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Foreman Homes Ltd

Land East of Posbrook Lane, Titchfield, Hampshire, P/19/1193/OA

Addendum: Shadow Habitats Regulations Assessment

November 2021

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1.0 INTRODUCTION

- 1.1 The following Shadow Habitats Regulations Assessment (sHRA) has been prepared by FPCR Environment and Design Ltd and commissioned by Foreman Homes Ltd, to guide the Planning Inspector and Fareham Borough Council, in the assessment of potential recreational impacts on the New Forest European Protected sites, from a proposed development on Land to the east of Posbrook Lane, Titchfield, Hampshire (P/19/1193/OA).
- 1.2 An outline planning application was submitted to Fareham Borough Council in November 2019 in respect of the Appeal Site, seeking permission for the erection of up to 57 dwellings, together with associated parking, landscaping and access from Posbrook Lane (P/19/1193/OA).
- 1.3 The Officer's Report to Committee (dated 24 June 2020) recommended refusal of the outline application. At the time of writing there was no objection to the application from the Council's Ecologist, and no objection from Natural England (the Statutory Nature Conservation Board in England) subject to the "Bird Conservation Area being appropriately secured and any positive nutrient budget being mitigated." The application was refused for a number of reasons by Fareham Borough Council, including ecological, based on the following assessments (referenced as per the refusal document);
- e) In the absence of a legal agreement to secure such, the proposal fails to appropriately secure mitigation of the likely adverse effects on the integrity of European Protected Sites which, in combination with other developments, would arise due to the impacts of recreational disturbance;*
- f) In the absence of a legal agreement to secure such, the proposal fails to appropriately secure mitigation of the likely adverse effects on the integrity of European Protected Sites which would arise as a result of the loss of part of a Primary Support Area for Brent geese and waders;*
- g) In the absence of a legal agreement to secure such, the proposal fails to appropriately secure mitigation of the likely adverse effects on the integrity of European Protected Sites which, in combination with other developments, would arise due to the additional generation of nutrients entering the water environment; This document specifically deals with points A and C, whilst point B is not relevant to this sHRA and is dealt with as part of an update Ecological Impact Assessment and Environmental Statement to be submitted as part of the appeals process.*
- 1.4 All three of these reasons for refusal have been assessed and mitigated by means of separate documents, which include a shadow Habitats Regulations assessment (sHRA) (CSA Environmental, 2020¹), which details a Bird Conservation Area specification to mitigate for the loss of a Solent Wader and Brent Goose Strategy site and mitigation payments to Solent Bird Aware scheme for recreational disturbance. This document is a supplementary addendum to that sHRA and only deals with potential impacts on the New Forest protected sites from increased recreational disturbance.
- 1.5 Natural England have not raised any objections to the proposals relating to increased recreational disturbance on the New Forest protected sites, however, due to other projects being assessed in the Fareham Borough since summer 2021, a sHRA for the Posbrook Lane site was deemed appropriate.

¹ CSA Environmental (2020) Shadow Habitats Regulations Assessment, Land East of Posbrook Lane. CSA/4084/03.

- 1.6 The intention of this sHRA is to provide Planning Inspector, as the “Competent Authority” under the Habitats Regulations, the required information to either a) conduct their own HRA as is their legal obligation, or b) adopt this document as the official HRA.

Proposals and Site Context

- 1.7 Foreman Homes Ltd submitted an outline application for up to 57 dwellings, associated parking and landscaping and a means of access from Posbrook Lane. This application was refused and is now at appeal. The land is currently pasture used for lowland grazing and is adjacent to the Solent & Southampton Water Special Protection Area (SPA) and Ramsar sites and a number of other statutory protected sites are present within 10 kilometres. The New Forest Special Area of Conservation (SAC), SPA and Ramsar sites are approximately 9.9km from the site boundary at their nearest point in a straight line, however due to the geography of the Solent area, it is a 33km journey by road to the closest feature of the protected sites at Copythorne (Barrow Hill Rd, Copythorne, Southampton, SO40 2PH).
- 1.8 A portion of the site has been identified as a Primary Support Area for dark-bellied brent geese (*Branta bernicla bernicla*) under the criteria of the Solent Waders and Brent Goose Strategy² (2020) and is labelled as parcel F48b (F relating to the Fareham area of strategy sites).

Consultation

- 1.9 Natural England were last consulted in early 2020 and responded in February 2020. No Objections were raised in relation to the New Forest Protected sites at this stage.
- 1.10 Following discussions between the appellant and Fareham Borough LPA in Autumn 2021, the issue of other proposed developments within the Borough being considered to have an increased recreational impact on the New Forest Protected sites was raised. It was agreed that screening for likely significant effects through HRA was appropriate.

Natura 2000 Sites Considered

- 1.11 Only the New Forest protected sites are considered in this assessment and are listed below:

Table 1: New Forest Natura 2000 sites

Site Name	Site Reference	Proximity to Site (approximate closest point)
New Forest Ramsar	UK11047	9.9km south west
New Forest SAC	UK0012557	9.9km south west
New Forest SPA	UK9011031	9.9km south west

² Whitfield, D (2020) *Solent Waders and Brent Goose Strategy*, Hampshire and Isle of Wight Wildlife Trust. Curdrige.

The HRA process

- 1.12 The HRA process has developed into a four-stage process summarised as follows:
- Stage One: Screening - also known as the Test of Likely Significant Effect (TOLSE). If the Competent Authority cannot screen out a *likely significant effect*, an Appropriate Assessment is required.
 - Stage Two: Appropriate Assessment - the Competent Authority will only agree to plans or projects that will not affect the *integrity* of a European site also known as the “Integrity Test”.
 - Stage Three: Alternative Solutions - assesses any alternative solutions of a potentially damaging plan or project that failed the Integrity Test, and if it is determined there are no alternative solutions, the project cannot be agreed to and it will either need to be changed or refused.
 - Stage Four: The final stage may allow a plan or project to proceed if after failing stage three if it is for Imperative Reasons of Overriding Public Interest, and only if suitable compensatory measures are secured.
- 1.13 A note on the people Over Wind Judgement in relation to the HRA process is provided in Appendix A Section 1.17 to 1.20.
- 1.14 This report identifies and considers ecological pathways between the Site and the Natura 2000 sites within the zone of influence selected. Each was screened with a TOLSE for alone effects, and then the effect in-combination with other plans or projects was considered. Where there are any ecological pathways that could not be screened without mitigation alone or in-combination, a stage 2 Appropriate Assessment would be included in this HRA.

2.0 STAGE 1: TEST OF LIKELY SIGNIFICANT EFFECT (SCREENING)

Section 1: New Forest SAC, SPA and Ramsar qualifying features, threats and pressures and condition assessments

Qualifying features

- 2.1 The closest boundary of the protected sites is found approximately 9.9km south west from the appeal site. A detailed description of each protected sites qualifying features can be found in Footprint Ecology's recreation impacts and mitigation approaches report³ from 2020. A summary from that report is shown below for reference;

"The New Forest is one of the largest tracts of semi natural vegetation in the country, and as such is one of our most important wildlife sites. The area hosts three international wildlife site designations and is closely located to other international wildlife sites such as the Solent and Southampton Water.

*The New Forest is classified as an SPA for its breeding and overwintering bird species of European importance, in accordance with the European Birds Directive. The designation relates to internationally significant breeding populations of Dartford Warbler *Sylvia undata*, Nightjar *Caprimulgus europaeus*, Woodlark *Lullula arborea*, Honey Buzzard *Pernis apivorus*, Hobby *Falco subbuteo* and Wood Warbler *Phylloscopus sibilatrix* and over-wintering Hen Harrier *Circus cyaneus*.*

*The New Forest is also designated as an SAC for its habitats and non-avian species of European importance, in accordance with the European Habitats Directive. This designation reflects the unique mosaic of habitats across the New Forest, which includes eight Annex 1 heathland, grassland, woodland, wetland, bog and open water habitats, together with three Annex 2 species, Stag Beetle *Lucanus cervus*, and Southern Damsel fly *Coenagrion mercuriale*, and Great Crested Newt *Triturus cristatus*.*

Also relevant is the New Forest's listing as a Ramsar site, under the Ramsar Convention. This recognises the international importance of the site as a wetland, supporting wetland flora and fauna of international importance, and adding to the global network of Ramsar listed wetlands."

Conservation Objectives

New Forest SAC

- 2.2 The conservation objectives are taken from the Natural England European Site Conservation Objectives site and those for the New Forest SAC are listed below.

"With regard to the SAC and the natural habitats and/or species for which the site has been designated (the 'Qualifying Features' listed below), and subject to natural change; Ensure that the integrity of the site is maintained or restored as appropriate, and ensure that the site contributes to achieving the Favourable Conservation Status of its Qualifying Features, by maintaining or restoring;

- *The extent and distribution of qualifying natural habitats and habitats of qualifying species*

³ Lake, S., Liley, D. & Saunders, P. (2020). Recreation use of the New Forest SAC/SPA/Ramsar: Impacts of recreation and potential mitigation approaches. Footprint Ecology, Wareham, Dorset.

- *The structure and function (including typical species) of qualifying natural habitats*
- *The structure and function of the habitats of qualifying species*
- *The supporting processes on which qualifying natural habitats and the habitats of qualifying species rely*
- *The populations of qualifying species, and,*
- *The distribution of qualifying species within the site.”*

New Forest SPA

2.3 The conservation objectives are taken from the Natural England European Site Conservation Objectives pages and those for the New Forest SPA are listed below.

“With regard to the SPA and the individual species and/or assemblage of species for which the site has been classified (the ‘Qualifying Features’ listed below), and subject to natural change; Ensure that the integrity of the site is maintained or restored as appropriate, and ensure that the site contributes to achieving the aims of the Wild Birds Directive, by maintaining or restoring;

- *The extent and distribution of the habitats of the qualifying features*
- *The structure and function of the habitats of the qualifying features*
- *The supporting processes on which the habitats of the qualifying features rely*
- *The population of each of the qualifying features, and,*
- *The distribution of the qualifying features within the site.”*

New Forest Ramsar

2.4 Conservation objectives are not specified for Ramsar sites, however as this designation relates to important wetland features and the boundaries of the sites are identical, the SAC and SPA conservation objectives are relevant and should be applied.

Threats and pressures

2.5 Site Improvement Plans (SIPs) were developed for each Natura 2000 site in England as part of the Improvement Programme for England's Natura 2000 sites (IPENS). *Table 1* below shows the threats and pressures relating to recreation identified in the New Forest SAC and SPA joint improvement plan and identifies the measures to mitigate for these.

Table 2: Threats and pressures: Cotswolds Beechwoods SAC Site Improvement Plan 2015

Priority & Issue	Measure
Public access/disturbance	Manage recreation to minimise disturbance to SPA birds and SAC habitats
Vehicles	Reduce and control damage by vehicles

SAC/SPA/Ramsar Qualifying Features Condition Assessment

- 2.6 Many of the New Forest SAC and SPA qualifying features, with the exception of some habitats are sensitive to recreational disturbance and increased recreational disturbance is likely to generate a significant effect on those features. This is particularly true of the qualifying bird species that breed and winter within the protected sites. Natural England only undertake condition assessments for Special Sites of Scientific Interest and whilst these occur within large areas of the European protected sites, they do not cover the same extent and cannot be considered alone for an assessment of the qualifying features condition.
- 2.7 Some of the SSSI units within the SAC designation areas show significant impacts from recreational disturbance, including Hollands Wood Campsite, Balmer Lawn and Hatchet Pond, as discussed in the Footprint Ecology recreational impacts report. In total 18 SSSI units within the SAC designation, record negative recreation impacts to their overall condition, however some remain in favourable condition. These SSSI units also include wetland habitats for which the Ramsar is designated and therefore, the condition assessments are relevant to the overall status of the Ramsar.
- 2.8 The qualifying features for which the SPA is designated are all declining bird species⁴ particularly sensitive to recreational disturbance. The Natural England Conservation Objectives document for the SPA summarises the recreational impacts on every qualifying species as follows;
- “The nature, scale, timing and duration of some human activities can result in the disturbance of birds at a level that may substantially affect their behaviour, and consequently affect the long-term viability of the population. Such disturbing effects can for example result in changes to feeding or roosting behaviour, increases in energy expenditure due to increased flight, abandonment of nest sites and desertion of supporting habitat (both within or outside the designated site boundary where appropriate). This may undermine successful nesting, rearing, feeding and/or roosting, and/or may reduce the availability of suitable habitat as birds are displaced and their distribution within the site contracts. Disturbance associated with human activity may take a variety of forms including noise, light, sound, vibration, trampling, and presence of people, animals and structures.”*
- 2.9 A 2008 study by Footprint Ecology of recreational pressure in the New Forest specifically surveyed the qualifying bird species and found that all with the exception of Dartford warbler reacted or were impacted by recreational disturbance. Increased recreational disturbance is therefore likely to lead to further decline in these species and some will become absent at their current low populations within the New Forest.

Section 2: Ecological Pathways and Screening Conclusion

- 2.10 The relevant ecological pathway in relation to all three New Forest protected sites is potential increased recreational pressure arising from the 57 homes proposed at the appeal site.
- 2.11 Footprint Ecology are the leading UK authority on carrying out surveys and designing mitigation recommendations, for the potential impacts of increased recreational pressure on European Protected Sites. In 2020, the New Forest National Park Authority commissioned them to undertake a study on the impacts of increased visitor numbers and recreational activity on the New Forest

⁴ Eaton MA, Aebischer NJ, Brown AF, Hearn RD, Lock L, Musgrove AJ, Noble DG, Stroud DA and Gregory RD (2015) Birds of Conservation Concern 4: the population status of birds in the United Kingdom, Channel Islands and Isle of Man. British Birds 108, 708–746

SAC/SPA/Ramsar European Protected sites. This study included a very large visitor survey in the park itself and telephone study of the surrounding postcodes.

2.12 From this study, Footprint Ecology compiled a summary of the use of the protected sites, where visitors came from and the frequency of their visits and then made recommendations for mitigation and a Zone of Influence (ZOI) in which these mechanisms should be supplied. Similarly, to the nearby Solent protected sites, mitigation recommendations included financial contributions from new development through a metric based on occupancy rate, but also includes for adequate SANG's provisions as part of developments where possible.

2.13 For the purposes of this summary, the relevant document is "*Discussion and analysis relating to the New Forest SAC/SPA/Ramsar and a Zone of Influence for recreation*" (Liley et al, 2020). The opening summary of that document reads as follows;

"This report provides clarification and advice relating to an appropriate 'zone of influence' or 'catchment area' within which visitors from new development are likely to have a significant impact on the New Forest Special Area of Conservation (SAC), Special Protection Area (SPA) and Ramsar designations. It has been commissioned by the New Forest National Park Authority, on behalf of a steering group made up of 6 local planning authorities and statutory agencies. The report draws on the findings of visitor surveys that Footprint Ecology conducted in 2018/19, which included interviews with visitors to the New Forest SAC/SPA/Ramsar. The zone of influence defines where additional housing growth would trigger likely significant effects on the New Forest SAC/SPA/Ramsar from recreation and as such where mitigation would be required."

2.14 The recommended ZOI, based on the 75th percentile of all visitor origin points from that document is 13.8km in a straight line from the European Protected Sites external boundaries. In a straight line, this ZOI includes Boroughs and Authorities including Fareham, Gosport and the Isle of White, of which the appeal site is within. However, the Footprint ZOI study recommends the following for those areas;

We recommend that the zone of influence should be modified to exclude the following local authorities: Fareham, Gosport and the Isle of Wight. This is to take into account the particular geographic barrier of Southampton Water and the Solent.

We recommend that large developments just outside the zone of influence should be subject to HRA and that mitigation may be required. This could be either through the provision of very high quality local greenspace or a reduced per dwelling contribution to the strategic mitigation scheme. The need for mitigation should be assessed on a site by site basis and should potentially be relevant for any site of around 200 or more dwellings within 15km of the SAC/SPA/Ramsar boundary.

2.15 It should be noted that the two primary objectives of European Site strategic mitigation plans and policies such as this are to provide a mitigation plan based on objective scientific information that; 1) fulfills the legal obligations under the Habitats Regulations to ensure no adverse effect on the integrity of the Habitats Site and; 2) provides a clear Zol to remove ambiguity to aid decision makers in determining which plans or projects should be screened in or out on an Appropriate Assessment. It would be a failure of the mitigation strategy if either these objectives were not met.

2.16 As all but large residential developments of "around 200 or more dwellings" are excluded within Fareham Borough, the project under consideration falls outside the Zol. It can therefore be screened out of an Appropriate Assessment based on the best available scientific information, and

it can be concluded there will be No Likely Significant Effect on the New Forest European Protected Sites from increased recreational pressure as a result of the proposals.

Table 2: Ecological Pathways and HRA Screening Conclusions for the New Forest Protected Sites

Ecological Pathway	Assessment / threshold applied	Likely Significant Effect
Recreational pressure	<p><i>Discussion and analysis relating to the New Forest SAC/SPA/Ramsar and a Zone of Influence for recreation</i>" (Liley et al, 2020)</p> <p>Site falls within Fareham Borough and is for 57 dwellings, below the 200-dwelling threshold for this area, therefore is outside the zone-of-influence.</p>	<p>No effects alone or in combination.</p> <p>No further assessment required.</p>

APPENDIX A: THE HABITATS REGULATIONS ASSESSMENT PROCESS AND LEGISLATION

Legislative Background

- A1.1. The Conservation of Habitats and Species Regulations 2017 consolidate the Conservation of Habitats and Species Regulations 2010 with subsequent amendments. The Regulations transpose Council Directive (the Habitats Directive) 92/43/EEC, and EC Directive on Wild Birds (the Birds Directive) (Council Directive) 2009/147/EEC, into national UK law. The Regulations require the compilation and maintenance of a register of European sites that includes Special Areas of Conservation, as well as Special Protection Areas designated for birds and sites designated as internationally important wetlands under the Ramsar Convention known as “Ramsar Sites”. These three designations form a collective Europe wide network of internationally protected sites known as Natura 2000.

The Habitats Directive

- A1.2. Article 6(3) of the Habitats Directive requires an Appropriate Assessment of any plans that could affect a Natura 2000 site:

“Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site’s conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of Paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.”

- A1.3. Article 6(4) of the Habitats Directive discusses alternative solutions, the test of “imperative reasons of overriding public interest” (IROPI) and compensatory measures (transposed to Regulation 60):

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

- A1.4. A “likely significant effect” is defined as: “any effect that may reasonably be predicted...that may affect the conservation objectives of the features for which the site was designated, but excluding trivial or inconsequential effects.”

- A1.5. The “integrity of a site” is defined as: “the coherence of its ecological structure and function, across its whole area, that enables it to sustain the habitat, complex of habitats and / or the level of populations of the species for which it was classified.”

The Habitats Regulations

A1.6. In relation to undertaking and consenting plans or projects, the due consideration of Natura 2000 sites is outlined in regulation 61 of the Habitats Regulations, which has led to the HRA process, as follows.

“61. 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 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 them 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 specify.

(4) They must also, if they consider it appropriate, take the opinion of the general public, and if they do so, they must take such steps for that purpose as they consider appropriate.

(5) In the light of the conclusions of the assessment, and subject to regulation 62 (considerations of overriding public interest), 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 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 they propose that the consent, permission or other authorisation should be given.”

Habitats Regulations Assessment Process

A1.7. The HRA process has developed into a four-stage process as follows:

- Stage One: Screening - also known as the Test of Likely Significant Effect (TOLSE). If the Competent Authority cannot screen out a *likely significant effect*, an Appropriate Assessment is required.
- Stage Two: Appropriate Assessment - the Competent Authority will only agree to plans or projects that will not affect the *integrity* of a European site also known as the “Integrity Test”.
- Stage Three: Alternative Solutions - assesses any alternative solutions of a potentially damaging plan or project that failed the Integrity Test, and if it is determined there are no alternative solutions, the project cannot be agreed to and it will either need to be changed or refused.

- Stage Four: The final stage may allow a plan or project to proceed if after failing stage three if it is for Imperative Reasons of Overriding Public Interest, and only if suitable compensatory measures are secured.

Key Case law in relation to Test of Likely Significant Effect

A1.8. The following are some relevant case law judgement quotes in relation to “likely Significant Effect” which are of relevance for a Stage 1 screening.

A1.9. EC Case C-127/02 - Waddenvereniging and Vogelsbeschermingvereniging – the “Waddenzee Judgement” (paras 45, 47 and 48) – 7th September 2004:

“...any plan or project ... is to be subject to an appropriate assessment ... if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects.”

“Where 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 that site.”

“In assessing the potential effects of a plan or project, the significance must be established in the light, inter alia, of the characteristics and specific environmental conditions of the site concerned by that plan or project”

A1.10. R (Hart District Council) v Secretary of State for the Communities and Local Government [2008] EWHC 1204 (Para 55 and 76) – 1st May 2008:

“If the competent authority does not agree with the proponents' view as to the likely efficacy of the proposed mitigation measures, or is left in some doubt as to the 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 ...”

“The competent authority is not considering the likely effect of some hypothetical project in the abstract. The exercise is a practical one which requires the competent authority to consider the likely effect of the particular project for which permission is being sought. If certain features ...have been incorporated into that project, there is no sensible reason why those features should be ignored at the initial, screening, stage merely because they have been incorporated into the project in order to avoid, or mitigate, any likely effect....”

A1.11. Boggis v Natural England [2009] EWCA Civ 1061 20th October 2009 (para 36 and 37)

“Notwithstanding the word “likely” ...is not that significant effects are probable, a risk is sufficient.”

“...a claimant who alleges that there was a risk which should have been considered by the authorising authority so that it could decide whether that risk could be “excluded on the basis of objective information”, must produce credible evidence that there was a real, rather than a hypothetical, risk which should have been considered.”

A1.12. Ec Case C-258-11 Reference for a preliminary Ruling, Opinion of Advocate General Sharpston ‘Sweetman’ (Para 48) – 22nd November 2012:

“The requirement that the effect in question be “significant” lays down a de minimis threshold. Plans or projects that have no appreciable effect on the site are thereby excluded. If all plans or projects capable of having any effect whatsoever on the site were to be caught by article 6(1), activities on or near the site would risk being impossible by reason of legislative overkill.”

A1.13. Bagmoor Wind Ltd v Scottish Ministers [2012] CSIH 93 7th December 2012 (para 45):

“The requirement for objective information at the preliminary examination is not to be equated with a need for scientific knowledge. The Court only refers to “the best scientific knowledge” in the context of the appropriate assessment (para [61]). “Objective”, in this context, means information based on clear verifiable fact rather than subjective opinion.”

A1.14. R (on application of An Taisce) v SoS [2014] EWCA Civ 1111 1st August 2014 (paras 38 and 39)

“The word “likely” ...implies at least some degree of flexibility. There comes a point when the probability...of a significant effect is so remote that it ceases to be “likely”, however broad the concept of likelihood.”

“The competent authority does not have to be satisfied that there is no risk, however remote...”

Note of Functional Linkage

A1.15. “Functional linkage” is a term that refers to the potential for habitat away from the designation boundaries of a Natura 2000 site, that is considered to have a “role” or “function” for a qualifying feature “beyond the boundary”. This is covered in the Guidance document on the strict protection of animal species of Community interest under Habitats Directive 92/43/EEC 2007. Paragraph 7 states:

“Assessing and evaluating the conservation status of habitats and species within the Natura 2000 network is therefore not always enough, especially when the occurrences of habitats or species are only partly covered by the network, maybe even in some cases only to a relatively small extent.”

A1.16. A case law example of where the concept of Functionally Linked Land (FLL) has been applied was RSPB and others v SoS and London Ashford Airport Ltd [2014] EWHC 1523 16th May 2014 (para 27):

“There is no authority on the significance of the non-statutory status of the FLL. However, the fact that the FLL was not within a protected site does not mean that the effect which a deterioration in its quality or function could have on a protected site is to be ignored. The indirect effect was still protected. Although the question of its legal status was mooted, I am satisfied, as was the case at the Inquiry, that while no particular legal status attaches to FLL, the fact that land is functionally linked to protected land means that the indirectly adverse effects on a protected site, produced by effects on FLL, are scrutinised in the same legal framework just as are the direct effects of acts carried out on the protected site itself. That is the only sensible and purposive approach where a species or effect is not confined by a line on a map or boundary fence. This is particularly important where the boundaries of designated sites are drawn tightly as may be the UK practice.”

2.17 Paragraph 40 of The Holohan and others versus An Bord Pleanála C-461/17 [7th November 2018] judgement states “an ‘appropriate assessment’ must, on the one hand, catalogue the entirety of habitat types and species for which a site is protected, and, on the other, identify and examine both the implications of the proposed project for the species present on that site, and for which that site has not been listed, and the implications for habitat types and species to be found **outside the boundaries of that site, provided that those implications are liable to affect the conservation objectives of the site.**” i.e. the boundary for the AA may extend beyond the Natura 2000 site boundary.

Note on the Sweetman ruling “People over Wind” and definition of “mitigation”

A1.17. The *People Over Wind* judgement (Peter Sweetman v Coillte Teoranta (C-323/17)), in April 2018, changed the way mitigation is viewed during the HRA Stage One screening i.e. the Test of Likely Significant Effect. The ruling was based on the view that allowing mitigation measures to be considered at the screening stage allows projects to avoid an Appropriate Assessment (Stage Two). The ruling stated:

“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.” (paragraph 37 of the judgment)”

A1.18. This has made what constitutes “mitigation” directly in relation to the European site, and what is considered “integrated” into the scheme for other reasons, a question that carries some uncertainty. The PINS Note 05/2018 *Consideration of avoidance and reduction measures in Habitats Regulations Assessment: People over Wind, Peter Sweetman v Coillte Teoranta* provides some clarification as follows:

“The implication of the CJEU judgment is that competent authorities cannot take account of any integrated or additional avoidance or reduction measures when considering at the HRA screening stage whether the plan or project is likely to have an adverse effect on a European Site.

The screening stage must be undertaken on a precautionary basis without regard to any proposed integrated or additional avoidance or reduction measures. Where the likelihood of significant effects cannot be excluded, on the basis of objective information the competent authority must proceed to carry out an AA to establish whether the plan or project will affect the integrity of the European site, which can include at that stage consideration of the effectiveness of the proposed avoidance or reduction measures.”

A1.19. PINS Note 05/2018 goes on to further explain:

“It should be noted that there is no authoritative definition of what constitutes an integrated or additional avoidance or reduction measure and this should be considered on a case by case basis. If a measure is being introduced to avoid or reduce an effect on a European site then it can be viewed as mitigation. It may be helpful to consider whether a proposal could be considered integral to a plan or whether it is a measure to avoid harm. For instance, the HRA report could identify European sites whose designated features are vulnerable to disturbance caused by people visiting the site. If evidence presented in the HRA report and during the examination demonstrates that the housing allocation is too far from the European site to lead to increased visitor numbers then it could be concluded that there is no pathway for likely significant effects to occur. However if the HRA report determines that the housing allocation would be likely to increase visitor use of the European site and relies on measures which reduce visitor pressure (such as securing land to provide a buffer to the European site or ensuring footpaths and car parks are located away from the site) to avoid or reduce likely significant effects an AA will be required to assess whether the plan will affect the integrity of the European site.”

A1.20. The interpretation of the above being taken by legal professionals appears to be that if it can be argued that mitigation, whether integrated or additional, is an “avoidance or reduction” measure directly due to an ecological pathway to a Natura 2000 site, then an Appropriate Assessment is

required. If it is truly integrated into the proposals for other reasons, for example green space due to an unrelated protected species mitigation licence, as was the case with UK High Court ruling in August 2018 (R (on the application of Langton) v Secretary of State for Environment, Food and Rural Affairs, Natural England [2018] EWHC 2190 Admin) in relation to mitigation within a badger cull licence, then the mitigation is fully integrated and would not automatically trigger the requirement for an Appropriate Assessment. However, in many cases, such a judgement would carry the risk of conflicting views within the planning process, and often it may be simpler to take a precautionary approach by progressing to Appropriate Assessment where there is room for doubt.