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Shooting for a Level Playing Field

Legal Issues with the HRA Process in England and Wales

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Executive Summary

Habitats Regulations Assessments (HRA) are undertaken to identify plans and projects that have the potential to undermine the conservation objectives of Protected Sites in England and Wales. In conclusion of an HRA, relevant authorities can either agree to plans or projects with or without conditions or refuse them in order to prevent environmental damage.

Aim to Sustain partner organisations have a wide experience of HRAs, including around the consenting of wildfowling, upland management for grouse, licences for the release of game birds in and near Protected Sites, and the use of general licences for controlling 'pest' bird species. Many of the shooting related activities, which are now subject to HRAs, predate the designation of these sites – sometimes by hundreds of years. These activities have often contributed to the creation or maintenance of the very features that made these sites worthy of a protected designation in the first place.

The Conservation of Habitats and Species Regulations 2017 (as amended) (CHSR 2017) and related legislation contain unsustainable legal ambiguities and provide regulating authorities with a vast latitude of discretion when applying specific provisions. Consequently, the meaning of legal thresholds or trigger terms, such as 'plan' or 'project' or 'likely significant effect', has in practice been almost completely eroded. Relevant authorities, therefore, apply HRAs remarkably inconsistently. We observe in relation to shooting, that authorities are currently micro-regulating activities that have no or only a minor impact on Protected Sites – either because they are the most convenient to be regulated or because decisions are made based on the fear of being challenged by judicial activists. At the same time, activities with a higher and potentially irreversible environmental impact are falling through the cracks.

This has two fatal consequences for our National Site Network (NSN). Firstly, resources of relevant authorities are being disproportionately spent on regulation depriving them from crucial restoration and enhancement projects. If this approach persists in the future, the conservation status of our NSN will at best remain stable, but it has no chance of improvement. Secondly, for the lack of a defined meaning, relevant authorities apply an overly rigid form of the precautionary principle on all aspects of HRAs, which does not consider the complex systems at play in conservation and biodiversity. This has the paradoxical consequence that conservation objectives are being undermined by the very decisions that are taken to protect them. Long term environmental gains are being lost in short-sighted, rigid bureaucracy.

Shooters are conservationists, working hand in hand with farmers and landowners. We protected and managed valuable sites long before nature designations. We have a wealth of knowledge about our habitats and unrivalled experience in managing them. We want to see an effective, fair and proportionate system that regulates the activities that cause the greatest harm and not those that are the most convenient to be regulated. We propose that the current ineffective approach to HRAs is replaced with cooperative, innovative and adaptable management strategies that truly benefit our environment long term.

Recommendations

- **Implement the precautionary principle for HRAs on a sliding scale of proportionality depending on the risk of harm.** The precautionary principle was established to deal with threats with clear cause and effect, such as industrial pollution. When applied to complex systems like conservation and biodiversity its rigidity can lead to perverse outcomes, such as ignoring significant future environmental gains by prohibiting activities with no or minor environmental impacts. This has led to the micro-regulation of century-old habitat management measures, with no regard to the long-term environmental impact of the change or cessation of such practices. To avoid such outcomes, the precautionary principle must be applied on a sliding scale of proportionality depending on the risk of harm. The risk of serious or irreversible harm should indeed attract strict precaution, but the risk of minor or transient harm requires a more adaptable approach, particularly if potential long term environmental gains are at stake. The precautionary principle must not be a justification for disguised protectionism, but a positive and proportionate policy tool taking into consideration economic, social, and environmental factors. ***[below]***

- **Implement a legal definition of the trigger terms in the CHSR 2017.** Trigger terms for HRAs, such as 'plan', 'project', 'ascertain' and 'adverse effect', are not defined in law for the fear of creating exploitable lacunae. These terms, especially 'plan' or 'project', should operate as filters to avoid unnecessary HRAs, but, in the absence of definitions, regulating authorities interpret these terms so widely that they lose all meaning or relevance. In consequence, unnecessary HRAs are being undertaken and resources wasted that could otherwise be used to restore and enhance our NSN. ***[below]***

- **Recognise the importance of the 'likely significant effect' (LSE) threshold.** The LSE threshold exists to avoid unnecessary HRAs, but the nuances of 'likely' and 'significant' are largely ignored by relevant authorities. For example, Natural England (NE) acknowledges that wildfowling does not reduce waterfowl populations, yet consent applications are routinely progressed to a full HRA. Again, this approach wastes resources on unnecessary micro-regulation that could otherwise be used for restoration and enhancement projects. ***[below]***

- **Appropriate assessments must be consistent and include a holistic, fair and precise analysis of the case based on cause and effect:** The outcomes of HRAs are remarkably inconsistent depending on the relevant authority and even the specific author within an authority. This renders the process unfair, ineffective and highly unpredictable, but could be addressed by providing clear definitions of trigger terms. Furthermore, relevant authorities make decisions based on disparate local information without considering the holistic effect of global factors such as climate change on the site and the network. ***[below]***

- **Facilitate scientific research on Protected Sites.** Scientific research on Protected Sites is currently inhibited by an overly precautious HRA process. Such research is vital for a better understanding of the functioning of the ecosystems on our Protected Sites and should underpin all conservation measures. ***[below]***

- **Review the interdependence between the WCA 1981 and the CHSR 2017 and consolidate the regulatory frameworks.** The interdependence between conservation legislation must be reviewed. The fact that only 'owners' and 'occupiers' of SSSIs can and must apply for consent for certain activities creates exploitable lacunae and unfairly prevents some users from appealing consenting decisions regulating their activity. Activities with a minor environmental impact are over-regulated, while high impact activities are falling through the net. Relevant authorities recognise the impact of such loopholes on the conservation objectives of our NSN yet have become mired in bureaucracy and are failing to act. ***[below]***

- **Acknowledge that 'mixed' projects with a dual purpose can be considered necessary to the management of a site.** Habitat management activities that are beneficial for the conservation objectives, i.e., predator control or vegetation management, must be considered 'necessary to the management' of a site despite their dual purpose. Such activities should not systematically be subjected to HRAs. A potential restriction or prohibition of such long-standing activities must be governed by the same precautionary approach in order to ensure that conservation objectives are not undermined. ***[below]***

- **Recognise that mitigating factors that are an integral part of a project must be considered at the LSE stage.** Mitigating factors that are an integral part of a project, such as shooting moratoria or severe weather protocols, must be considered at the LSE stage. It would be inefficient to separate these elements and proceed a plan or project to the appropriate assessment (AA) stage even though it has no effect on the conservation objectives in its totality. ***[below]***

Current Legal Issues

In essence, an HRA is triggered if a 'plan' or 'project', which is not directly connected with or necessary to the management of that site, is likely to have a significant effect (LSE) on a Protected Site (PS), either alone or in combination with other plans or projects. If this is the case, the competent authority must undertake an appropriate assessment of the implications of the 'plan' or 'project' in view of that site's conservation objectives. The competent authority may only agree to the 'plan' or 'project' after having ascertained that it will not adversely affect the integrity of the site. The HRA process, therefore, consists of two main stages, the LSE stage (or screening stage) and the AA stage. Both stages are underpinned by the precautionary principle.

The trigger terms such as 'plan' or 'project', 'likely significant effect', 'adverse effect' etc. are not defined in the regulations.[1] While case law, both on a European and a domestic level, attempted to elucidate the meaning of these terms, ambiguity and vagueness remains. As a consequence, it is often within the discretion of a relevant authority to decide whether the threshold these trigger terms set is reached in a specific case.

In the following, we will highlight the current legal issues deriving from the design of the provisions governing HRAs, their application as well as the underpinning precautionary principle. Based on that we recommend law and policy reforms. It is important to note that none of our recommendations will weaken the current level of protection in relation to Protected Sites. On the contrary, the recommendation will allow for an effective, fair and consistent HRA process with a firm focus on the conservation objectives.

We have reproduced the most important provisions of the applicable legal framework as a reference point in the Annex of this paper ***[below].***

[1]These terms are neither defined in the Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (Habitats Directive) nor the CHSR 2017.

The precautionary principle in the context of conservation and biodiversity

The precautionary principle underpins all stages of the HRA process. We therefore discuss this overarching principle before analysing the various elements of an HRA.

The precautionary principle originally emerged to prevent emissions of harmful substances into our waters.[2] It was first enshrined as an element of international environmental policy in the form of Principle 15 of the Rio Declaration on Environment and Policy to which the UK is a signatory.[3] The meaning of the precautionary approach or principle was described as follows:

> "Where there are **threats of serious or irreversible damage**, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation". (**Emphasis** added).

Article 191(2) of the Treaty of the Functioning of the European Union (TFEU) further set out that European environmental policy should be based on the precautionary principle:

> 2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

Even though Article 191(2) of the TFEU is not applicable in the UK after the Brexit implementation period, the precautionary principle is considered to be an integral part of Article 6 of the Habitats Directive and therefore retained law through the Habitats Regulations that transpose the Directive into domestic law.[4] This will be the case until the Habitats Regulations are modified. The precautionary principle will further be enshrined in environmental law through the implementation of the Environment Bill.[5]

The rationale behind the precautionary principle seems clear. However, its practical application and scope remain equivocal[6] – particularly in the area of conservation. As a general rule, the precautionary principle should be applied in relation to threats of potential serious impacts on the environment or human health, which are unacceptable, and where government action should be taken in relation to such threats, even though the issue in question is governed by scientific uncertainty or an ongoing scientific debate.[7]

The definition of the principle, as described in the Rio declaration, focuses on potential **serious** or **irreversible** damage as a trigger for a precautionary approach[8], while the Habitats Directive engages the term **likely significant effect**. *Von Schomburg* suggests that

[2]Deville A ,Harding R, Applying the Precautionary Principle (The Federation Press 1997) 14.
[3]Report of the United Nations Conference on Environment and Development, Rio Declaration on Environment and Development (1992) A/CONF.151/26 (Vol. I), principle 15.
[4]European Union Withdrawal Act 2018 (as amended), sections 2 and 3.
[5]Environment Bill, section 18.
[6]See for example, comments about the application of the principle in the UK in relation to sheep dips and GM crops, in Science for Environment Policy, 'FUTURE BRIEF: The precautionary principle: Decision making under uncertainty' (issue 18, 2017) 11.
[7]Von Schomberg R, 'The precautionary principle and its normative challenges' in: Fisher E, Jones J, von Schomberg R (eds), *Implementing the Precautionary Principle, Perspectives and Prospects* (EE 2006) 19, 23.
[8]The same level of seriousness seems to underpin the Environment Bill, see DEFRA, 'Draft Environmental Principles Policy Statement' (2021) 18.

whether the principle is triggered or not should in fact not depend on any abstract definition of seriousness but should be determined by the level of protection each member state chooses to apply – indicating a margin of appreciation.[9]

Moyle analyses the precautionary principle in the context of biodiversity and points out that the precautionary principle should not be applied in the same manner to pollution scenarios and conservation issues.[10] He warns that a strict application of the precautionary principle in relation to conservation, which is much more complex in its cause and effect, could have the perverse outcome that future significant gains are being lost by preventing current insignificant harms:

> "The main merit of the precautionary principle is that it deals with irreversible environmental harms. Nonetheless, the exclusive focus on avoiding harm ignores potential environmental gains from different strategies. This makes the precautionary principle extremely timid. The fear of a loss dominates the strategy. While some risk aversion is warranted – and this is especially the case in the presence of irreversibility – **this timidity leads to foregone opportunities to improve conservation outcomes**."[11]

> "The precautionary principle's chief merit is the drive to avoid irreversible environmental harms. The precautionary principle is, however, difficult to apply in conservation work because of its extremely timid nature. Uncertainty in the biodiversity context differs from the original industrial context of the precautionary principle, as environmental harms are associated with many of the management options facing decision-makers. **The focus on avoiding harm implies that the opportunities for conservation gains are lost if they are associated with any potential harms."**[12]
> (**Emphasis** added.)

In relation to shooting activities, we experience in practice exactly what *Moyle* predicts. A rigid precautionary approach applied by NE and Natural Resources Wales (NRW) leads to the perverse result that future conservation gains are being lost because of an overly bureaucratic desire to micro-regulate small-scale activities that are sustainable and have no or only a minor environmental impact. Relevant authorities, at times, quite literally fail to see the wood for the trees.

For example, vegetation management on grouse moors is being restricted because it has a minor, and likely short-term, effect on the hydrology of deep peat and a minor effect on emissions of greenhouse gases (GHG).[13] The perverse outcome of this restriction is an increased risk of occurrence of wildfires.[14] Wildfires on peatland, not to mention their GHG emissions, have the capacity to cause enormous and irreversible damage to our blanket

[9]Von Schomberg (n 7) 24-25.
[10]Moyle B, 'Making the Precautionary Principle Work for Biodiversity: Avoiding Perverse Outcomes in Decision-making Under Uncertainty' in: Cooney R, Dickson B (eds), Biodiversity & the Precautionary Principle (Earthscan 2015) 159, 163.
[11]ibid, 166.
[12]ibid, 171.
[13]EMBER project, 'Effects of Moorland Burning on the Ecohydrology of River Basins, Key Findings from the EMBER project', https://water.leeds.ac.uk/wp-content/uploads/sites/36/2017/06/EMBER_full-report.pdf last accessed 5th October 2021; Farage, P, Ball, A, McGenity T J, et al, 'Burning management and carbon sequestration of upland heather moorland in the UK' (2009) Aust. J. Soil Res. 47, 351-361.
[14]McMorrow J, Lindley S, Aylen J et all, 'Moorland wildfire risk, visitors and climate change patterns prevention and policy' in: Bonn A, Allot K, Huback K et al (eds) *Drivers of Change in Upland Environments* (Routledge 2008), 404-431.

bog[15] – one of our rarest and most protected landscapes. Vegetation management by burning also effects the habitat diversity available for ground nesting birds. On grouse moors endangered bird species are currently bucking national trends of decline. Growth of unmanaged vegetation would naturally force out those species, which would contribute further to their decline. Prescribed burning has taken place on our moors for centuries, if not millennia, and has shaped landscapes that are now deemed to be amongst the most valuable and therefore worthy of a special protection designation. Neither the environmental impact of a cessation of burning nor its replacement with other vegetation management methods have yet been studied sufficiently to ascertain that restrictions of burning will not have an impact on the conservation objectives of Protected Sites that is far higher than prescribed burning itself.

Wildfowling activities are currently being micro-regulated, although wildfowlers were pioneers in conservation and habitats management and acted as wardens on our estuaries for centuries.[16] For instance, the Barton on Humber Wildfowling club, has installed mallard nesting tubes on most of their land holdings, which are monitored throughout the year. This intervention has the capacity of boosting the nesting success of mallard from as low as 15% to in excess of 80%. This is an extremely important conservation measure considering the species is seeing both national and international declines. With their interventions, this club provides for far more mallard than they take throughout the season. Their activity is clearly sustainable and beneficial for the conservation objectives of the site, yet it is restricted. If we lose our wildfowlers because overly precautious restrictions render their activity unviable, we lose not only a pool of engaged and highly experienced conservationists but also invaluable and successful conservation work on our estuaries.

Predator and pest control measures are globally recognised as a necessary tool to manage habitats and ecosystems and even the RSPB uses lethal predator control to protect ground nesting birds. In the UK, general and individual licences, have helped us balance our ecosystems for decades. However, for the last few years such measures have faced restrictions.[17] These restrictions are, for the majority, untested as to their environmental impact. A change in long-standing predator and pest control measures risks an unprecedented surge of generalist predators to the potentially irreversible detriment of vulnerable ground nesting birds like curlew, oystercatcher, lapwing, redshank, golden plover and hen harrier.[18]

[15]Davies G M, Grey A, N, Rein G et al, 'Peat consumption and carbon loss due to smouldering wildfire in a temperate peatland' (2013) For. Ecol. Manag. 308, 169-177.
[16]Jones G, 'Wildfowling: conservation at its core' blog post: https://basc.org.uk/wildfowling-conservation-at-its-core%e2%80%8b/ last accessed 9th October 2021.
[17]For more information regarding the recent changes to general licences see: https://basc.org.uk/gl/ last accessed 9th October 2021.
[18]Langholm Moor Demonstration Project Partners, 'MANAGING MOORLAND FOR BIRDS OF PREY AND RED GROUSE, The Final Report of the Langholm Moor Demonstration Project Partners 2008-2017' http://www.langholmproject.com/PDF%20downloads/Langholm%20Moor%20Demonstration%20Project%20Final%20Report.pdf, last accessed 9th October 2021; Agreement on the Conservation of African-Eurasian Migratory Waterbirds (AEWA), 'International Single Species Action Plan for the Conservation of the Eurasian Curlew' (AEWA Technical Series No. 58 2015); Roodbergen M, van der Werf B, Hötker H, 'Revealing the contributions of reproduction and survival to the Europe-wide decline in meadow birds: review and meta-analysis' (2012) J. Ornithol 153, 53-74; Douglas, D J T, Bellamy P E, Stephen L S et al, 'Upland land use predicts population decline in a globally near-threatened wader' (2004) J. Appl. Ecol. 51, 194–203; Grant, M C, Osman C, Easton J et al, 'Breeding success and causes of breeding failure of curlew Numenius arquata in Northern Ireland' (1999) J. Appl. Ecol. 36, 59–74.

Important scientific studies about our most valuable landscapes, such as blanket bog, are currently being inhibited by the overly precautious HRA process.[19] We therewith lose the long-term benefit of understanding the functioning of our ecosystems better, which is not only crucial for successful conservation, but it is the basis that should underpin all environmental decisions.

In most of these examples, the precautionary principle is only applied in relation to the effect the assessed activity itself might have, but ironically not to the potentially much larger environmental impacts a change or cessation of such long-standing habitat management measures will bring along. As *Moyle* describes, the precautionary approach taken by NE and NRW has, therefore, the paradoxical effect of undermining the conservation objectives of our protected site, rather than protecting them. This perverse effect can be avoided by applying a precautionary principle that is more adaptable and more proportionate.[20] We suggest that it should be applied on a sliding scale considering both the current threat of harm as well as the potential future gains.

An illustration by *Deville* and *Harding* proposes that the application of the precautionary principle should in any case, not just limited to conservation, be applied on a sliding scale. Very significant threats to the environment should attract a strong to strict precaution, moderately significant threats a moderate to strong precaution, and slightly significant threats a weak to moderate precaution.[21]

The *Deville* and *Harding* framework seems to correspond with EU policy and case law providing that the precautionary principle must be applied proportionally. The Court of Justice of the European Union (CJEU) held, for example, in *Pesce et al case*[22] [at 48]:

> "That principle must, in addition, be applied having regard to the principle of proportionality, which requires that measures adopted by EU institutions **should not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives** pursued by the legislation in question, and where there is a choice between several appropriate measures, recourse **must be had to the least onerous**, and the disadvantages caused must not be disproportionate to the aims pursued (see, inter alia, judgment of 17 October 2013, Schaible, C-101/12, EU:C:2013:661, paragraph 29)." (**Emphasis** added).

The European Commission's Communication[23] on the precautionary principle further states that:

> In addition, the general principles of risk management remain applicable when the precautionary principle is invoked. These are the following five principles:

[19]GWCT, letter to HRA working group, sent 19th July 2021.
[20]Moyle (n 10) 172.
[21]Deville,Harding (n2) 38.
[22]C-78/16 and C-79/16 Giovanni Pesce and Others v Presidenza del Consiglio dei Ministri - Dipartimento della Protezione Civile and Others [2016] ECLI:EU:C:2016:428, para 48.
[23]Commission of the European Union, 'COMMUNICATION FROM THE COMMISSION on the precautionary principle' COM(2000) 1 final, 3.

- proportionality between the measures taken and the chosen level of protection;
- non-discrimination in application of the measures;
- consistency of the measures with similar measures already taken in similar situations or using similar approaches;
- examination of the benefits and costs of action or lack of action;
- review of the measures in the light of scientific developments.

The European Commission also highlights that the recourse to the precautionary principle should **not serve as a justification for disguised protectionism**.[24] Similarly, the UK Interdepartmental Liaison Group on Risk Assessment suggests that:

> "In practice the position adopted should reflect the commitment to sustainable development that gives full weight to **economic, social and environmental** factors. The precautionary principle should not, therefore, be an obstacle to innovation. **Properly applied it is a positive, proportionate policy tool** to encourage technological innovation and sustainable development by helping to engender stakeholder confidence that appropriate risk control measures are in place." [25]

Relevant authorities do not currently apply the precautionary principle within the HRA process proportionately, nor do they give any significant weight to economic and social factors, or, as illustrated above, to potential long-term environmental factors. The precautionary principle is often not used as a positive and proportionate policy tool, but a justification for disguised protectionism.

As an illustration of the inconsistency, when DEFRA decided not to include jackdaw and rook in General Licence 40, they based their precaution on the assumption that this was not likely to cause a **serious** or **irreversible** effect on the environment. This does reflect the precautionary principle as it is set out in the Rio Declaration and the Environment Bill, but NE and NRW invoke regularly a much more restrictive precautionary approach in their HRAs of shooting related activities and base their precaution on whether the activity has **any** effect on the Protected Sites.[26]

A disproportionate and inconsistent application of the precautionary principle leads to arbitrary decisions, and it results in an overuse of HRAs for plans or projects which pose no or only a minor environmental threat. These resources could be used to further the restoration of ecosystems and enhancement of Protected Sites and therewith benefit the NSN long term. Following an inconsistent approach to HRAs, that focusses on those activities that are the most convenient to regulate, rather than the enhancement of the NSN, further undermines NE's obligations under section 2(2) of the Natural Environment and Rural Communities Act 2006 (NERC) and NRW's obligation under section 6(1) Environment (Wales) Act 2016.

[24]ibid, 8.
[25]Interdepartmental Liaison Group on Risk Assessment, 'THE PRECAUTIONARY PRINCIPLE: POLICY AND APPLICATION' (2002), para 3 https://publications.parliament.uk/pa/ld200304/ldselect/ldsctech/110/110we29.htm, last accessed 1st October 2021.
[26]For example, Natural England stated that: "They also require a precautionary approach to decision-making where there is limited available evidence and significant uncertainty about the **likely effects** of a proposal." Natural England, 'Natural England's approach to wildfowling consenting on Protected Sites' (2019/ZZ008), 4, http://publications.naturalengland.org.uk/publication/6534172534636544, last accessed 06 October 2021.

For the above outlined reasons, we recommend that a more adaptable and proportionate form of the precautionary principle, contextualised for conservation, is implemented that avoids perverse outcomes and that can be applied consistently.

Recommendation – Contextualise the precautionary principle for HRAs and implement a proportionate legal definition:
As the precautionary principle has a wide application from public health decisions, industrial pollution to environmental impact assessments, we recommend that the principle is contextualised specifically for HRAs and implemented either in Regulation 3 or 61 of the Habitats Regulations. It must be clear that the principle needs to be applied proportionally to the potential risk of harm as well as impartially. We suggest a sliding scale of precaution depending on whether an activity attracts a potential risk of serious or irreversible harm as opposed to less significant impacts. It is also crucial, in view of meeting our conservation objectives, to avoid micro-regulating activities to prevent a minor short-term ecological harm at the expense of a long-term environmental benefits. Otherwise, relevant authorities undermine the rationale of the NSN by the very measure they put in place to protect them, and conservation objectives are stagnating at best. The precautionary principle should be a positive policy tool taking into consideration all social, economic and environmental factors.

Recommendation – Further scientific research on the functioning of the ecosystems of our Protected Sites:
The precautionary principle governs decision making in environmental law, particularly in areas of scientific uncertainty. The current rigid approach of the principle in the HRA process means, however, that scientific research that might have a minor short-term impact on a site, but would help alleviate this uncertainty, is inhibited. This must be addressed in order to ensure that conservation measures can be imposed that are most beneficial for the specific requirements of a site.

Implication from a lack of a legal definition of the terms 'plan' and 'project'

The Habitats Directive uses the terms 'plan' or 'project' as a first initial filter when determining if an AA is required.[27] The same terms were transposed into the Habitats Regulations.[28] The Directive does, however, not offer any legal definition of these terms and it remains unclear what activities should be screened out or moved on to the LSE stage based on this initial filter. European and domestic case law have consistently stated that the terms plan and project must be defined broadly rather than narrowly to avoid undermining the objectives of the Directive,[29] but neither have offered a clear definition.

In the *Waddenzee* case[30], which is often referred to as the leading case on the application of Article 6 of the Habitats Directive, the court acknowledged that [at 23]:

> "The Habitats Directive does not define the terms 'plan' and 'project'."

Instead of relying on an internal definition, the court referred to the definition, at least of the term 'project', in the Council Directive (85/337/EEC) on the assessment of the effects of certain public and private projects on the environment (EIA Directive) [at 24]:

> "By contrast, Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p.40), the sixth recital in the preamble to which states that development consent for projects which are likely to have significant effects on the environment should be granted only after prior assessment of the likely significant environmental effects of these projects has been carried out, defines 'project' as follows in Article 1(2):
>
> – the execution of **construction works** or of **other installations** or **schemes**
> – **other interventions** in the natural surroundings and landscape including those involving the extraction of mineral resources.'
> (**Emphasis** added).

The court further concluded that plans and projects that have been carried out for several years on a site and required obtaining a periodical licence can fall under the definition of 'plan' or 'project' under the Habitats Directive.[31] This was the core question referred to the CJEU in this case. The activity in question was mechanical cockle fishing with trawlers which were scraping up the top layer of the seabed.

The reference to the definition of 'project' in the Environmental Impact Assessment (EIA) Directive in the *Waddenzee* case[32] suggests that the terms plan and project describe activities that entail some form of physical development on, or at least a physical alteration of the Protected Sites, or alternatively proposals that relate to the planning of such activities.

[27]Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, Article 6(3).
[28]Conservation of Habitats and Species Regulations 2017 (as amended), regulation 63.
[29]Instead of many, C-127/02 Landelijke Vereniging tot Behoud van de *Waddenzee*, Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij [2004] ECR I-175; R(*Friends of the Earth Ltd and Others*) *v Environment Agency* [2003] EWHC 3193 [59].
[30]*Waddenzee* (n 29).
[31]ibid, para 25.
[32]ibid.

Attorney General (AG) *Kokott* concurs in her opinion in the *Waddenzee* case[33] that the terms need to be interpreted broadly, but she also acknowledges that the presented case relates to a physical intervention akin to the extraction of mineral resources as described in in the EIA Directive [at 31]:

> "On account of its [referring to mechanical cockle fishing] wide-ranging effects on the upper layer of the seabed **it is in principle comparable, in terms of its environmental impact, with the extraction of mineral resources**. In that respect it would therefore have to be regarded as another intervention and thus as a project within the meaning of Article 1 (2) of the directive on environmental impact assessment."
> (**Emphasis** added).

The European Commission (EC) also concluded that the term project should be interpreted considering the EIA Directive. The EC's guidance specifies, however, that the term is not limited to physical construction, but can also include other interventions in the natural environment including regular activities aimed at utilising natural resources, such as a significant intensification of agriculture, **which threatens to damage or destroy the semi-natural character of a site**.[34] The term plan has, according to the Commission, potentially a very broad meaning and includes land-use plans and sectoral plans.[35]

The Dutch Nitrogen cases[36] engaged with the question whether the application of fertiliser or the grazing of cattle can be considered a 'project' under the Habitats Directive, although these activities are not easily subsumed under the definition of project in the EIA Directive. The CJEU held that the definition of project in the EIA Directive is certainly relevant in the interpretation of Habitats Directive [60]:

> "In the first place, it must be noted that, while the Habitats Directive does not define the concept of 'project', **it is apparent from the Court's case-law that the definition of 'project' within the meaning of Article 1(2)(a) of the EIA Directive is relevant to defining the concept of project as provided for in the Habitats Directive** (see, to that effect, judgment of 14 January 2010, Stadt Papenburg, C-226/08, EU:C:2010:10, paragraph 38 and the case-law cited)."

The court, however, clarified that simply because an activity does not fall under the definition of 'project' in the EIA Directive, does not mean that this activity is incapable of being a 'project' under the Habitats Directive, if the activity is likely to have a significant effect on the integrity of a Protected Site.[37] In the context of the facts presented in this case, the court concluded that it could not be excluded that the application of fertiliser or use of land for cattle grazing is a 'plan' 'project'.[38]

[33]C-127/02 Landelijke Vereniging tot Behoud van de Waddenzee, Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij [2004] ECR I-175, opinion of AG Kokott.
[34]European Commission, 'MANAGING NATIONAL SITE NETWORK SITES The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC' (2019), Commission Notice C(2018) 7621 final, para 4.4.1. https://ec.europa.eu/environment/nature/natura2000/management/docs/art6/EN_art_6_guide_jun_2019.pdf last accessed 9th September 2021.
[35]ibid, para 4.4.2.
[36]C-293/17 and C-294/17 Coöperatie Mobilisation for the Environment UA, Vereniging Leefmilieu v College van gedeputeerde staten van Limburg, College van gedeputeerde staten van Gelderland [2018] ECLI:EU:C:2018:882.
[37]ibid, para 66.
[38]ibid, para 71-72.

On a domestic level, the *Wightlink* (*or Akester*) case[39], which predates the *Dutch Nitrogen* cases[40], engaged in a similar question regarding the definition of 'plan' or 'project' in relation to the installation of new ferries on routes from the Isle of Wight to the mainland that had the potential to erode mud flats on the Lymington estuary. The *Wightlink* case suggests that the *Waddenzee* judgement[41] provides a test as to the interpretation of the terms plan and project. *Owen J* concluded that according to *Waddenzee*, the test to be applied to determine whether a proposal amounts to a 'plan' or 'project' within the meaning of the Directive is simply whether it is likely to have a significant effect on the site [at 75]:

> "As to the second, *Waddenzee* provides guidance as to the test to be applied to determine whether a proposal amounts to a 'plan' or 'project' within the meaning of the directive. A plan or project will be caught by Article 6(3), in the sense that it will trigger the requirement for an appropriate assessment of its environmental impact, if it "*is likely to have a significant effect*" on the site."

The conclusion that *Waddenzee*[42] provides a test is difficult to support as the judgement was limited to the question of whether an activity, which has taken place for several years and required periodical authorisation should be considered a 'plan' or a 'project', rather than the question as to the general definition of the term 'plan' or 'project'.[43] Furthermore, the *Wightlink* case, unlike both *Waddenzee and Dutch Nitrogen* , seems to suggest that the terms 'plan' or 'project' are in their entirety devoid of any autonomous meaning and that the only focus must be on the likely significant effect.[45] This seemingly contradicts AG *Kokott's* opinion in *Waddenzee*[46] that the terms 'plan' or 'project' impose the initial filter before other elements such as the likely significant effect, the in-combination effect, etc. should be examined [at 29]:

> "**In this multi-stage assessment the words 'plan' and 'project' are the initial filter** which removes measures which are not subject to an appropriate assessment. Before an appropriate assessment becomes necessary, **other limiting conditions must be assessed, namely the direct connection with the management of the site referred to by the Commission and the likelihood of significant effect** on the site mentioned in the third question submitted for a preliminary ruling. **Each of these criteria has its own function and justification.**"
> (**Emphasis** added).

The suggestion in *Wightlink*[47] that the determining test to define 'plan' or 'project' should, without considering any further context, be whether the proposal is likely to have a significant impact on the site is flawed and it leads to a tautological interpretation of the law. The 'likely significant effect' element is an additional requirement set out in the

[39]R*(Akester & Anor) (On Behalf of the Lymington River Association) v Dept for Environment, Food and Rural Affairs and Wightlink* [2010] EWHC 232 (Admin).
[40]*Dutch Nitrogen* (n 36).
[41]*Waddenzee* (n 29).
[42]ibid.
[43]The fact that mechanical cockle fishing was a project was not disputed in the *Waddenzee* case.
[44]*Dutch Nitrogen* (n 36).
[45]Both *Waddenzee* (n 29), para24 and *Dutch Nitrogen* (n 36), para 60 highlight the importance of the definition of project in the EIA definition.
[46]Opinion AG *Kokott, Waddenzee* (n 33).
[47]Wightlink (n 39).

Habitats Directive and cannot have the same meaning as 'plan' or 'project' per se. If the test, as suggested by *Owen J*, was to be followed, the result would be that any 'plan' or 'project' would likely have a significant effect, as the terms 'plan' and 'project' are defined by the very fact that they likely have a significant effect. This amounts to the same as describing a circle as circular or a desert as dry. It would make the reference to 'plan' or 'project' completely superfluous. If this outcome was indeed intended, the legislator would have used a general word such as 'activity' or 'proposal' rather than specific terms such as 'plan' or 'project'[48].

However, what is nevertheless important to note, is that the potential environmental impact in the *Wightlink* case was the erosion of mud flats on the Lymington estuary by introducing ferries of a new type. This is akin to a physical alteration of the PS itself. The introduction of the new ferries is therefore a 'project' in the sense of the Habitats and the EIA Directive.

The Scottish case of *RSPB v Secretary of State for Scotland*[49], involved the question whether the granting of wildfowling licences to two farmers to shoot barnacle geese on Islay, was a 'plan' and 'project' in the sense of the Habitats Regulations. In the Outer House of the Court of Session, Lord *Johnston* followed the suggestion that the terms 'plan' or 'project' only relate to **extraneous development** of the land. This definition is arguably narrower than what the CJEU held in *Waddenzee*[50] and *Dutch Nitrogen*[51] and contradicts the notion that the terms require a broad interpretation. However, even if the rationale is questionable, the outcome of the case is certainly justified regarding wildfowling licenses.

According to NE there is no evidence that wildfowling, throughout its occurrence, has reduced the waterfowl population – either through harvesting, or disturbance.[52] During periods where wildfowling has taken place at much higher intensity the wildfowl population has even seen a significant increase, such as seen in the 1970s and 80s. It is clear, therefore, that wildfowling does not undermine the integrity of a site, nor does it damage or destroy its semi-natural character. Wildfowling cannot be considered akin to activities such as mechanical cockle fishing that involves scraping up the top layer of the seabed, the regular use of nitrogen that leads to a eutrophication of the soil, or land use for cattle grazing that alters the biological character of a site. Because wildfowling does not alter a PS in any way, it should in general fall below the threshold the trigger terms 'plan' and 'project' set.

In summary, neither European nor domestic case law provides a clear definition of the terms 'plan' or 'project'. Most of the relevant case law suggests a broad interpretation of the terms in order to avoid lacunae, but many cases refer simultaneously to the definition of 'project' in the EIA Directive. The interpretation, as per *Wightlink*, that the terms plan or project are devoid of any autonomous meaning, however, cannot be supported. Such an interpretation would remove an initial filter of the HRA process and would allow for a near unlimited latitude of discretion of relevant authorities to decide what activities should be considered a 'plan' or 'project' or not.

[48]Or 'plan' and 'programme' as mentioned in the 10th recital of the Habitats Directive.
[49]RSPB v Secretary of State for Scotland 2000 SLT (OH) 22, 28 A-C.
[50]*Waddenzee* (n 29).
[51]*Dutch Nitrogen* (n 36).
[52]Natural England, 'Natural England's approach to assessing and responding to wildfowling notices on Sites of Special Scientific Interest (SSSIs) and European sites' (2014), para 4.1, https://consult.defra.gov.uk/natural-england/wildfowling-guidance-review/supporting_documents/Wildfowling%20Guidance_Final_draft_Oct_2014.pdf last accessed 20th September 2021.

To achieve legal clarity and consistency and to avoid arbitrariness in relation to HRAs, we suggest that the terms 'plan' and 'project' are defined in either Regulation 3 or 61 CHSR 2017. The definition should encompass the reference to the EIA Directive as well as the rationale of European case law, such as the *Dutch Nitrogen* cases[53].

Recommendation – Implement a clear definition of the terms 'plan' and 'project':
A clear legal definition of the terms 'plan' and 'project' should be included in Regulation 3 or 61 CHSR 2017. This could help overcome inconsistency and arbitrariness and strengthen the Conservation Regulations. Such a definition should focus on the activities that either have a direct or indirect physical and irreversible effect on the site or threaten to damage or the destroy the semi-natural character of the site. The definition should include the tried and tested wording of the EIA Directive as well as extensions to this definition set by European case law:

> 'Plan' and 'project' means any activity that is capable of irreversibly affecting the integrity of a Protected Site, either directly or indirectly. The term 'plan' includes all forms of land-use plans including plans for 'projects' as defined in this provision.
> The term 'project' includes:
> - The execution and planning of construction works or other installations;
> - interventions in the natural surroundings and landscape akin to those involving the extraction of mineral resources;
> - other interventions that threaten to damage or destroy the semi-natural character of a site.

The incorporation of a clear legal definition does not mean that environmental protection is weakened and there is no risk that exploitable loopholes are being opened, which has always been the argument behind the use of a wide definition of these terms. It only means that the HRA process is being rendered more effective and efficient. Activities that do not fall under the above definition can still be regulated or prohibited. Relevant authorities do not have to rely on HRAs for that but can resort to the imposition of Special Nature Conservation Orders (SNCO), byelaws or voluntary agreements.[54]

[53] *Dutch Nitrogen* (n 36).
[54] Conservation of Habitats and Species Regulations 2017, reg 7 and 27; Wildlife and Countryside Act 1981, section 28R; Natural Environment and Rural Communities Act 2006, section 7.

The effect of the interdependence between the WCA 1981, CHSR 2017 and other legal frameworks

In England and Wales further inconsistency and arbitrariness in the HRA process occurs from an unworkable interdependence between the WCA 1981, the CHSR 2017 and other legal frameworks. Almost all PS are simultaneously Sites of Special Scientific Interest (SSSIs). These sites will therefore have a section 28[55] notification in place which lists operations requiring consent from NE or NRW – so called ORNEC or OLDSI lists.[56] Consent procedures for operations likely to damage a SSSI, require relevant authorities to undertake HRAs in accordance with regulations 24 and 63 of the CHSR 2017 respectively. However, whether a person can instigate such consent procedures depends on whether they are deemed the 'owner' or 'occupier' of the SSSI.[57] This leads to legal loopholes and inconsistencies.

For example, many ORNEC and OLDSI lists of SSSIs covering our estuaries include both wildfowling and bait digging as operations requiring consent. Many wildfowling clubs in England and Wales rent or buy shooting rights on the foreshore from the Crown Estate, or other private landowners and they so become an 'occupier' of these sites. They can and must therefore apply for consent in order to pursue their recreational activity and wildfowling is subject to the HRA process. Bait diggers on the other hand are not usually deemed to be the 'owner' or 'occupier' of the foreshore and they cannot apply for consent to go bait digging on a SSSI. Bait digging on a SSSIs is, therefore, generally, unlawful.[58] The 'owner' and 'occupier' of a site who permits bait digging could be held criminally liable under section 28P of the WCA 1981 and bait diggers themselves might commit an offence for intentionally or recklessly damaging the interest of a site. Nevertheless, in practice, while wildfowling is heavily assessed, regulated and restricted, there seems to be no effort on behalf of NE or NRW to enforce the law against bait digging, even though it has the potential to cause significantly greater harm on a SSSI than wildfowling.

A similar situation occurs in relation to other recreational activities, such as walking with or without a dog, which is regularly mentioned as a high priority issue on Site Improvement Plans and has a far higher disturbance factor than wildfowling.[59] Such activities, if they threaten a site feature, could be subsumed under most ORNEC or OLDSI lists,[60] which means the 'owner' and 'occupier' of a SSSI must theoretically prevent them from happening in order to avoid criminal liability. However, open air recreation is encouraged for very good reasons, and public access activities are not as such assessed through HRAs at all, unless they form part of a project which requires an HRA or a similar impact assessment. For example, the Countryside and Rights of Way Act 2000 (CROW Act) gives people the right to

[55]Wildlife and Countryside Act 1981 (as amended), section 28.
[56]ORNEC (Operations Requiring Natural England's Consent); OLDSI (Operations Likely to Damage the Special Interest).
[57]Wildlife and Countryside Act 1981 (as amended), section 28E.
[58]Depending on the ORNEC or OLDSI lists.
[59]Pedestrian disturbance causes 100 times more disturbance than wildfowling, see Collop, C, 'Impact of human disturbance on coastal birds: population consequences derived from behavioural responses' (PhD thesis, Bournemouth University 2017).
[60]Standard reference 27 on ORNEC and OLDSI lists covers "recreational or other activities likely to damage or disturb the features of special interest".

walk, run and climb on open access land[61], including open access land that is designated as a SSSI. CROW access on a PS will be impact assessed when such access is granted and can be restricted. However, statutory guidance reveals that restrictions should be limited to the lowest level of restriction necessary.[62] The outcome of this is that high impact activities on the foreshore, such as walking with or without a dog, face either no or the lowest level of restrictions, while wildfowling, which has a less significant effect on a site, is facing the most far-reaching and restrictive conditions. This discrepancy does not make sense from an ecological perspective and is not in the best interest of our NSN.

In relation to wildfowling, the fact that the consent procedure is linked to the 'owner' or 'occupier' requirement under the WCA 1981 also leads to the fact that individual clubs within the wildfowling community are subject to a different regulatory framework. For example, wildfowling clubs that are 'owners' or 'occupiers' of land must apply for consent. Under section 28F of the WCA 1981, these clubs have the right to appeal consent decisions made by NE or NRW. Wildfowling clubs that operate on land owned or managed by NE or NRW, are not considered 'occupiers'. They therefore cannot apply for consent for their activity, but rather a licence issued by NE or NRW. Even though both consents and licences are issued by the same authorities for the same activity, wildfowling clubs that are not 'owners' or 'occupiers' do not have the right to appeal a licensing decision.

For these reasons we suggest that the different regulatory frameworks that apply to activities on PS should be reviewed and consolidated to avoid lacunae and make the HRA process more efficient and consistent.

Recommendation – Review the interdependence between the WCA 1981 and the CHSR 2017:
The interdependence between the WCA 1981, the CHSR 2017, and other regulatory frameworks must be reviewed. The fact that only 'owners' and 'occupiers' can and must apply for consent creates legal loopholes. It means that activities with a minor environmental impact are over-regulated, while high impact activities are falling through the net. As a consequence, conservation objectives are being undermined and resources are wasted on regulation that could be used to restore and enhance our NSN.

[61]It is interesting to note here, that wildfowling in Scotland form part of the right to recreation on the foreshore (regalia majora). Furthermore, section 2.12 in the Scottish Outdoor Access Code gives wildfowlers the right of access across private land with a firearm if immediately going to or from an area of land or water where they have the right to shoot.
[62]Natural England, 'Public Access to the countryside and part I of the Countryside and Rights of Way Act 2000, Statutory guidance to relevant authorities on their function in relation to local access right restrictions' (Version 4.0: 2010) chapter 2.2.

Meaning of 'not directly connected with or necessary to the management of that site'

A 'plan' or a 'project' that is likely to have a significant effect on a Protected Site is only to undergo an appropriate assessment if it is not directly connected with or necessary to the management of that site.[63] According to EC guidance the term 'management' in this context is to be treated as referring to the 'conservation' management of a site. Therefore, the term 'management' is deemed to have the same meaning as in Article 6(1) of the Habitats Directive:[64]

> "For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites."

The phrase 'not directly connected with or necessary to' therefore only relates to particular conservation measures which are defined as appropriate management plans specifically designed for the sites or integrated into other development plans.[65] The Commission's guidelines specify in relation to 'mixed' plans with conservation components, that the terms 'not directly connected with or necessary to' ensure that a non-conservation component of a 'plan' or 'project' **may** still require an assessment.[66] The CJEU held in *Commission v France*[67] that in relation to contractual work that is undertaken to achieve fixed conservation goals, a systematic exclusion of these works from an AA is unlawful. This does, however, not preclude that projects with a significant benefit for the conservation objectives of a site, which also happen to have a second purpose, cannot be considered necessary to the management of a site on a case-by-case basis.

For example, prescribed burning of specified vegetation on upland grouse moors is a crucial activity for maintaining habitat quality for grouse, but it also benefits feature species such as the hen harrier and other vulnerable birds, and it helps preventing devastating wildfires, which could have a severe impact on a PS.[68] Wildfires on moorland have the potential to create significant and irreversible damage to the integrity of a PS – not to mention their impact on greenhouse gas emissions.[69] Predator control measures on grouse moors and lowland shoots support game birds, but they are also a crucial contribution to the survival of

[63]Conservation of Habitats and Species Regulations 2017, Reg 63(1)(b).
[64]Habitats Directive, Article 6(1).
[65]Sundseth K, Roth P,' Article 6 of the Habitats Directive, Rulings of the European Court of Justice' (2014) 13 https://ec.europa.eu/environment/nature/info/pubs/docs/others/ECJ_rulings%20Art_%206%20-%20Final%20Sept%202014-2.pdf, last accessed 8th October 2021.
[66]European Commission (n 34), para 4.4.3.
[67]C-241/08, *European Commission v French Republic* [2008] ECR I – 1723, para 55.
[68]McMarrow, Lindey, Aylen et al (n 14); Bonn, Allot, Huback et al (n 14); Glaves D, Morecroft M, Fitzgibbon C et al, 'Natural England review of upland evidence 2012 – the effects of managed burning on upland peatland biodiversity, carbon and water' (NEER004 2013) with further references; Werrity A, Pakeman R, Shedden C, 'A review of sustainable Moorland Management, Report to the Scientific Advisory Committee of Scottish Natural Heritage' (2015) https://www.nature.scot/sites/default/files/2017-11/Guidance-A-Review-of-Sustainable-Moorland-Management-A1765931.pdf last accessed 9th October 2021.
[69]Davies, Grey, Rein et al (n 15).

rare ground nesting birds, such as golden plover, merlin or the iconic curlew.[70] However, neither have ever been accepted as necessary to the management of a PS because they have a 'mixed' purpose. It is important to reiterate that many of these shooting related activities predate the protection designation of sites and have over centuries shaped the very features that made sites worthy of their designation.

The current practice of excluding 'mixed' projects systematically from the definition 'necessary to the management of a site' means activities which are important to the restoration, maintenance and enhancement of a site must still undergo HRAs, even though they are pivotal in view of the conservation objectives of a PS. This seems short-sighted, especially considering that it is in fact the 'alternative purpose', i.e. game shooting, that is funding these essential conservation management activities. If such activities were to cease, because they are either restricted or heavily regulated, alternative conservation management activities must be put in place and funded by the taxpayer, otherwise various PS will inevitably deteriorate. A precautionary approach further demands that the consequence of a restriction of such longstanding management measures must be analysed as to their environmental impact, just as a proposal of a plan or project.

Recommendation – Recognise that 'mixed' plans with a net-benefit to conservation objectives are necessary to the management of a PS:
We recommend that 'plans' or 'projects' that are beneficial to the conservation objectives of a site can be considered 'necessary to the management' of site under Regulations 63 CHSR 2017, irrespective of the fact that they have a dual purpose. Relevant authorities must prevent wasting resources on unnecessary assessments of 'mixed' projects that are beneficial for conservation. Likewise, such 'mixed' projects should only be restricted or prohibited following an assessment of the environmental impact of the restriction or prohibition itself, otherwise the conservation objectives of a PS could be undermined. The assessment of restrictions and prohibition should be governed by the same precautionary approach as suggested in the first recommendation.

[70]Langholm Moor Demonstration Project Partners (n 18); AEWA International Single Species Action Plan for the Conservation of the Eurasian Curlew (n 18); Roodbergen, van der Werf, Hötker (n 18); Douglas, Bellamy, Stephen (n 18); Grant, Osman, Easton (n 18).

The LSE stage

Meaning of the term 'likely significant effect'

Once relevant authorities are satisfied that the proposed activity is a 'plan' or 'project', they need to proceed to the LSE stage – the initial screening of whether the 'plan' or 'project' has a likely significant effect on the PS, either alone or in combination with other plans or projects.

The Habitats Directive defines neither the term 'likely' nor the term 'significant effect'. The term 'likely' is further not used in a consistent way in the different language versions of the Directive. Both the German and the Italian version rely on a broad level of probability by requiring that the 'plan' or 'project' 'could' have a significant effect, which reflects a loose translation of the verbs '*könnten*' and '*possa avere*'. The French version uses the term 'susceptible', i.e plans and project that are susceptible to have a significant effect on the sites, while the English version clearly implements a much narrower form or probability with the term 'likely'. AG *Kokott* clarifies in her opinion in the *Waddenzee* case [at 62] that the possibility of a significant adverse effect is primarily a question of nature conservation, which must be answered based on the circumstances of the individual case.[71] *Kokott* further submits that the requirement relating to the probability of harm should not be too strict and that [at 73]:[72]

> "In that regard the criterion must be whether or not reasonable doubt exists as to the absence of significant adverse effects. **In assessing doubt, account will have to be taken, on the one hand, of the likelihood of harm and, on the other, also of the extent and nature of such harm. Therefore, in principle greater weight is to be attached to doubts as to the absence of irreversible effects** or effects on particularly rare habitats or species than to doubts as to the absence of reversible or temporary effects or the absence of effects on relatively common species or habitats."
> (**Emphasis** added).

The criterion to assess the LSE adopted in various judgments is, therefore, whether, based on objective information, reasonable doubt exists as to the absence of a significant effect.[73] However, there are two crucial points that should not be missed. Firstly, the interpretation of whether doubt exists must take account of **the likelihood and the nature and extent of the harm**. Potential irreversible harm requires therefore a higher standard of proof in terms of absence of doubt than harm which has only a transient effect on the conservation site. This is in line with the sliding scale of the precautionary principle as illustrated above with the *Deville* and *Harding* framework.[74] Secondly, the requirement for an absence of reasonable doubt refers to **significant** effects not any effects, which requires further interpretation.

Kokott emphasises the importance of this 'significant' criterion in order to avoid unnecessary assessments.[75] According to her opinion, the definition of the term 'significant' should not be made in the abstract but focused on the specific conservation objectives of the site. What should be avoided is a defeat of the conservation objectives and a

[71] *Waddenzee*, opinion of AG Kokott (n 33), para 62.
[72] ibid, paras 70-74.
[73] *Waddenzee* (n 29), para 59; C-441/17 European Commission v Republic of Poland [2018] ECLI:EU:C:2018:255, para 117.
[74] Deville, Harding (n 2), 38.
[75] *Waddenzee*, opinion of AG Kokott (n 33), para 80.

destruction of essential components of the site.[76] The definition that has been adopted in case law[77] is therefore [at 49]:

> "The answer to Question 3(b) must therefore be that, pursuant to the first sentence of Article 6(3) of the Habitats Directive, 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.**" (**Emphasis** added).

The *Waddenzee* judgment[78] highlights the importance of the term 'significant' and stated [at 49] that:

> "So, where such a plan or project **has an effect on that site but is not likely to undermine its conservation objectives, it cannot be considered likely to have a significant effect on the site concerned**." (**Emphasis** added).

NE and NRW, when applying Reg 63 CHSR 2017, do not seem to follow the definition set out in case law and do not attribute enough weight to the requirement of 'significance'. In consequence, they progress too many plans and projects to the AA stage even though they do not undermine the conservation objectives of a site. The term 'significant' seems to be largely ignored. As an example, NE state that there is no existing evidence in the UK that wildfowling, including the harvesting of quarry species and shooting related disturbances, have reduced waterfowl populations.[79] Objective information, in the form of scientific as well as historic evidence, firmly supports this statement.[80] In other words, the conservation objectives of Protected Sites, i.e to maintain or restore the population of qualifying species, are not undermined by wildfowling and have not been undermined for centuries. The effect of wildfowling compared to other recreational pressures on our foreshore, such as walking with or without a dog, motor boating, or other water sports, is trivial and insignificant.

It, therefore, makes little sense that all wildfowling proposals are regularly being progressed to the AA stage. As mentioned earlier, NE and NRW seem to be micro-regulating shooting related activities – either because they are the most convenient to be regulated or because they attract emotive and political controversy. However, this approach consumes unnecessary resources that would be available for restoration and enhancement projects.

Recommendation – Recognise the importance of the 'likely significant effect' threshold: In application of Regulation 63 CHSR 2017, authorities must pay sufficient attention to the terms 'likely' and 'significant' when deciding whether a 'plan' or 'project' has an LSE. These terms create a threshold to avoid unnecessary HRAs. However, relevant authorities are largely ignoring said threshold. For example, NE acknowledges that wildfowling has no impact on the waterfowl population, yet all consent applications are being progressed to a full HRA. This approach is wasting resources on unnecessary micro-regulation that could otherwise be used for restoration and enhancement projects.

[76] ibid, para 81-84.
[77] *Waddenzee* (n 29), para 49.
[78] ibid, para 47.
[79] Natural England (n 52), para 4.1.
[80] Collop (n 59).

Mitigating factors integral to a plan or project

Further legal uncertainty around the HRA process transpired in relation to the question whether mitigating factors of a 'plan' or 'project' could be considered at the LSE stage or only later during the AA stage. The case of *Hart DC*[81] engaged this very question. *Hart DC* related to a series of developments that had the potential to increase recreational pressures on a PS located within 2 km. The development project proposed to mitigate these pressures by creating alternative recreational places or by enhancing access to existing alternative recreational places, which should reduce potential visitors to the PS. The essential legal question, therefore, was whether it was legitimate to screen out this project at the LSE stage because the project incorporated elements to reduce the effects on nearby PS. *Sullivan J* confirmed that mitigating measures that form part of a 'plan' or 'project' should be considered at the LSE stage and that it would in fact be 'ludicrous' to delay a consideration of these factors to the AA stage [at 76 and 72]:

> "For all these reasons, **I am satisfied that there is no legal requirement that a screening assessment under Regulation 48(1) [now reg 63] must be carried out in the absence of any mitigation measures that form part of a plan or project. On the contrary, the competent authority is required to consider whether the project, as a whole, including such measures, if they are part of the project, is likely to have a significant effect on the SPA**. If the competent authority does not agree with the proponent's view as to the likely efficacy of the proposed mitigation measures, or is left in some doubt as to their efficacy, then it will require an appropriate assessment because it will not have been able to exclude the risk of a significant effect on the basis of objective information (see *Waddenzee* above)."

> "If, having considered the "objective information" contained in the EPR Report, and agreed by NE in the Statement of Common Ground, the first defendant, as the competent authority, was satisfied that the package put forward by the second and third defendants, including the SANGS, would avoid any net increase in recreational visits to the SPA (thereby avoiding any increased disturbance to the Annex 1 bird species), **it would have been "ludicrous" for her to disaggregate the different elements of the package and require an appropriate assessment** on the basis that the residential component of the package, considered without the SANGS, would be likely, in combination with other residential proposals, to have a significant effect on the SPA, only for her to have to reassemble the package when carrying out the appropriate assessment." (**Emphasis** added).

However, the legal approach to incorporate mitigating factors of a 'plan' or 'project' in the LSE stage seemed to have changed with the CJEU's judgement in the *People over Wind* case.[82] The core question referred to the court in this case related to the effect of laying cables to connect a wind farm in Ireland to the electricity grid. The court was asked to clarify whether it was legitimate to consider at the LSE stage protective measures that were put in place to prevent silt and sediment run-offs into nearby rivers, which could potentially affect freshwater pearl mussels. The court made it quite clear that it was not [at 36 and 37]:

[81] *R(Hart District Council) v Secretary of State for Communities and Local Government* [2008] EWHC 1204 (Admin) [72-76].
[82] Case C-323/17 *People Over Wind*, Peter *Sweetman v Coillte Teoranta* [2018] ECR I-244.

> "That conclusion is supported by the fact that a full and precise analysis of the measures capable of avoiding or reducing any significant effects on the site concerned must be carried out **not at the screening stage**, but specifically at the stage of the appropriate assessment." (**Emphasis** added).
>
> "Taking account of such measures at the screening stage would be liable to compromise the practical effect of the Habitats Directive in general, and the assessment stage in particular, as the latter stage would be deprived of its purpose and there would be a risk of circumvention of that stage, which constitutes, however, an essential safeguard provided for by the directive."

Following the *People over Wind* case[83], domestic courts confirmed that the approach in *Hart DC* was not good law anymore. *Dove J*, for example held in the *Canterbury* case[84] that [at 77]:

> "It is clear that the approach of the CJEU to taking into account mitigation measures at the screening stage is directly contrary to the approach which had been taken in domestic law in Hart and Smyth. The approach to the interpretation and application of Article 6(3) of the Directive set out in those cases **can no longer therefore be regarded as good law**." (**Emphasis** added.)

However, in the *Langton* case[85], the court followed a more pragmatic interpretation of *People over Wind*[86]. *Langton* related to badger culling licences and amongst other legal issues the question was posed whether conditions attached to the licences to protect other wildlife, for example the condition that shooting cannot take place in certain areas during the bird breeding season, can be considered at the LSE stage or should in the essence of *People over Wind* be considered at the AA stage. The court did not dispute the change in the law set by *People over Wind* but distinguished the case from the set of facts in the CJEU ruling. According to the court in *Langton*, the *People over Wind* approach only applies to protective or mitigating factors that are not an integral part of a 'plan' or 'project'. However, when mitigating factors are an integral feature, they must be considered, in the spirit of *Hart DC*, at the LSE stage [at 156 and 157]:

> "The claimant submitted that the conditions which Natural England had attached to the cull licences, following advice to applicants, fell within the *People Over Wind* ruling and should not have been taken into account at the screening stage. These were that no culling activity would take place in certain locations (e.g., Severn Estuary SPA) or at certain times of the year (e.g., bird-breeding season with Dorset Heathlands SPA and Poole Harbour SPA)."
>
> "In my view the licence conditions which Natural England attached to the licences in Areas 16 and 17 **are not the mitigating or protective measures which featured in the *People Over Wind* ruling. They are properly characterised as integral features of the project** which Natural England needed to assess under the Habitats Regulations. I accept Natural England's submission that it would be contrary to common sense for Natural England to have to assume that culling was going to take place at times and places where the applicants did not propose to do so." (**Emphasis** added).

[83] *People over Wind* (n 82).
[84] *Canterbury City Council v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 1211 (Admin) [77].
[85] *R(Langton) v Secretary of State for Environment, Food and Rural Affairs* [2018] EWHC 2190 (Admin) [156-157]. The legal issue on integral mitigating factor was not discussed in the following Court of Appeal case.
[86] *People over Wind* (n 82).

Wildfowlers often impose their own moratoria in relation to the shooting of certain species, for example the Dyfi, Mawddach and Dysynni wildfowlers implemented a voluntary moratorium on the shooting of Greenland white-fronted geese on the Dyfi estuary 40 years before the Government protected them. Furthermore, some clubs also prohibit the shooting of hens of certain species or follow very stringent severe weather protocols that go far beyond the statutory requirements. Just as the time and area constrictions to the badger cull licences, such moratoria should be considered as an integral feature of a project and should be considered at the LSE stage in order to avoid unnecessary AA. NE and NRW could secure theses currently voluntary measures though conditions or undertakings in order to establish a sufficient guarantee of their effect.

Recommendation – Recognise that mitigating factors that form an integral part of a 'plan' or 'project' must be considered at the LSE stage.
Mitigating factors that are an integral part of plans or projects, such as shooting moratoria or severe weather protocols, must be considered at the LSE stage. If such plans and projects in their entirety are not likely to have a significant effect on the site in question, they should be screened out at the LSE stage. It would be inefficient to separate these elements and proceed the plan and project to the AA stage. Relevant authorities would waste resources that could be used on restoration project etc.

Appropriate assessments

A 'plan' or 'project', which was not screened out at the LSE stage because the relevant authority could not exclude a likely significant effect on the site in question, will undergo an appropriate assessment to determine its implications on that site's conservation objectives – this is also referred to as the AA stage. As part of the process during the AA stage, the competent authority must consult the appropriate nature conservation authority and must also consider, if appropriate, the opinion of the general public.[87] As the LSE stage, the AA stage is undoubtedly governed by the precautionary principle.[88]

The *Waddenzee* case described the characteristics of the AA stage as follows [at 54]:

> "Such an assessment therefore implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those objectives must be identified **in the light of the best scientific knowledge in the field**. Those objectives may, as is clear from Articles 3 and 4 of the Habitats Directive, in particular Article 4(4), be established on the basis, inter alia, of the importance of the sites **for the maintenance or restoration at a favourable conservation** status of a natural habitat type in Annex I to that directive or a species in Annex II thereto and for the coherence of National Site Network, and of the threats of degradation or destruction to which they are exposed." (**Emphasis** added)

What is important to note is that an AA must consider **all aspects** of a 'plan' or 'project' and that the assessment needs to be undertaken in view of the specific characteristics of the case and the specific conservation objectives of a site.[90]
The relevant authority may only agree to a 'plan' or 'project' after having ascertained that it will not adversely affect the integrity of the site:

> 63(5) In the light of the conclusions of the assessment, and subject to regulation 64, the competent authority may agree to the plan or project only after having **ascertained** that it will **not adversely affect** the integrity of the European site or the European offshore marine site (as the case may be).[91] (**Emphasis** added).

The practical application of the legal terms 'ascertain' and the 'adverse effect' has proven to be difficult for a lack of a clear definition of their meaning. This, combined with an overly rigid application of the precautionary principle, renders the AA stage highly susceptible to inconsistency and arbitrariness. We experience inconsistency in the outcome of AAs for similar activities, depending on the relevant authorities taking the decision and also depending on the individual authors withing the same authority. For example, two area teams of NE that assessed wildfowling activities on the Humber estuary have in the past concluded the assessment of the same activity on the same Protected Site differently. This makes the law highly unpredictable.

We have also experienced that shooting related activities are assessed against a higher threshold than other activities with similar or even higher effects on a site – either because they are governed by a different regulatory framework or because they evoke a different

[87]Conservation of Habitats and Species Regulations 2017, Reg 63(3) and (4).
[88]*Waddenzee*, opinion of AG Kokott, (n 33), para 100.
[89]*Waddenzee* (n 29), para 54.
[90]See also, *R(Champion) v North Norfolk District Council* [2015] UKSC 52 [41].
[91]Conservation of Habitats and Species Regulations 2017, Reg 63(5).

emotive and political response. For instance, a scientific study conducted on Poole Harbour shows that walking causes 100 times more disturbance to waterbirds and waders than wildfowling.[92] Pedestrian disturbance pressures on our estuaries are in the future likely to increase with the implementation of the England Coastal Path.[93] Public access recreation therefore dwarfs wildfowling as to its disturbance impact. However, wildfowling activities are restricted in terms of frequency and time of visits to avoid disturbance of waterbirds, while other recreational activities with a much higher disturbance factor are allowed all year around at any time of day with no limits on numbers of visitors. As an anecdotal example of the bias affecting the HRA process, wildfowling intensity suffered significant restrictions within Poole Harbour in 2017 following an HRA by NE based on its potential for disturbance, despite a PhD study concluding that wildfowling could increase by over 50 times within the harbour and still not affect the birds.[94] In the same year and place the RSPB was allowed to demolish a bird hide and rebuild two new hides with increased capacity. The building work took place during the winter months, when waterbirds are most affected by disturbance, and there are no limits or mechanisms in place to monitor this increase in recreational disturbance even though public access and its associated disturbance is highlighted within the Poole Harbour Site Improvement Plan.[95]

To address these aspects of inconsistency and bias, legal definitions for trigger term such as 'ascertain', or 'adverse effect' should be implemented.

Meaning of the term 'ascertain'

AG *Kokott* described the meaning of the term 'ascertain' in her opinion in the *Waddenzee* case[96] as follows:

"Such a conclusion of the assessment is tenable only where the deciding authorities at least are satisfied that there is **no reasonable doubt as to the absence of adverse effects on the integrity of the site concerned**."

The *Waddenzee* case[97] with reference to the Monsanto case[98] concurred equivalently that:

> [N]ational authorities (...) are to authorise such 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** (see, by analogy, Case C-236/01 *Monsanto Agricoltura Italia and Others* [2003] ECRI-8105, paragraphs 106 and 113). (**Emphasis** added)

This seems to suggest that the AA is based on a standard of proof of 'beyond a reasonable scientific doubt'. What is more, the burden of proof is almost completely shifted to the applicant because they are required to provide information that the competent authority may reasonably need for the purposes of the AA or to enable it to determine whether an AA

[92]Collop (n 59).
[93]For more info on the England Coastal Path see https://www.gov.uk/government/collections/england-coast-path-improving-public-access-to-the-coast last accessed 9th October 2021.
[94]Collop (n 59).
[95]Site Improvement Plan, Poole Harbour, http://publications.naturalengland.org.uk/publication/6713862766198784 last accessed 13th October 2021.
[96]*Waddenzee*, opinion of AG *Kokott* (n 33), para 108.
[97]*Waddenzee* (n 29), para 59.
[98]C-236/01 *Monsanto Agricoltura Italia and Others* [2003] ECRI-8105.

is necessary.[99] Such a high standard of proof with a near complete shift of the burden of proof onto the applicant is problematic and unusual.

For this reason, it is not surprising that AG *Kokott*[100] repeatedly emphasised the need for a proportionate application of this provision and offered clarification that an AA should not require certainty of the absence of adverse effects [at 103 and 104, among other paragraphs]:

> "**However, it could be contrary to the principle of proportionality, which is cited by PO Kokkelvisserij, to require certainty as to the absence of adverse effects** on the integrity of the site concerned before an authority may agree to a plan or project."

> "It is settled case-law that the principle of proportionality is one of the general principles of Community law. A measure is proportionate only where it is both appropriate and necessary and not disproportionate to the objective pursued. This principle is to be taken into account in interpreting Community law."

A standard of proof based on the phrase 'beyond reasonable doubt' is generally reserved for criminal trials, where the highest legal interest – a person's freedom – is at stake. It is, therefore, difficult to distil what this term means within the realm of environmental law. It has been established that 'beyond scientific doubt' in environmental law does not equate to scientific 'certainty', which describes confidence and statistical probably above 95%.[101] Instead, the term should be defined in the context of the specific case at hand and under a proportionate application of the precautionary principle. This can only mean that the acceptable level of scientific doubt depends on the acceptable level of potential harm.[102] As described above, in relation to the LSE stage,[103] a sliding scale of precaution should be applied. Projects that carry potential threats of serious or irreversible harm do indeed attract a standard of proof above reasonable scientific doubt and near certainty. However, such a standard would seem disproportionate in relation to an activity that, even in its worst-case scenario, would only carry a minor or moderate threat of harm.

Many shooting related activities only carry a minor risk of potential harm. Wildfowling, for example, has taken place for centuries and at a higher intensity during periods where waterfowl numbers were, despite the activity, increasing and NE has acknowledged that there is no evidence that wildfowling reduces the waterfowl population.[104] If such activities were not already screened out at the LSE stage, the following AA should certainly not be based on the requirement of an absence of all reasonable scientific doubt in the sense of a reflection of near certainty. Reasonableness for activities carrying low level threats would demand that the AA should be based on a holistic assessment of all relevant information. This must include, not only scientific studies, but also historic evidence as well as a significant a body of anecdotal evidence, especially if this is the only data that is reasonably available.

[99] Conservation of Habitats and Species Regulations, Reg 63(2).
[100] *Waddenzee*, opinion of AG *Kokott* (n 33), paras 103-104.
[101] Jones J, Bronitt S, 'The burden and standard of proof in environmental regulations: the precautionary principle in an Australian administrative context' in: Fisher E, Jones J, von Schomberg R (eds) *Implementing the Precautionary Principle, Perspectives and Prospects* (Edward Elgar 2008) 137, 142.
[102] ibid, with reference to the Australian case *Briginshaw v Briginshaw* (1938) 60 CLR 336 [361-362].
[103] The LSE-stage.
[104] Natural England (n 52), para 4.1.

Recommendation – Define the term 'ascertain' based on a sliding scale of precaution: The term 'ascertain' should be defined in light of a sliding scale of precaution. Plans and projects that attract a potential serious or irreversible threat of harm should be assessed as to whether there is any reasonable scientific doubt as to their adverse effect. However, plans and projects that do not carry a high level of threat, should be analysed on the basis of a holistic assessment, including all available information, such as historic evidence or a significant body of anecdotal evidence.

Meaning of the terms 'adverse effects'

The term 'adverse effects' and therewith the decision whether a 'plan' or 'project' can be authorised is based on the concept of the preservation of 'integrity of the site' and the furtherance of the conservation objectives, which the site was designated for. If a 'plan' or a 'project' has an effect on the site, but does not affect the conservation objectives, it does not adversely affect the site. *Waddenzee*[105] clarified that:

> "As is clear from the first sentence of Article 6(3) of the Habitats Directive in conjunction with the 10th recital in its preamble, the significant nature of the effect on a site of a plan or project not directly connected with or necessary to the management of the site is linked to the site's conservation objectives. **So, where such a plan or project has an effect on that site but is not likely to undermine its conservation objectives, it cannot be considered likely to have a significant effect on the site concerned.**"
> (**Emphasis** added).

In *Commission v Poland*[106], the CJEU further stated that [at 116]:

> "In order for the integrity of a site as a natural habitat not to be adversely affected for the purposes of the second sentence of Article 6(3) of the Habitats Directive, **the site needs to be preserved at a favourable conservation status; this entails the lasting preservation of the constitutive characteristics of the site concerned that are connected to the presence of a natural habitat type whose preservation was the objective justifying the designation of that site in the list of SCIs, in accordance with the directive**"

Section 63 of the CHSR 2017, therefore, requires the relevant authority to undertake an appropriate assessment in view of the conservation objectives. The conservation objectives are set out in detail for all sites individually in the site citations.[107] These should form the basis as well as the limitations of an AA.[108] A relevant authority will act ultra vires if they restrict or regulate activities under regulation 63 that do not affect the conservation objectives. We experience several issues with NE's or NRW's interpretation of an adverse effect on conservation objectives when assessing shooting activities. Decisions are often based on the population trends of a species at either local, national or international scale to suit the most limiting and restrictive response, rather than an assessment of the impact on conservation objectives or a specific species holistically. For example, NE still concludes that wildfowling has an adverse effect on a site through the take of a specific species, even if the

[105] *Waddenzee* (n 29), para 46.
[106] Commission v Poland (n 73), para 116.
[107] Site citations for PS in England can be found here: https://designatedsites.naturalengland.org.uk/ and for Wales here: https://naturalresources.wales/guidance-and-advice/environmental-topics/wildlife-and-biodiversity/protected-areas-of-land-and-seas/find-protected-areas-of-land-and-sea/?lang=en,last accessed 9th October 2021.
[108] Conservation of Habitats and Species Regulation 2017, Regulation 63(1): "A competent authority [...] must make an appropriate assessment of the implications of the plan or project for that site in **view of that site's conservation objectives.**"

mitigation measures provided by the wildfowling club increases the abundance of that species on the site by more than their take. This seems illogical and contrary to the interpretation of adverse effect by European case law.

Regarding the content of the AA, section 63(6) of the CHSR 2017 further states that:

> (6) In considering whether a plan or project will adversely affect the integrity of the site, the competent authority must have regard **to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which it proposes that the consent, permission or other authorisation should be given**. (**Emphasis** added.)

The law, therefore, requires the relevant authority to take a holistic approach considering all aspects of a 'plan' and 'project' in order to determine the adverse effects. The assessment must be based on whether a proposed 'plan' or 'project' in its totality, including all mitigating and protective measures, will have an impact on the conservation objectives set out in the citations. Shooters are quintessentially conservationists and habitat managers. It is important that relevant authorities acknowledge that shooting related activities, such as wardening, predator and pest control, and vegetation management, are necessary to further the conservation objectives of Protected Sites. To restrict such activities, that have shaped our Protected Sites over centuries, might in itself create an adverse effect on the conservation objectives.

Causation versus correlation

Plans and projects should not be consented to if an authority cannot ascertain that they do not have an adverse effect on conservation objectives. The AA must, therefore, focus on factual causation between the proposed activity and the potential effect on the conservation objectives of a site. However, relevant authorities take decisions in relation to shooting activities based on correlation effects rather than causation.

Commission v Poland[109] states, in relation to the outcome of an AA, that the crucial requirement is that the site is preserved at a favourable conservation status. While plans and project that are **causing** an effect on the conservation status must undergo an AA, it cannot be ignored that there are correlating external factors that can influence the conservation status of a site that are not linked to the proposed plan or project and are in fact not in any way influenceable by conservation management. Such correlating phenomena need to be taken out of the equation when conducting an AA.

In practice, we experience that NRW and NE do not assess the causal link between the activity and a potential effect. HRA decisions are based, at times, on correlating factors that have nothing to do with the proposed activity and cannot be influenced. For example, if a migratory bird species decides to short stop in the Netherlands due to climate change rather than travel to an estuary in the UK, then their numbers on that estuary will inevitably decrease. This, however, does not mean that the species number nationally or internationally is in decline and the bird endangered. It might well be that the species is thriving elsewhere. Wildfowling or other shooting related activities will have no influence on a phenomenon like short stopping nor can it be influenced by any conservation management on the estuary. In the proposed scenario it seems unreasonable to restrict wildfowling takes based on the argument that they might adversely affect the conservation

[109] *Commission v Poland (n 73), para 116.*

objectives, as correlating factors don't equate to causal factors and the law requires the latter. A full and precise analysis at the AA stage, as per *People over Wind*[110], must take such external factors into consideration when determining whether a proposed 'plan' or 'project' causes an adverse effect.

Recommendation – Require authorities to take a holistic, fair and consistent approach when deciding the adverse effect on conservation objectives:
We recommend that guidance is being issued to relevant authorities as to the requirement of a holistic approach to assess 'adverse effects' on conservation objectives. The assessment must be limited to causal factors and elements of mitigation and protection should be duly considered as well as potential inadvertent side effects, that derive from regulating, changing or prohibiting long standing shooting related activities that formed part of the management of a PS long before designation. The precautionary principle should be applied proportionately on a sliding scale depending on the risk of harm. Appropriate assessments must be applied consistently and free of bias. Shooting related activities are currently assessed more restrictively compared to similar activities.

[110] *People over Wind* (n 82), para 36.

Conclusions

Relevant authorities are currently taking a precautionary approach in HRAs that is not proportionate to the assessed risks and is not suitable in assessments of complex conservation and biodiversity scenarios. The unintended consequence of this is that conservation objectives are being undermined by the very processes that are in place to protect them.

What is more, trigger terms, such as 'plan' or 'project' or 'likely significant effect' that are supposed to set thresholds within the HRA process, are being interpreted so widely that they lose all meaning. The reasoning behind a broad interpretation of the law and a wide latitude of discretion on behalf of relevant authorities has always been that exploitable lacunae must be prevented. However, in practice, this approach led to an almost complete focus on regulation, depriving restoration and enhancement of any resources. This is not beneficial to our Protected Sites and their conservation objectives, which will at best stagnate. Shooting related activities, especially, tend to get caught up in bureaucratic micro-regulations, with the effect that long-standing habitat management and conservation measure are being restricted or prohibited without any consideration to the environmental effect a sudden change in habitat management might have.

Shooters have over centuries been involved in and have even pioneered conservation work. Rather than being stifled by overly formalistic processes, we would like to be able to collaborate and contribute to the conservation objectives of our Protected Sites. If shooting related activities are over regulated, centuries of experience in conservation will be lost.

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ANNEX

Legal Framework

The Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention) imposes a legally binding obligation on the European Union (EU) as well as the United Kingdom (UK) to implement appropriate legislative and administrative measures for the protection of wild flora and fauna species, their habitats as well as the regulation of migratory species, while taking account of cultural, economic and recreational requirements and the needs of sub-species, varieties or forms at risk locally. The Bern Convention set out the following overriding duty:

> **Article 2**
> The Contracting Parties shall take requisite measures to maintain the population of wild flora and fauna at, or adapt it to, a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements and the needs of sub-species, varieties or forms at risk locally.

The Bern Convention acted as a catalyst for the implementation of our amendments to habitat and species conservation laws at an EU and domestic level. The EU has implemented the obligations arising from the Bern Convention in the Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (Habitats Directive) and Council Directive 2009/147/EC on the conservation of wild birds (Birds Directive). The Birds Directive provides for a classification of sites for the protection of specified bird species, so called Special Protection Areas[111] while the Habitats Directive require the designation of sites for the protection of habitats and species that are of European importance – Special Areas of Conservation. The Birds Directive reiterates that measures of protection need to take account of cultural, economic and recreational requirements of Member States. SPAs and SACs, together, form a network of breeding and nesting sites for rare and threatened species as well as types of rare natural habitats – under the Bern Convention these sites underpin the Emerald network[112]. This network of PS is domestically referred to as National Site Network.

The Conservation of Habitats and Species Regulations 2017 transpose the obligations deriving from the Habitats Directive and elements of the Birds Directive into domestic law in England and Wales. The Habitats Regulations are considered EU derived domestic legislation under section 2 of the European Union (Withdrawal) Act 2018 and will continue to have effect during and after the implementation period until they are amended.

EU case law, which is applicable before the implementation period is retained and any question as to the validity, meaning or effect of any retained EU law is to be decided in accordance with any retained case law and any retained principles so far as that law is unmodified.[113] However, neither the Supreme Court nor the Court of Appeal are bound to retained EU law.[114]

[111] Wildlife and Countryside Act 1981, ss 27A-34.
[112] For more information regarding the Emerald network, see https://www.coe.int/en/web/bern-convention/emerald-network last accessed 9th October 2021.
[113] European Union (Withdrawal) Act 2018, sections 3(2) and 6(3).
[114] ibid, section 6(4).

Regulation 9 of the Habitats Regulations requires appropriate authorities to exercise their functions which are relevant to nature conservation to secure compliance with the Birds and the Habitats Directive.

PS complement the UK's pre-existing conservation protection sites known as Sites of Special Scientific Interests (SSSI) that were originally set up through the National Parks and Access to the Countryside Act 1946 and are currently governed by the WCA 1981 (as amended). It is important to note that all PS are at the same time SSSI but not vice versa.

In general, 'owners' and 'occupiers' of SSSI have the duty not to carry out any operations specified under the notification. In England, these operations are also referred to as operations requiring Natural England's or Operations Likely to Damage a Site Interest (ORNEC or OLDSI).

> **28E Duties in relation to sites of special scientific interest.**
> (1) The owner or occupier of any land included in a site of special scientific interest shall not while the notification under section 28(1)(b) remains in force carry out, or cause or permit to be carried out, on that land any operation specified in the notification unless—
>
> (a) one of them has, after service of the notification, given Natural England notice of a proposal to carry out the operation specifying its nature and the land on which it is proposed to carry it out; and
>
> (b) one of the conditions specified in subsection (3) is fulfilled.
>
> (2) Subsection (1) does not apply to an owner or occupier being an authority to which section 28G applies acting in the exercise of its functions.
>
> (3) The conditions are—
>
> (a) that the operation is carried out with Natural England's written consent;
>
> (b) that the operation is carried out in accordance with the terms of an agreement under section 16 of the 1949 Act [section 7 of the Natural Environment and Rural Communities Act 2006 or section 16 of the Environment (Wales) Act 2016];
>
> (c) that the operation is carried out in accordance with a management scheme under section 28J or a management notice under section 28K.
>
> (4) A consent under subsection (3)(a) may be given—
>
> (a) subject to conditions, and
>
> (b) for a limited period, as specified in the consent.
> [...]

Where a SSSI notification by virtue of section 28 of the WCA 1981 (WCA) is in place, regulation 24 of the CHSR 2017 requires the following in relation to HRAs:

> **Assessment of implications for European sites**
> 24.—(1) Where it appears to the appropriate nature conservation body that a notice of a proposal under section 28E(1)(a) of the WCA 1981 relates to an operation which is or forms part of a 'plan' or 'project' which—
>
> (a) is likely to have a significant effect on a European site (either alone or in combination with other plans or projects), and
>
> (b) is not directly connected with or necessary to the management of that site,
> it must make an appropriate assessment of the implications for that site in view of that site's conservation objectives.

(2) In the light of the conclusions of the assessment, it may give consent for the operation only after having ascertained that the plan or project will not adversely affect the integrity of the site.

(3) This regulation does not apply in relation to a site which is a European site by reason of regulation 8(1)(c).

The general duties in relation to a HRAs of plans and projects are covered in Regulations 63 and 64:

Assessment of implications for European sites and European offshore marine sites

63.—(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—

(a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and

(b) is not directly connected with or necessary to the management of that site,
must make an appropriate assessment of the implications of the plan or project for that site in view of that site's conservation objectives.

(2) A person applying for any such consent, permission or other authorisation must provide such information as the competent authority may reasonably require for the purposes of the assessment or to enable it to determine whether an appropriate assessment is required.

(3) The competent authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority specifies.

(4) It must also, if it considers it appropriate, take the opinion of the general public, and if it does so, it must take such steps for that purpose as it considers appropriate.

(5) In the light of the conclusions of the assessment, and subject to regulation 64, the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be).

(6) In considering whether a plan or project will adversely affect the integrity of the site, the competent authority must have regard to the way it is proposed to be carried out or to any conditions or restrictions subject to which it proposes that the consent, permission or other authorisation should be given.

[...]

Regulation 64 provides:

Considerations of overriding public interest

64.—(1) If the competent authority is satisfied that, there being no alternative solutions, the plan or project must be carried out for imperative reasons of overriding public interest (which, subject to paragraph (2), may be of a social or economic nature), it may agree to the plan or project notwithstanding a negative assessment of the implications for the European site or the European offshore marine site (as the case may be).

(2) Where the site concerned hosts a priority natural habitat type or a priority species, the reasons referred to in paragraph (1) must be either—

(a) reasons relating to human health, public safety or beneficial consequences of primary importance to the environment; or

(b) any other reasons which the competent authority, having due regard to the opinion of the European Commission, considers to be imperative reasons of overriding public interest.

[...]

In essence, a HRA is triggered if a 'plan' or 'project', that is not directly connected with or necessary to the management of that site, is likely to have a significant effect on a PS, either alone or in combination with other plans or projects. If this is the case, the competent authority must undertake an appropriate assessment ("AA") of the implications of the 'plan' or 'project' for that site in view of that site's conservation objectives. The competent authority may only agree to the 'plan' or 'project' after having ascertained that it will not adversely affect the integrity of the site.