

Development, Natura sites and Habitats Regulations Appraisal (HRA)



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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 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

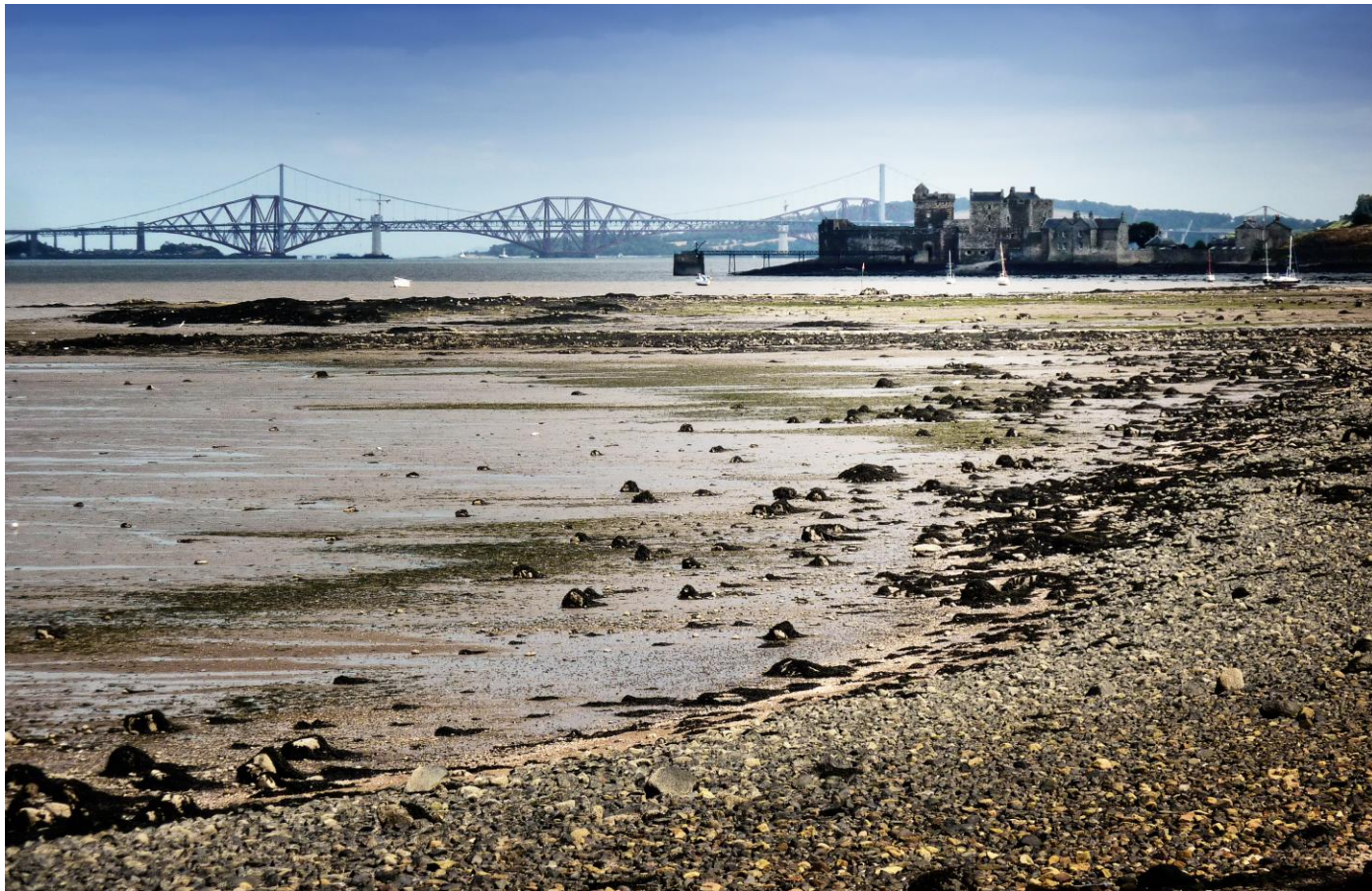
Approximately **240** SACs in Scotland.

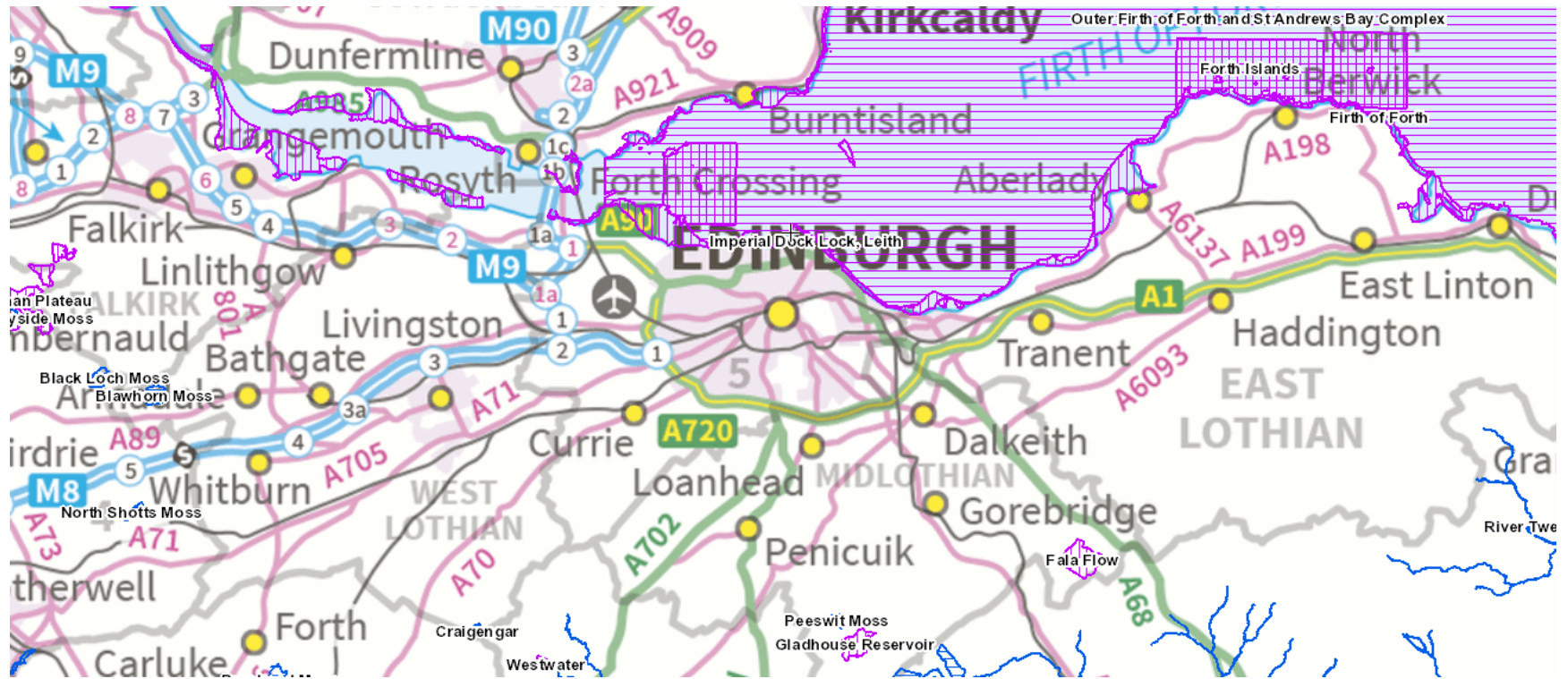
Protects:

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

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







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 HRA

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 planning 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?

Competent Authority:

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**.

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’
- AA test is precise – is there ‘no adverse effect on site integrity’?
- Do not approximate, adapt, or change HRA phrases.
- Do not combine or mix jargon of LSE and AA 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?



HRA of Plans

The screening process has three key steps:

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

<https://www.nature.scot/sites/default/files/2018-09/Habitats%20Regulations%20Appraisal%20of%20Plans%20-%20plan-making%20bodies%20in%20Scotland%20-%20Jan%202015.pdf>



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; for Competent Authority 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 there is a LSE is **not a calamity**
2. It should be a **simple, precautionary decision**
3. The check for LSE provides **scope** for the appropriate assessment
4. The **COs** will help you: e.g. re ‘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.
- Can get very messy very quickly.

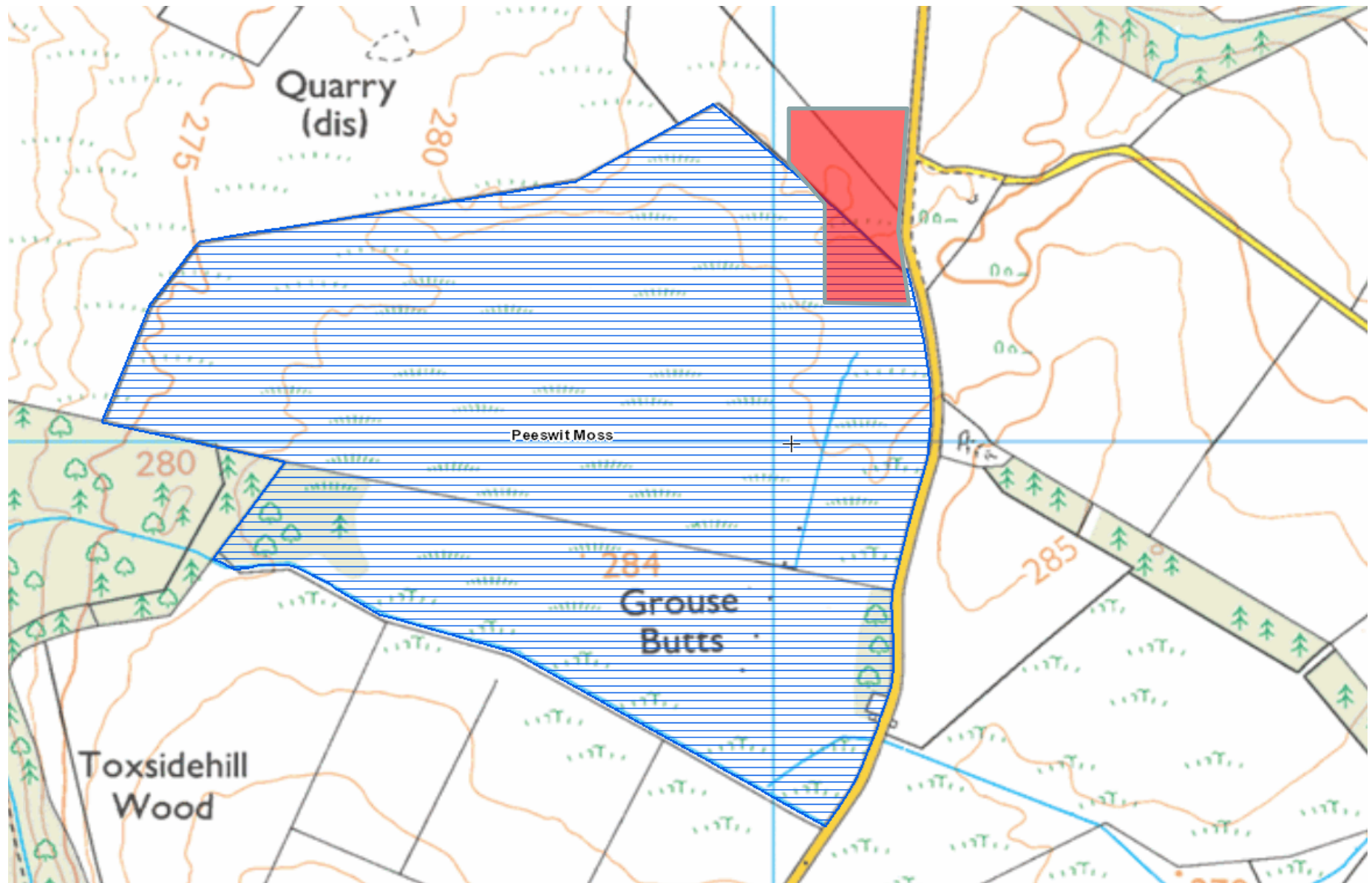


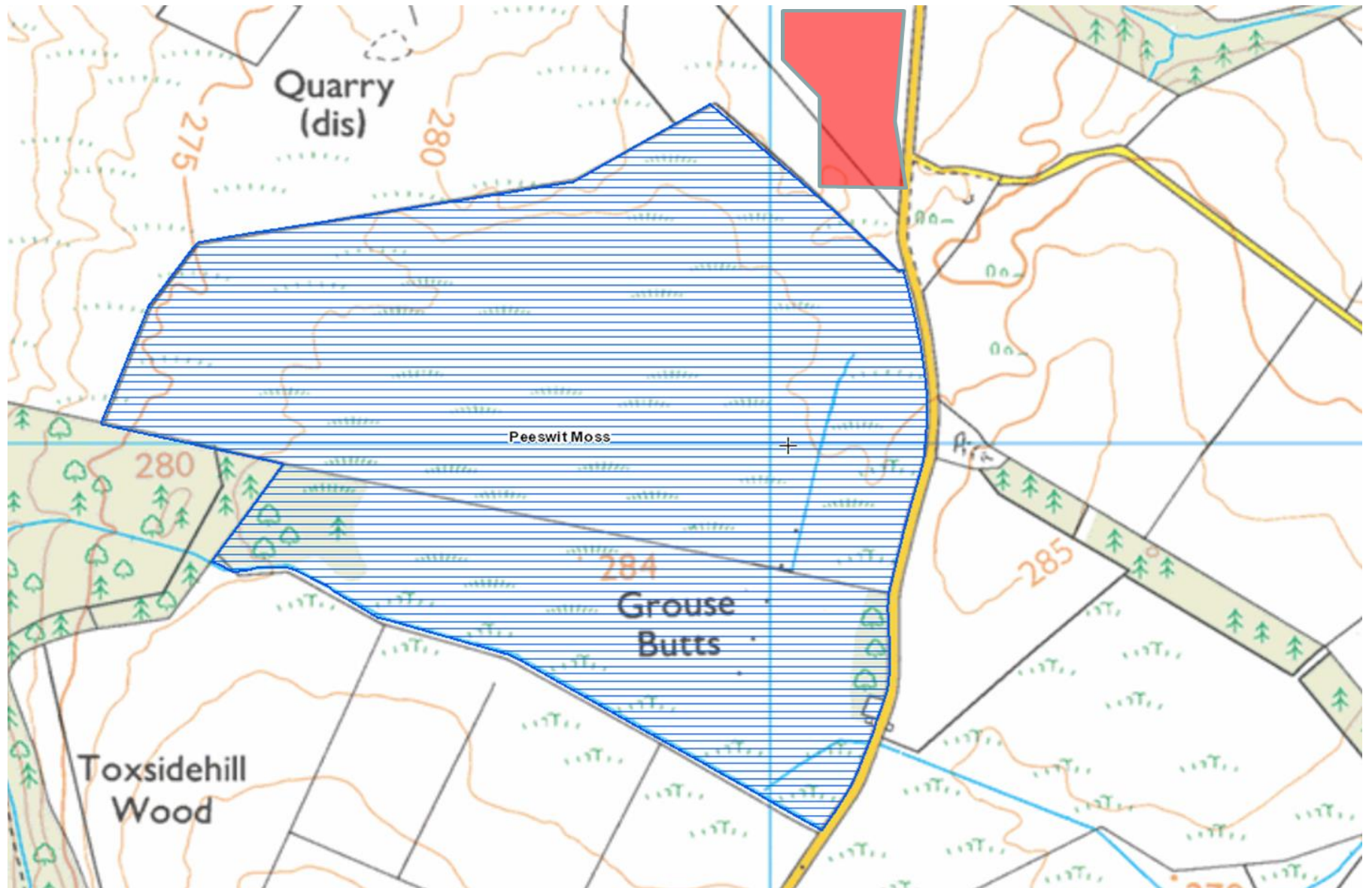
Mitigation at the LSE stage

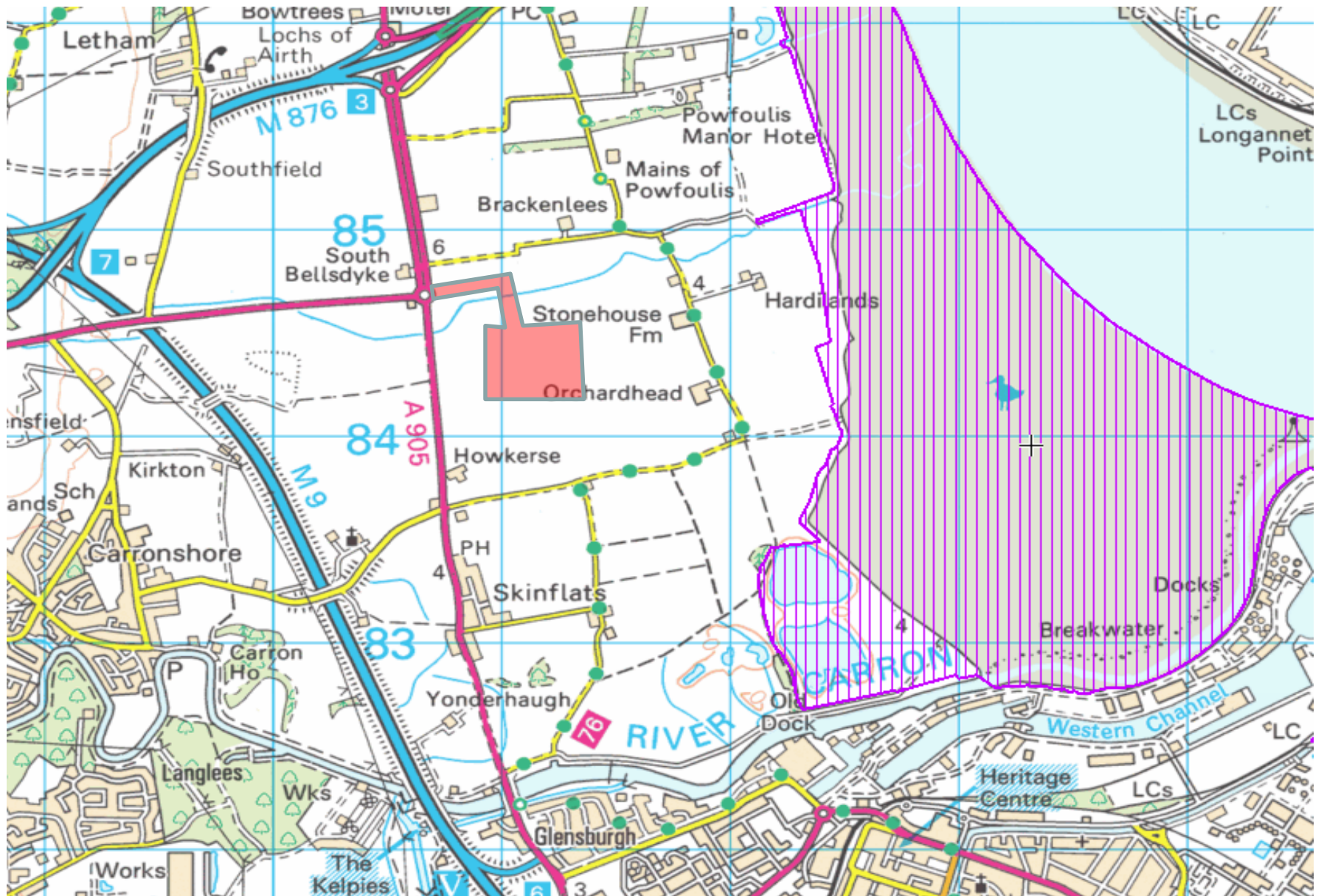
CJEU ‘People over Wind’ case, 2018.

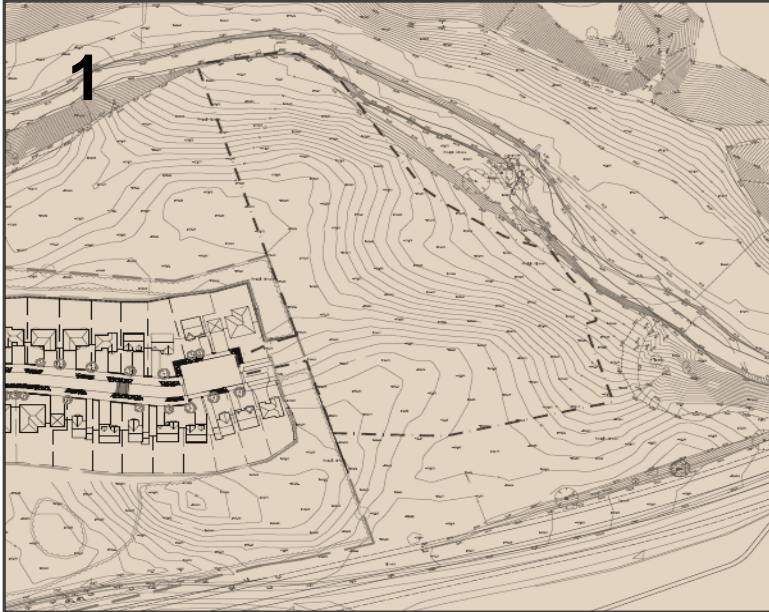
“... in order to determine whether it is necessary to carry out, subsequently, an appropriate assessment of the implications, for a site concerned, of a plan or project, **it is not appropriate, at the screening stage, to take account of the measures intended to avoid or reduce the harmful effects of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











- 3 Policy BU16 - Motor Vehicle Sales and Services**
Motor vehicle sales or service areas will be directed to industrial parks or other key commercial sites adjoining main roads within settlement boundaries; and provided access, servicing and any associated processes can be accommodated without resulting in any unacceptable impact on road safety, residential or visual amenity.



Key points for HRA of plans

Early engagement: problems can result from ignoring or delaying it.

Screening for LSEs can be time-consuming.

In-combination effects; use SG Databank.



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?**



HRA of Plans

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

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

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



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:

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

- Must use the site's Conservation Objectives
- All impacts that are '**likely to have a significant effect**' (whether alone or in-combination) are assessed
- Screening for LSE therefore provides a **focus** for the appropriate assessment



Appropriate Assessment of plans

The AA test (i.e. ‘site integrity’) remains the same.

- Usually relatively straightforward to resolve.
- Mitigation can be required (e.g. policy caveats and policy restrictions/conditions), so competent authority can ascertain no AESI.
- Court of Session judgement; to “*put in place a legally enforceable framework*”, to avoid an adverse effect on site integrity



‘Certainty’

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

- 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**



‘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”

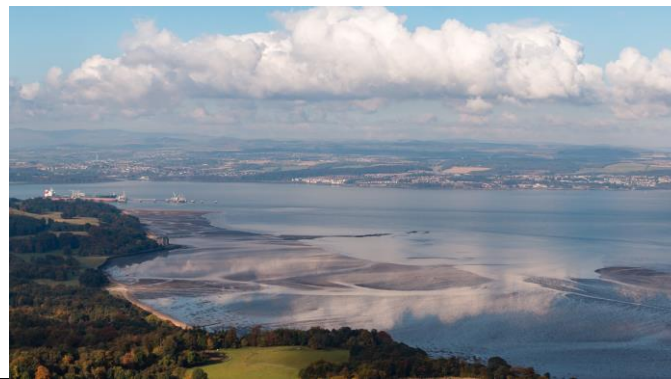
(revised Circular 6/1995)

- It will always be a matter for scientific judgement.
- will depend on factors which vary from case to case.
- It is 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”?



Mitigation in HRA; Plans

- 1. General protective policies re. “conservation”.** Resulting contradiction prevents the required certainty
- 2. Deferring appraisals ‘down the line’ of consent.** Advocate General C-6/04; *“adverse effects... must be assessed at every relevant stage of the procedure, to the extent possible on the basis of the precision of the plan”*



Fail the site integrity test yet still want to approve?

Two sequential tests to apply:

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).



Sources of Natura information

- Sitelink: <https://sitelink.nature.scot/home>

SiteLink Map Alerts Slamannan Plateau SPA

Overview

Features

Slamannan

Overview


Details

Designation
[Special Protection Area](#)

Lead SNH Area
[Forth](#)

Last Designated
09 Oct 2008

Documented Area
590.91 ha



Casework

reset

1 to 6 of 203 cases
previous
next
6

Case CPA132671 09 Jul 2014

Development pre-application enquiry
Advice only

Case CEA125837 16 Aug 2013

EIA
Advice only

Case GEN125836 16 Aug 2013

General Advice
Advice only

Case CDM126469 20 Sep 2013

Planning Application
Conditioned objection

Case CDM131404 10 Jun 2014

Planning Application
Advice only

Case CEA134744 07 Jan 2015

EIA
Advice only

Sources of Natura information

- Guidance; SNH website

Natura Casework Guidance: affecting Special Areas of Conservation Areas (SPAs)

Version 9.0
February 2014

Interim HRA guidance

CJEU 'People over Wind' case - use

This interim guidance has been issued by the Scottish Natural Heritage (SNH) in response to the Court of Justice of the European Union (CJEU) judgment in *People over Wind and Sweet* (C-323/17) regarding the need for mitigation to avoid concluding likely significant effects (LSE) in a way to avoid the consequent need to undertake a Natura 2000 site assessment.

The ruling in case C-323/17 was that the account of measures intended to avoid the impact of a proposed Natura 2000 site.



HABITATS REGULATIONS AND

GUIDANCE FOR PLANNING IN SCOTLAND

VERSION 2
JANUARY 2014

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Scottish Natural Heritage

Habitats Regulations Appraisal (HRA) on the Firth of Forth

A Guide for developers and regulators





[HRA advice sheet 1 Aligning Development Planning procedures with Habitats Regulations Appraisal \(HRA\) requirements.pdf](#)

7 page PDF | 396.9 kB

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[HRA Advice Sheet 2 - Screening general policies and applying simple mitigation measures.pdf](#)

7 page PDF | 345.0 kB

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[HRA Advice sheet 3 - Habitat Regulation Appraisal \(HRA\) and Strategic Environmental Assessment \(SEA\).pdf](#)

11 page PDF | 412.2 kB

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MANAGING NATURA 2000 SITES

The provisions of Article 6
of the 'Habitats' Directive 92/43/EEC



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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

- The LSE and AA tests are very precautionary
- 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

Benefits of a (good) HRA

- Early start should help identify mitigation, which can avoid unnecessary, abortive, and expensive work.
- An audit trail demonstrates compliance and robustness; decisions less ‘challengeable’.
- Strong, useful foundation for subsequent HRAs.
- **HRA demonstrates and helps ensure the ‘sustainable’ part of “*sustainable economic development*”.**

