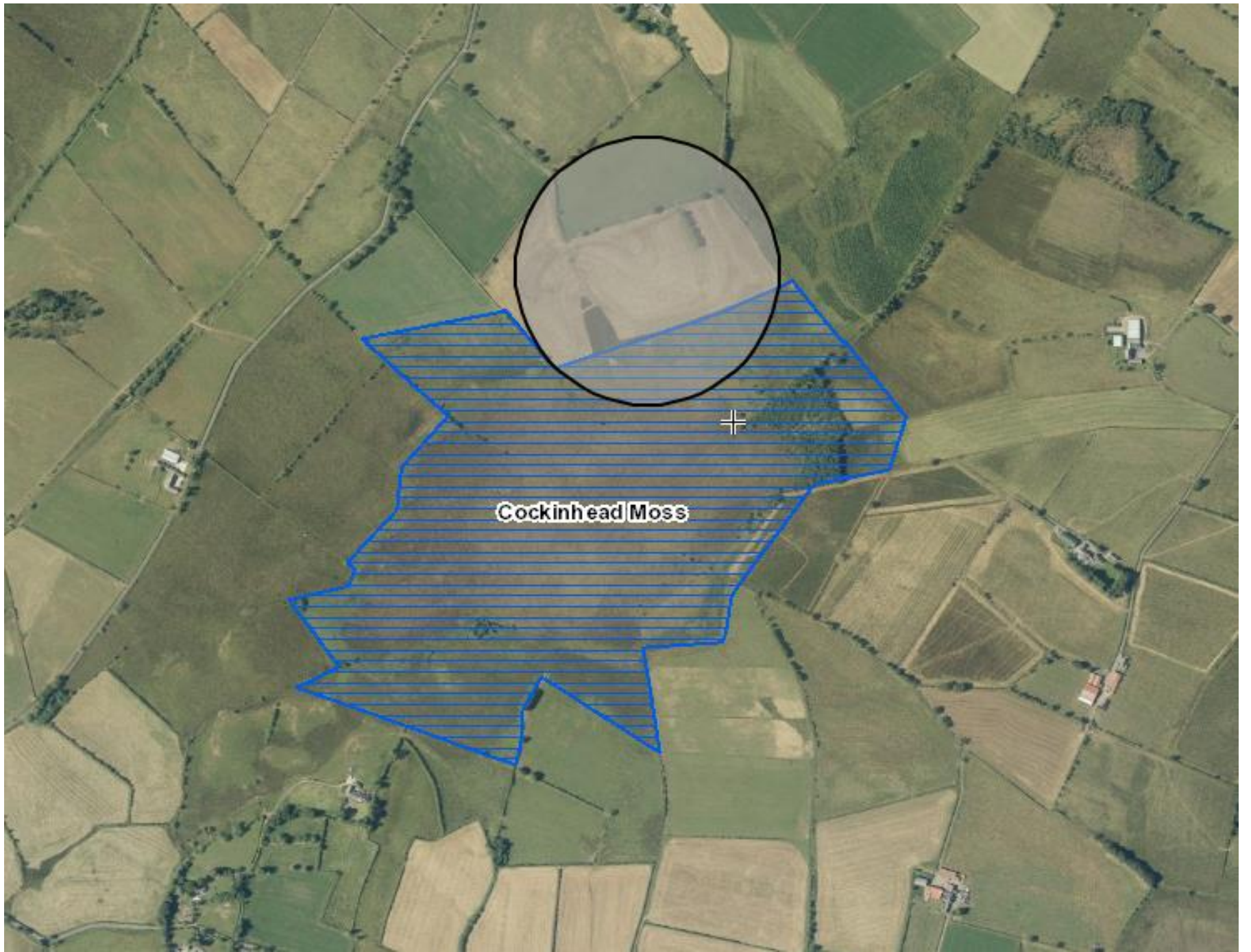


Mitigation at the LSE stage

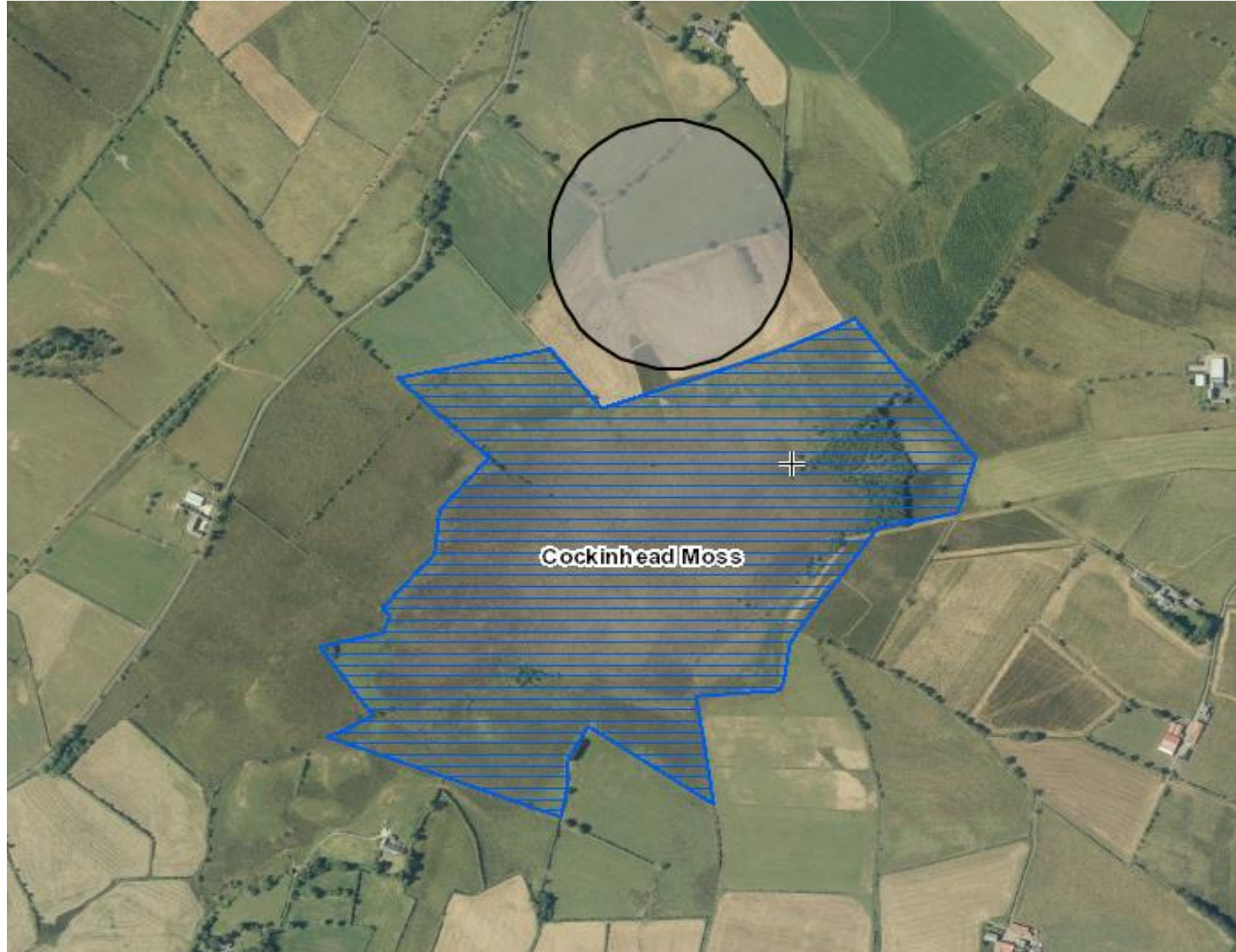
CJEU Sweetman case – the return... ‘People over Wind’

“... in order to determine whether it is necessary to carry out, subsequently, an appropriate assessment of the implications, for a site concerned, of a plan or project, **it is not appropriate, at the screening stage, to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on that site.**”



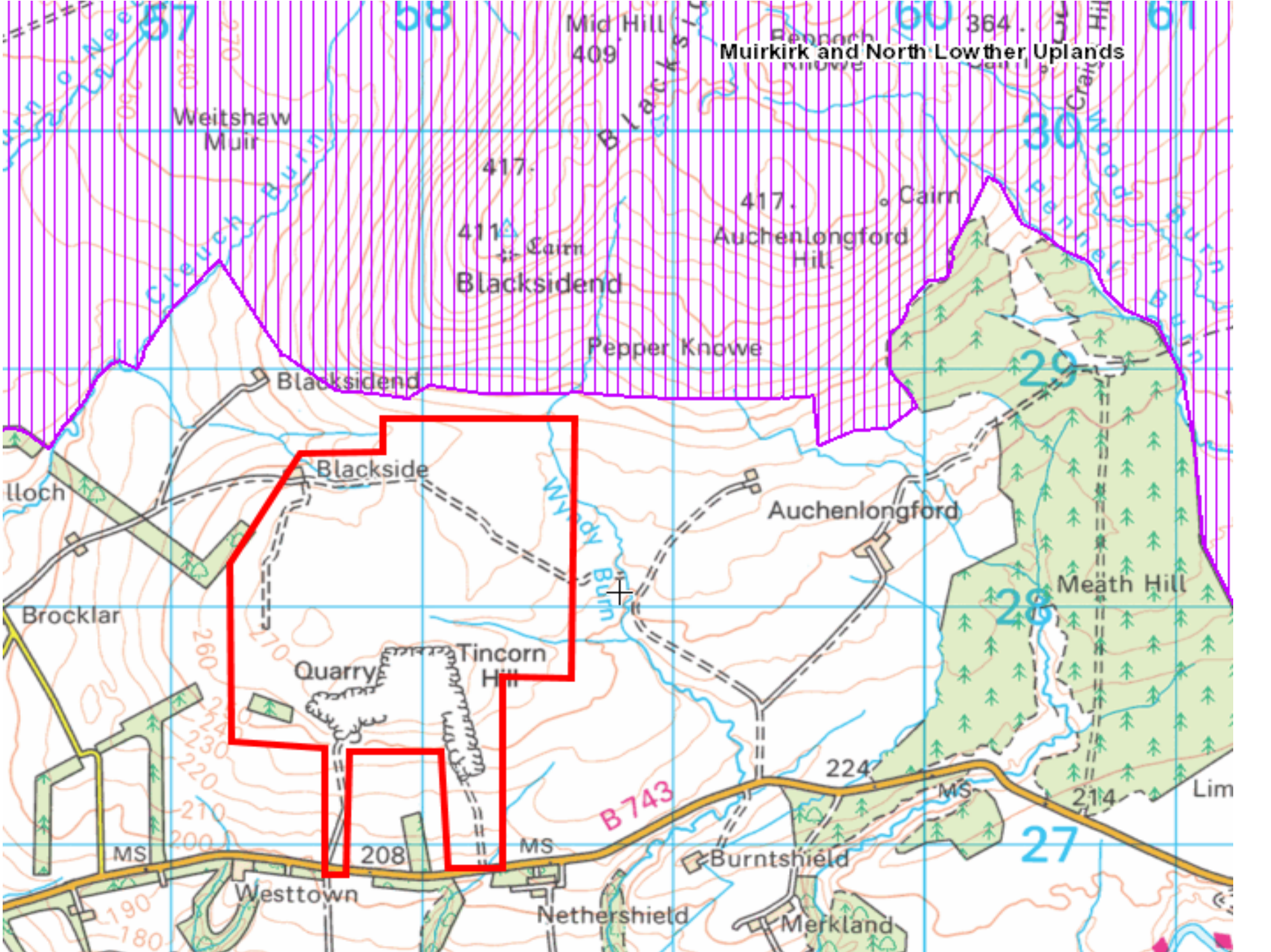


Cockinhead Moss



Cockinhead Moss

Muirkirk and North Lowther Uplands



Weitshaw Muir

Mid Hill
409

417
411 Cairn
Blacksidend

417
Auchenlongford Hill

Cairn

Pepper Knowe

Blacksidend

Blackside

Auchenlongford

Meath Hill

Quarry

Tincorn Hill

Brocklar

Westtown

Nethershield

Burntshield

Merkland

Lim

B743

208

224

214

MS

MS

MS

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[Casework](#)

Muirkirk and North Lowther Uplands SPA

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4 ▼

Golden plover (*Pluvialis apricaria*), breeding

Birds

Negative Pressures	Latest Assessed Condition
– Burning	Unfavourable Declining
– Climate Change	30 Jun 2015
– Forestry operations	
– Under grazing	

Hen harrier (*Circus cyaneus*), breeding

Birds

Negative Pressures	Latest Assessed Condition
– Agricultural operations	Unfavourable Declining
– Burning	20 Jul 2008
– Game/ fisheries management	
– Over grazing	

Hen harrier (*Circus cyaneus*), non-breeding

Birds

Negative Pressures	Latest Assessed Condition
– Other	Unfavourable Declining
	02 Dec 2004

Merlin (*Falco columbarius*), breeding

Birds

Negative Pressures	Latest Assessed Condition
– Agricultural operations	Unfavourable No change
– Burning	25 Jul 2009
– Forestry operations	
– Game/ fisheries management	



The HRA procedure – recap

3 sequential tests for all plans and projects

1. Is the proposal directly connected with the conservation management of the site?
2. Is it likely to have a significant effect (LSE) on a Natura site (alone or in-combination)?
3. **Can it be ascertained that it will not adversely affect the integrity of the site?**



Appropriate assessment; obligations

1. Habitats Directive, Article 6.3 & Regulation 48.1: *“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**”*
2. *“the authority shall agree... only after having ascertained that it [the proposal] will not adversely affect the integrity of the site”*. (Might need mitigation).
3. Formal binding conclusion after the assessment is required from the competent authority re. the absence of adverse effects.



What's appropriate, and what is assessed?

- **'Appropriate'** means fit for the task – no set formula
- The task is to answer a very specific question
- Must use the site's Conservation Objectives
- All impacts that are **'likely to have a significant effect'** (whether alone or in-combination) must undergo an appropriate assessment
- Screening for LSE therefore provides a **focus** for the appropriate assessment



‘Certainty’ and ‘site integrity’

The question:

“Can it be ascertained that the proposal will not adversely affect the integrity of the site?”

- Must use the COs to help reach your decision
- Existing presumption is in favour of development, unless material considerations outweigh the benefits of the development. However...
- **Natura legislation only allows development if it can be ascertained that the integrity of the Natura site will not be adversely affected.**



What is the integrity of the site?

“The integrity of a site is the coherence of its ecological structures 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”

(revised Circular 6/1995)



Lendalfoot Hills Complex SAC

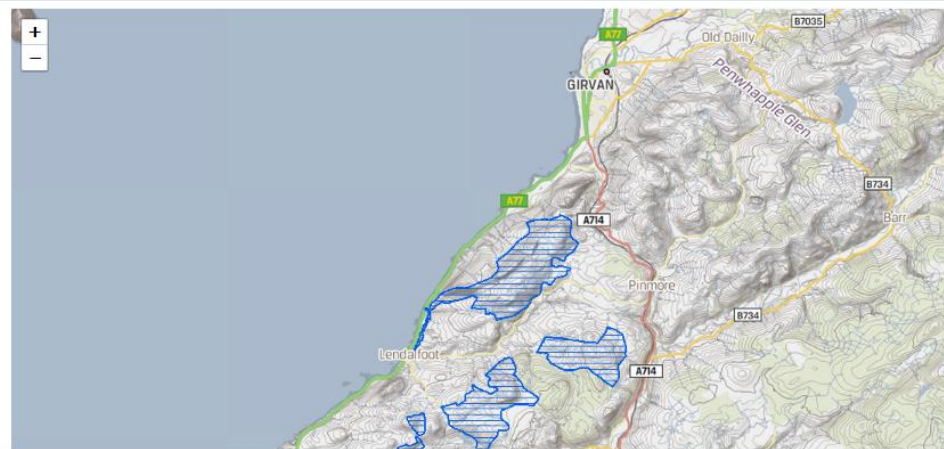
Overview

Details

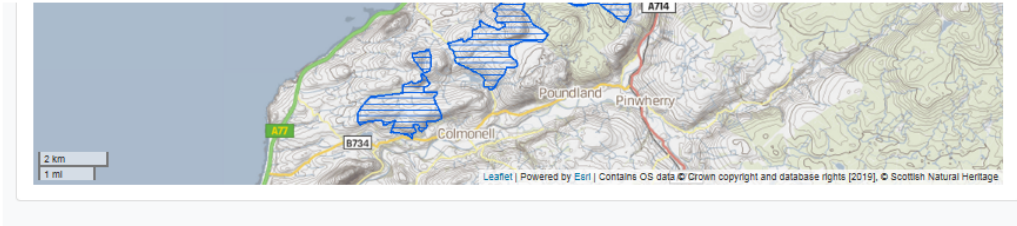
Designation Special Area of Conservation ?	Designation Status Current
Lead SNH Area Strathclyde & Ayrshire ?	Local Authority South Ayrshire
Last Designated 17 Mar 2005	SNH Site Code 8288
Documented Area 1308.02 ha	EU Site Code UK0013592

Documents & Links

- SAC Qualifying Interest List [?](#)
- Conservation Objectives [?](#)
- SAC Map [?](#) 2.7Mb
- Scotland's Environment - Feature Condition [?](#)
- JNCC SAC Site Details [?](#)
- JNCC SAC Data Form [?](#)



Lendalfoot Hills Complex SAC



Features

Assessments are sent to owners and occupiers. Contact your [local office](#) for more info.

Filter features 1 to 4 of 6 features 4

<p>Base-rich fens</p> <p>Upland habitat</p> <table border="0"> <tr> <td>Negative Pressures</td> <td>Latest Assessed Condition</td> </tr> <tr> <td>- Burning</td> <td>Unfavourable Recovering</td> </tr> <tr> <td></td> <td>13 Jul 2006</td> </tr> </table>	Negative Pressures	Latest Assessed Condition	- Burning	Unfavourable Recovering		13 Jul 2006	<p>Dry heaths</p> <p>Upland habitat</p> <table border="0"> <tr> <td>Negative Pressures</td> <td>Latest Assessed Condition</td> </tr> <tr> <td>- Burning</td> <td>Unfavourable Declining *</td> </tr> <tr> <td>- Invasive species</td> <td>18 Jul 2002</td> </tr> <tr> <td>- Over grazing</td> <td></td> </tr> </table> <p>* Management measures are in place that should, in time, improve the feature to Favourable condition (Unfavourable Recovering Due to Management)</p>	Negative Pressures	Latest Assessed Condition	- Burning	Unfavourable Declining *	- Invasive species	18 Jul 2002	- Over grazing	
Negative Pressures	Latest Assessed Condition														
- Burning	Unfavourable Recovering														
	13 Jul 2006														
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<p>Grasslands on soils rich in heavy metals</p> <p>Upland habitat</p> <table border="0"> <tr> <td>Negative Pressures</td> <td>Latest Assessed Condition</td> </tr> <tr> <td>- Over grazing</td> <td>Unfavourable Declining *</td> </tr> <tr> <td></td> <td>03 Jun 2003</td> </tr> </table> <p>* Management measures are in place that should, in time, improve the feature to Favourable condition (Unfavourable Recovering Due to Management)</p>	Negative Pressures	Latest Assessed Condition	- Over grazing	Unfavourable Declining *		03 Jun 2003	<p>Species-rich grassland with mat-grass in upland areas</p> <p>Upland habitat</p> <table border="0"> <tr> <td>Negative Pressures</td> <td>Latest Assessed Condition</td> </tr> <tr> <td>- Over grazing</td> <td>Unfavourable No change</td> </tr> <tr> <td>- Under grazing</td> <td>13 Jul 2008</td> </tr> </table>	Negative Pressures	Latest Assessed Condition	- Over grazing	Unfavourable No change	- Under grazing	13 Jul 2008		
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- Over grazing	Unfavourable No change														
- Under grazing	13 Jul 2008														



Lendalfoot Hills Complex SAC

Agreements

Agreement 6832

SSSI Agreement (S.15)
Knockbain Farm

Scheme	Term
n/a	5 years
Area	Expiry
13.7 ha	31 Dec 2019

Casework

Filter cases 1 to 6 of 40 cases 6

<p>Case GEN135420 20 Feb 2015</p> <p>General Advice Advice only</p>	<p>Case GEN129437 19 Feb 2014</p> <p>General Advice Advice only</p>
<p>Case CDM133735 22 Oct 2014</p> <p>Planning Application Conditioned objection</p>	<p>Case ALC134642 22 Dec 2014</p> <p>SSSI Consent (s.13 or s.16) SSSI Consent Given</p>
<p>Case CDM131683 27 Jun 2014</p> <p>Planning Application Holding objection</p>	<p>Case CLC148820 04 Jan 2018</p> <p>SSSI Consultation (s.15 - from a regulatory authority) Advice only</p>



Site integrity – summary

- always be a matter for scientific judgement
- will depend on a number of factors which vary from case to case
- essential that judgement is reasoned, properly exercised and recorded throughout



Mitigation in HRA

What is mitigation?

What can it consist of?

What is not mitigation?

What are “compensatory measures”?



Fail the site integrity test yet still want to approve?

Two sequential tests to apply (Article 6.4):

1. CA must be satisfied there are **no alternative solutions**
2. CA must examine the existence of any **imperative reasons of overriding public interest (IROPI)**.

If both tests are passed, then consent can be given.

(Priority qualifiers have stricter IROPI conditions).



Compensatory measures

- Compensatory measures must be secured by Ministers to maintain ecological coherence. SNH likely to advise.
- These should offset the negative impact(s) on the species or habitat concerned.
- Shouldn't include measures required for the normal implementation of the Directives (e.g. implementing a management plan).
- Can include designating a new site, extending the same or a different site, or restoring non-qualifying habitat to qualifying habitat status.
- Should be in place before damage occurs.



Case example – IROPI: Clyde Valley Woods SAC (priority habitat)



Clyde Valley Woods SAC case

- Concerns over slippage of slope above the SAC
- Application was to stabilise slope to protect West Coast mainline
- HRA supporting original documentation concluded loss of SAC habitat (c.1 ha)
- SNH's initial appraisal showed the case was probably going to fail its HRA test of 'no AESI'
- Discussions were held





Clyde Valley Woods SAC case

- Initial site meeting with Network Rail to look at and discuss the proposed work
- Had discussions with North Lanarkshire Council about the consenting process and SNH's likely advice on the outcome of an HRA
- Full meeting with Network Rail, consultant and Council staff
- Worked internally and with Council to produce a package of workable compensatory measures to pass on to Ministers (to be funded by Network Rail)



Clyde Valley Woods SAC case – documentation

- HRA including appropriate assessment (still necessary)
- ‘Alternatives’ paper
- IROPI rationale
- Construction Method Statement (‘Works Package Plan’)
- Compensatory measures
- Habitat Management Plans – for compensatory area
(Soil Management Statement for affected area)
- Section 69 agreement



Other stuff...

Permitted development

Activities / development considered to be ‘permitted development’ must still undergo, and pass, the HRA tests before going ahead.

Review of consents

“Where... a competent authority have decided to undertake, or have given, any consent, permission, or other authorisation for a plan or project to which Regulation 48(1) would apply... the authority shall **as soon as reasonably practical** review their decision, or as the case may be, consent permission or other authorisation, **and shall affirm, modify, or revoke it.**”



Recap of HRA

- Wide-ranging responsibilities on all Competent Authorities
- Natura is important, the sites are valuable
- There are HRA processes that must be followed, reasoned through, and recorded
- Early engagement is key
- HRA is not an unsurpassable barrier to development, but it is usually best to seek alternatives if a proposal is likely to fail the tests
- The LSE and AA tests are very precautionary

Benefits of a (good) HRA

- Early start should help identify mitigation, which can avoid unnecessary, abortive, and expensive work.
- Essential audit trail demonstrates compliance. Project more robust, CA's decisions less 'challengeable'.
- Strong, useful foundation for subsequent HRAs.
- **Protecting Natura sites through HRA helps demonstrate and ensure the 'sustainable' part of *"sustainable economic development"*.**



The end

