

Joint Links Fitness Check Evidence Submission 25/03/2015 (Updated 29/04/2015)

Annex VII: Coherence Detailed Analysis and Case Studies

C.2 Detailed Analysis: SEA¹

There is significant commonality of strategic aims between the SEA Directive (SEAD) and the BHDs. Both instruments aim to provide a high level of environmental protection, the SEAD reinforcing the duty on Parties to the Convention on Biological Diversity (CBD) to integrate, as far as possible, the conservation and sustainable use of biological diversity into relevant sectoral and cross-sectoral plans and programmes². Both the BHDs and the SEAD embody the precautionary principle³ in requiring a prior assessment of the likely significant effects of plans and programmes on Natura 2000 sites (under the BHDs) and the environment more generally (under the SEAD) before the adoption of plans or programmes or their submission to legislative procedures.

The aims of the SEAD are achieved by ensuring that an Environmental Assessment (EA) is carried out of certain plans and programmes which are likely to have significant effects on the environment⁴. This assessment is conducted without prejudice to any requirements under the EIA Directive and 'any other Community law requirements⁵', thus recognising the potential for overlap between assessment procedures conducted under the EIA Directive and the BHDs. Where an obligation to undertake assessments arises simultaneously from the SEAD and other Community legislation, Member States are encouraged to provide for coordinated or joint procedures⁶. This enables Member States to efficiently fulfil the distinct, but overlapping, requirements of assessment processes under relevant Directives.

Both the SEAD and the Habitats Directive require Member States to consider alternative solutions. Article 6(4) of the Habitats Directive only allows Member States to sanction plans or projects adversely affecting the integrity of Natura 2000 sites in the *absence* of alternative solutions. Article 5(1) of the SEAD requires Member States to consider '*reasonable alternatives*' and is therefore narrower than the assessment required under the Habitats Directive. Information to be provided in the Environmental Report may include relevant information on the environmental effects of the plans and programmes obtained through other Community legislation, such as the BHDs.

There are other commonalities between the BHDs and the SEAD including:

- Sustainable development – both instruments explicitly refer to the importance of sustainable development for ensuring environmental protection⁷.
- Public participation – the Habitats Directive acknowledges the public's role in the consideration of plans and programmes⁸ and the desirability of re-introducing species listed in Annex IV of the

¹ Day, C (2015) 'The EU "Fitness Check" on Nature Legislation: Legal Analysis of certain Mandate questions' legal research for WWF-UK

² Recital 3 SEAD

³ See recital 10 of the Habitats Directive and recitals 1 SEAD

⁴ Article 1, SEAD

⁵ Article 11(1) SEAD

⁶ Recital 19 and Article 11(2) SEAD

⁷ Recital 3 of the preambles to the Habitats Directive and recitals 1, 2 and Article 1 of the SEAD

Directive⁹. The importance of participatory rights are developed in Article 6 of the SEAD, which requires Member States to ensure that draft plans or programmes and Environmental Reports are made available to relevant authorities and the public, along with effective opportunities to submit views before the adoption of the plan or programme or its submission to the legislative procedure. Similar rights apply to authorities and the public in Member States where a plan or programme arising in another Member State is likely to have a significant environmental effect in their territory;

- Monitoring - Article 10 of the SEAD requires Member States to monitor the significant environmental effects of the implementation of plans and programmes in order, *inter alia*, to identify unforeseen adverse effects, and to be able to undertake appropriate remedial action. Where appropriate and in order to prevent duplication, Member States may use existing monitoring arrangements, thereby providing an opportunity for monitoring schemes under the BHDs¹⁰ to be integrated with those under the SEAD;
- Information, reporting and review – both instruments create duties in relation to regular reporting and review. Article 17(1) of the Habitats Directive and Article 12(1) of the Birds Directive require Member States to submit regular reports to the Commission on the implementation of measures taken under the BHDs. The Commission must then prepare a composite report evaluating the progress achieved. Article 12 of the SEAD obliges Member States to exchange information on the experience gained in applying the Directive. The SEAD also obliges the Commission to issue a report on the application and effectiveness of the Directive to the European Parliament and to the Council¹¹ at seven-yearly intervals; and
- Community action – both instruments reinforce the crucial role of Community action in light of the trans-boundary nature of the Community's natural heritage¹². In particular, the SEAD requires different environmental assessment systems operating within Member States to contain a set of common procedural requirements in order to contribute to a high level of environmental protection¹³.

Case Study C.2(i): UK SEA Case Study

The Strategic Environmental Assessment Directive considers the impact of programmes and plans on the wider environment, while the Birds and Habitats Directive is focussed on protected habitats and species. So for marine energy for example, the Department for Energy and Climate Change commissions an SEA of all marine energy including oil & gas, offshore wind, wave and tidal power every few years. This is integrated with the Birds & Habitats Directive by also undertaking a Habitats Regulations Assessment of the proposal, to ensure no specific impacts on sites. Sometimes this will result in them revising their strategic policy to not develop energy projects in a specific Special Area of Conservation (SAC). At other times they will leave such decisions up to the project level Appropriate Assessment.

⁸ Article 6(3) Habitats Directive

⁹ Article 22(a) Habitats Directive

¹⁰ Recital 16 and Articles 4(3) and 12 Birds Directive and recital 16 and Articles 12(1), 12(2) and 17 of the Habitats Directive

¹¹ Due to delays in transposing the Directive in many Member States and the limited experience of its application, the information available on 21 July 2006 was not sufficient to enable the Commission to produce a report as required.

The Report was duly published in 2009 and can be accessed here: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52009DC0469>

¹² Recital 4 of the preambles to the Habitats Directive and recitals 6, 7, 8 and 16 SEAD

¹³ Recital 6 SEAD

C.2 Detailed Analysis: EIA¹⁴

There is an obvious overlap between the provisions of the Birds and Habitats Directives and the EIA Directive concerning the assessment of impacts of plans and projects on biodiversity, and on the environment generally. It is most relevant to consider the revised version of the EIA Directive, Directive 2014/52/EU, amending Directive 2011/92/EU.

The 2014 EIA Directive recognises the role of assessment and mitigation within the context of achieving the objectives of the CBD (Preamble 10), the BHDs, the EU's Biodiversity Strategy 2020, no net loss of biodiversity and avoiding environmental deterioration (Preamble 11). Preamble 35 identifies that Member States are responsible for ensuring that both mitigation and compensation measures are implemented and that appropriate procedures to monitor significant adverse environmental effects arising from projects are established.

In terms of actual coherence in practice, the 2014 EIA Directive requires Member States to establish coordinated or joint procedures where assessments are required simultaneously under the EIA Directive and the BHDs. The joint procedures established under Article 2(3) of the EIA Directive are designed to provide for a single assessment of the environmental impact of a particular project required by all relevant EU legislation. Article 2(3) of the 2014 EIA Directive also obliges the Commission to provide guidance in respect of joint procedures involving EIA and assessments required under the BHDs, Water Framework Directive and the Industrial Emissions Directive.

In the UK, a major problem with EIAs is that the potential infringing party is the funder for the EIA consultancy, which can lead to conflict of interests¹⁵. One solution would be an independent body accepting funds from developers and appointing consultants on an independent basis.

Case Study C2(ii): UK EIA Case Study – The Dogger Bank¹⁶

The Dogger Bank is a large sand bank complex located in the North Sea and is located in UK, Dutch, German and Danish waters. It is an important marine habitat supporting large numbers of sandeels and fish which in turn support marine mammals and seabirds. Due to the importance of the sandbank habitat, the UK, Dutch and German Governments have designated their parts of the Dogger Bank a SAC for the feature 'sandbanks covered slightly by water at all time'. In the Dutch and German sites, harbour porpoise and grey seals are also listed as features of the site.

The Dogger Bank is an important area for seabirds and many birds from designated Special Protection Area (SPA) breeding colonies forage in the area. This makes it important for the viability of these populations.

The assessment process established under Articles 6(3) and (4) of the Habitats Directive has allowed for one assessment to be carried out for development proposals to assess the potential transboundary affects on SACs and SPAs outside of the UK jurisdiction. In the absence of this shared basis for site designation and protection, developers would have to carry out several different assessments, resulting in the assessment being a more drawn out process and less joined up.

This is also the case for the development of the EIA which looks at wider environmental impacts. Again the developer must consider trans-boundary impacts of their development and the EIA process allows them to do this in a manner which is used across Member States.

¹⁴ Day, C (2015) 'The EU "Fitness Check" on Nature Legislation: Legal Analysis of certain Mandate questions' legal research for WWF-UK

¹⁵ <http://www.scirp.org/journal/PaperInformation.aspx?PaperID=36162#.VPhdL7CsXTo>

¹⁶ Day, C (2015) 'The EU "Fitness Check" on Nature Legislation: Legal Analysis of certain Mandate questions' legal research for WWF-UK

From an environmental perspective this is also of benefit as it is possible to assess the full impacts of the development over the North Sea area, rather than on impacts in the specific country area. This is especially important when considering possible regional population level impacts on mobile marine mammals and seabirds.

C.2 Detailed analysis: WFD¹⁷

There are many synergies between the texts of the BHDs and the Water Framework Directive (WFD) and the implementation of measures under the WFD will generally benefit the objectives of the Nature Directives. The implementation of the Directives has, in practice, led to a number of questions. However, EU Guidance on the links between the Directives demonstrates that, together, they provide a sound basis for joint objective setting, management, the consideration of derogations/exemptions, monitoring, public engagement and reporting.

The Fitness Check of the Water Framework Directive found that legal coherence between the Birds and Habitats Directives and the Water framework Directive is clear, 'although the interaction on the ground needs interpreting on a case by case basis by the Member States.'¹⁸

Areas of commonality include:

- The BHDs and the WFD are primarily concerned with protecting biodiversity and natural resources. The BHDs form the backbone of the EU's biodiversity policy and the WFD explicitly recognises water and wetlands as inherently valuable. As such, both aim to ensure healthy aquatic ecosystems while at the same time ensuring a balance between water/nature protection and the sustainable use of natural resources.
- Both the BHDs and the WFD recognise the crucial role of Community action in light of the trans-boundary nature of natural resources and threats to them.
- Both instruments explicitly recognise the polluter pays principle, sustainable development and embody the precautionary principle.
- While the BHDs and the WFD cite their main aims as the maintenance of biodiversity and healthy aquatic ecosystems (respectively), they explicitly take account of economic, social, cultural requirements and regional and local characteristics (in the case of the Habitats Directive) and the economic and social development of the Community as a whole (in the case of the WFD).
- While there is no direct correspondence between water body types of the WFD and habitat types of the Habitats Directive, EU Guidance explains how the objectives of the BHDs and the WFD can be jointly and effectively managed on those habitats to which the WFD applies.
- The WFD explicitly confines itself to sites containing habitats and species where the maintenance or improvement of the status of water is an important factor in their protection.
- The BHDs target specific components of aquatic ecosystems such as species or habitats, but also (like the WFD) the Habitats Directive uses species/species groups as indicators of the conservation status of the natural habitat types listed in Annex I. All three Directives help to protect or enhance aquatic ecosystems by either (directly or indirectly) protecting species and habitats, and in the case of the Birds Directive specifically mentioning wetlands of international importance.

¹⁷ Day, C (2015) 'The EU "Fitness Check" on Nature Legislation: Legal Analysis of certain Mandate questions' legal research for WWF-UK

¹⁸ <http://ec.europa.eu/environment/water/blueprint/pdf/SWD-2012-393.pdf>

- The WFD does not change what Member States must achieve for the BHDs - the objectives of all three instruments are closely related. The Directives form a joint framework for implementation in water-dependent Natura 2000 sites.
- The use of water body type and its characteristics can be used as guidance for setting joint objectives for the management of the Natura 2000 water bodies in RBMPs and management plans under Article 6(1) of the Habitats Directive. Measures serving the BHDs and WFD objectives must be included in both plans.
- The management measures for aquatic areas/ water dependent systems under the WFD may overlap with the conservation objectives for water dependent Natura 2000 sites. Measures under all three Directives must be coordinated and included in the WFD Programme of Measures.
- Both the BHDs and the WFD permit the use of derogations/exemptions for socio-economic reasons under certain conditions. While there are differences in the procedures to be followed under Article 6(4) of the Habitats Directive and Article 4(7) of the WFD, they are compatible - and exemptions from the achievement of the environmental objectives of the WFD cannot be used to deviate from the achievement of objectives under the BHDs (and *vice versa*). If a measure or plan/project only fulfils the conditions of one Directive, competent authorities may not authorise it under either Directive.
- The WFD explicitly allows the designation of water bodies as Heavily Modified and, therefore the derogation of the Good Status objectives where, amongst other things, physical restoration would have “would have significant adverse effects on...the wider environment” and/or the purpose of the modification “cannot, for reasons of technical feasibility or disproportionate costs, reasonably be achieved by other means, which are a significantly better environmental option”. While the use of derogations should be the exception rather than the rule it does allow MS the flexibility to maintain physically modified water and wetland ecosystems where restoration would be incompatible with BHD objectives.
- The requirement to establish a register(s) of protected areas provides the opportunity to integrate the management of WFD wetlands, water dependent Natura 2000 sites and areas protected under national legislation.
- Both the BHDs and the WFD place due emphasis on monitoring. Wherever possible (e.g. for fish) joint monitoring should be undertaken in order to save resources and to allow an assessment based on a common data set. This is also advisable in a trans-boundary context.
- The Habitats Directive focuses on habitats and species of Community interest. The WFD looks at a broad range of biological, physical, water quality and hydrological parameters and judges status against reference conditions for example determining the ecological status of a water body presence or absence of certain species (if their presence is a good parameter for the assessment of the status of a specific biological quality element or their absence is essential to determine the ecological status of that water body type). While the differences in objectives, scope and approach result in different monitoring needs, there are many commonalities and the main objective should be to integrate monitoring as far as possible.
- Both the BHDs and the WFD recognise the importance of involving civil society in implementing the Directives. However, there is generally a stronger requirement for public participation in the WFD which is absent from the BHDs which only requires public involvement in plans and projects with the potential to effect SPAs and SACs, if appropriate. These stronger requirements in the WFD reflect subsequent EU commitments to participatory rights under the UNECE Aarhus Convention and associated EU law.

- The obligation to regularly report on progress made under the BHDs and the WFD enables Member States and the Commission to evaluate the extent to which the Directives are not only achieving their own objectives but also contributing to the achievement of other environmental objectives under Community law.
- Commission guidance makes it clear that the WFD does not change what Member States must achieve for the BHDs, but it provides a joint framework for the implementation of measures needed by the WFD and BHDs in water-dependent Natura 2000 sites.¹⁹ The guidance also points out that, according to WFD Article 4.1.(c) the WFD objective of good status may need to be complemented by additional objectives in order to ensure that conservation objectives for protected areas are achieved. Art. 4.2 WFD says that 'where more than one of the objectives ... relates to a given body of water, the most stringent shall apply'.
- The 'Blueprint to safeguard Europe's Water Resources'²⁰, which aims to tackle the obstacles which hamper action to safeguard Europe's water resources, points out that achieving widespread improvement in aquatic ecosystems will contribute positively to the EU Biodiversity Strategy goal of halting the loss of biodiversity and the degradation of ecosystem services in the EU by 2020, and restoring them in so far as feasible.

C.2 Detailed analysis: MSFD²¹

Both the BHDs and the MSFD aim at ensuring healthy marine ecosystems while at the same time balancing marine/nature protection with the sustainable use of natural resources.

There are a great many synergies between the BHDs and the MSFD, including mutually supportive objectives, overlapping measures (including the identification of protected areas), the consideration of derogations/ exceptions, monitoring, public engagement and reporting.

Areas of commonality include:

- The BHDs and the MSFD are concerned with aspects of biodiversity conservation in the marine environment, including a requirement to achieve good status for the elements of biodiversity covered by each Directive.
- The concepts of good environmental status (GES) and favourable conservation status (FCS) (or status of population (BD)) are not necessarily equivalent but can be mutually supportive. The specific mechanisms of the BHDs (Articles 6 and 12) make an important contribution to achieving the wider objectives of the MSFD. Similarly, the MSFD can help to ensure that Natura 2000 sites are not compromised by addressing degradation outside protected sites.
- The obligation on Member States to take measures in order to achieve or maintain GES by 2020 provides an imperative for the implementation of conservation measures under the BHDs and the opportunity to integrate measures to maintain or achieve FCS for Annex I habitats and Annex II species (and equivalent measures for wild birds) within the programme of measures in marine strategies.
- There is a requirement to take existing environmental targets at national, Community and international level into account when establishing a comprehensive set of environmental targets

¹⁹ <http://ec.europa.eu/environment/nature/natura2000/management/docs/FAQ-WFD%20final.pdf>

²⁰ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012DC0673&from=EN>

²¹ Day, C (2015) 'The EU "Fitness Check" on Nature Legislation: Legal Analysis of certain Mandate questions' legal research for WWF-UK

and associated indicators for their marine waters to guide progress towards achieving GES. Measures for the achievement of FCS under the BHDs therefore provide a starting point for the relevant environmental targets under the MSFD.

- Both the BHDs and the MSFD acknowledge the relationship between the achievement of targets and sustainable use. The Habitats Directive recognises that achieving FCS may require the maintenance, or even the encouragement, of human activities. Similarly, marine strategies under the MSFD are based on an ecosystem based approach to the management of human activities, ensuring that the collective pressures are within levels compatible with the achievement of GES and the capacity of marine ecosystems to respond to human-induced change.
- The requirements of the BHDs can contribute to the development of marine strategies under the MSFD. A number of the measures required under both instruments have elements in common, such as spatial protection measures, measures to improve the ecological coherence of Natura 2000 under Article 10 of the Habitats Directive and the requirement to take appropriate steps to avoid pollution or deterioration of habitats outside protected areas under Article 4(4) of the Birds Directive.
- Conservation measures identified under Article 6(1) of the Habitats Directive should be integrated into the programme of measures under the MSFD on the basis that measures to achieve/maintain FCS will generally help the achievement of GES. Similarly, the regime of strict protection established under Article 12 of the Habitats Directive should also be taken into account when drawing up the programme of measures for the marine strategies on the basis that species play a functional role in the protection of habitats and, as such, species protection measures are pivotal to achieving GES.
- The Natura 2000 network is recognised as a component of the programmes of measures pursuant to the objective of achieving or maintaining GES. To adequately cover the full diversity of marine ecosystems under the MSFD, Member States should, where necessary, establish management measures outside Natura 2000 sites and consider broadening the scope of management measures within the Natura 2000.
- Both the BHDs and the MSFD recognise socio-economic considerations, albeit at different stages. Care therefore needs to be taken to ensure that the consideration of socio-economic concerns under the MSFD is in line with the conservation management aspect of HBD.
- The “overriding public interest” exception under Article 14 of the MSFD has fewer safeguards than the Habitats Directive, but cannot take precedence over Article 6 of the Habitats Directive as the Treaty requires that stricter provisions take precedence when more than one applies to the same issue.
- The monitoring requirements of the BHDs and the MSFD are broad, thereby allowing scope for monitoring regimes to be mutually supportive.
- Key stakeholders, including the public, routinely participate in the implementation of the BHDs and the MSFD, with particular emphasis on the establishment of the necessary conservation measures and the setting of environmental targets for marine waters.
- The reporting of species and habitats under the BHDs, as part of the 2012 initial assessment, has been streamlined with MSFD reporting, so that Member States can report for MSFD on these features using the BHDs reporting formats and timescales (i.e. in 2013 instead of by October 2012).

C.2 Detailed analysis: FLOODS DIRECTIVE²²

The purpose of the Floods Directive is to reduce and manage the risks that floods pose to human health, the environment, cultural heritage and economic activity. The Directive requires Member States to identify river basins and associated coastal areas at risk of flooding, to draw up flood risk maps and to establish flood risk management plans focused on prevention, protection and preparedness.

The Floods Directive does not make explicit reference to the BHDs. However, Member States are under a duty to take appropriate steps to coordinate the implementation of the Floods Directive with the WFD, which has strong synergies with the BHDs. Particular emphasis is placed on opportunities for improving efficiency, information exchange and for achieving common synergies and benefits having regard to the environmental objectives laid down in Article 4 of the WFD²³ (which contains provisions in relation to protected areas including Natura 2000 sites²⁴).

In particular:

- The preparation of the preliminary flood risk assessments under Article 4 of the Floods Directive provides an opportunity for Member States to assess the potential risks of flooding on relevant Natura 2000 sites and the achievement of the objectives of the BHDs more generally;
- Flood hazard maps and flood risk maps developed under Article 6 of the Floods Directive must show the potential adverse consequences associated with flood scenarios for protected areas identified in Annex IV(v) of the WFD (including Natura 2000 sites where the maintenance or improvement of the status of water is an important factor in their protection); and
- Flood risk management plans prepared under Article 7 of the Floods Directive must take account of the environmental objectives of Article 4 of the WFD and related provisions on protected areas, including Natura 2000 sites²⁵. Moreover, Member States must take other factors into account in the development of the Plans, including land use and nature conservation²⁶. As such, it can be argued that the ambit of the Plans extends beyond relevant Natura 2000 sites to consider whether, and how, the Plans may affect the achievement of the objectives of the BHDs more generally.

In terms of other areas of commonality, both the BHDs and the Floods Directive:

- Recognise the contribution they make towards achieving the general objective of sustainable development²⁷;
- Include provisions for public participation²⁸. The Floods Directive strengthens opportunities for public engagement by requiring Member States to make the preliminary flood risk assessments, the flood hazard maps, the flood risk maps and the flood risk management plans available to the public and encouraging the active involvement of interested parties in the production, review and updating of the flood risk management plans.

²² Day, C (2015) "The EU "Fitness Check" on Nature Legislation: Legal Analysis of certain Mandate questions" unpublished legal research for WWF-UK

²³ Article 9 Floods Directive

²⁴ Article 4(1) of the WFD states: (c) for protected areas "*Member States shall achieve compliance with any standards and objectives at the latest 15 years after the date of entry into force of this Directive, unless otherwise specified in the Community legislation under which the individual protected areas have been established*"

²⁵ *Ibid*

²⁶ Article 7(3) Floods Directive

²⁷ Recital 3 Habitats Directive and Recital 22 Floods Directive

²⁸ Articles 6(3) and 22 Habitats Directive and Recital 25 and Article 10 Floods Directive

- Reinforce the crucial role of Community action in light of the trans-boundary nature of flooding and measures needed to reduce the risk of flood damage and maintain the Community's natural heritage²⁹;
- Provide for the establishment of a Committee to assist the Commission in the discharge of duties under the Directive³⁰; and
- Require Member States and the Commission to regularly report on progress made with respect to the implementation of the Directive³¹.

C.2 Detailed analysis: NECD³²

The National Emission Ceilings Directive (NECD) sets upper limits for the total emissions of pollutants responsible for acidification, eutrophication and ground-level ozone pollution (sulphur dioxide, nitrogen oxides, volatile organic compounds and ammonia) in 2010 for each Member State. The Directive was amended as part of the accession of new Member States and is currently being reviewed as part of the EU's Clean Air Policy Package^{33 34}.

The 2001 NECD does not make explicit reference to the BHDs. However, its principal aim is to improve the protection of human health and the environment in the Community by limiting emissions of acidifying and eutrophying pollutants and ozone precursors³⁵ and there are numerous references in the Directive to the impact of acidifying and eutrophying substances on the environment, including plants and ecosystems³⁶. Thus, while there is no overt linkage between the two texts, the reduction of atmospheric pollution and consequential impacts on the environment (including vegetation and ecology) is clearly coherent with, and helps to support, the achievement of the objectives of the BHDs.

The proposal for a revised NECD makes reference to the EU's 7th Environmental Action Programme³⁷ and the long-term objective of achieving levels of air quality that do not give rise to significant negative impacts on the environment and gives a somewhat higher emphasis to the impact of air pollution on ecosystems and biodiversity³⁸.

In particular, the revised Directive enables Member States to make use of monitoring systems established under other EU instruments to monitor the adverse impacts of air pollution on water and terrestrial ecosystems³⁹, including under the the WFD⁴⁰. EU Guidance⁴¹ recommends that, wherever possible, joint monitoring under the BHDs and the WFD should be undertaken in order to save

²⁹ Recital 4 Habitats Directive and Recital 23 and Articles 4(3), 5(2), 6(2), 7(4) and 8(1), (2) and (3) Floods Directive

³⁰ Article 20 Habitats Directive and Article 12 Floods Directive

³¹ Article 17 Habitats Directive, Article 12 Birds Directive and Articles 8(5), 15 and 16 Floods Directive

³² Day, C (2015) "The EU "Fitness Check" on Nature Legislation: Legal Analysis of certain Mandate questions" legal research for WWF-UK

³³ The Clean Air Policy Package was adopted 18 December 2013. See: http://ec.europa.eu/environment/air/clean_air_policy.htm

³⁴ The current proposal for a revised NECD aims to ensure that the current NECs for SO₂, NO_x, NMVOC and NH₃ apply until 2020 and establishes new national emission reduction commitments ("reduction commitments") applicable from 2020 and 2030 for SO₂, NO_x, NMVOC, NH₃, fine particulate matter (PM_{2,5}) and methane (CH₄)

³⁵ Article 1 NECD

³⁶ Recital 5 and Article 3(d) NECD

³⁷ See <http://ec.europa.eu/environment/newprg/>

³⁸ Recitals 2, 7 and 18 and Article 8 revised NECD

³⁹ Annex V is set out in Annex B of this text. Alternatively, it can be accessed at: http://ec.europa.eu/environment/air/pdf/com2013_920/COM_2013_920_F1_ANNEX_EN.pdf

⁴⁰ Recital 18, Article 8 and Annex V of the revised NECD

⁴¹ See Links between the Water Framework Directive and Nature Directives – frequently asked questions (2011) available at: <http://ec.europa.eu/environment/nature/natura2000/management/docs/FAQ-WFD%20final.pdf>

resources and to allow an assessment based on a common data set, thus enabling Member States to coordinate monitoring regimes under the BHDs, the WFD and the NECD.

Additionally, there are a number of commonalities in the texts of the BHDs and the NECD with regard to the recognition of fundamental principles of EU environmental law and implementation strategies. For example, both the BHDs and the NECD:

- Recognise the EU's commitment to sustainable development⁴² and the precautionary principle⁴³;
- Include provisions for public participation⁴⁴. The NECD includes opportunities for public engagement by requiring Member States to make the national programmes for the progressive reduction of national emissions of pollutants in Article 4 of the Directive available to the public and appropriate organisations. The EU's ratification of the UNECE Aarhus Convention has strengthened provisions for public participation in the revised NECD still further;
- Reinforce the crucial role of Community action. While there is explicit recognition of the need to take measures at Community level in Recital 4 of the Habitats Directive, the NECD places great emphasis on the importance of developing harmonised Community measures in light of the trans-boundary threat of atmospheric pollution⁴⁵. The principle of Community action is maintained in the revised NECD, which harmonises the requirements on national programmes and on the monitoring and reporting of emissions of air pollutants with a view to correcting shortcomings of the 2001 NECD;
- Provide for the establishment of a Committee to assist the Commission in the discharge of duties under the Directives⁴⁶; and
- Require Member States and the Commission to regularly report on progress made with respect to the implementation of the Directives⁴⁷.

The emphasis on reporting in the NECD reflects the recognition that the objectives of the Directive can only be achieved through coordinated and effective Community action. The revised NECD requires Member States to communicate their NAPCPs (and any updates) and all monitoring information established in accordance with Articles 7 and 8 of the Directive to the Commission. The revised NECD also obliges the Commission to regularly verify the accuracy and completeness of reported national emission inventory data and to report on the implementation of this Directive every five years.

C.2 Detailed analysis: ELD⁴⁸

The key purpose of the Environmental Liability Directive (ELD) is to establish a framework based on the Polluter Pays Principle (PPP) to prevent and remedy environmental damage as set out in the TFEU⁴⁹⁵⁰. The focus of the ELD is the protection of nature using measures designed to prevent or remedy damage caused to protected species and natural habitats, notably Natura 2000 sites⁵¹.

⁴² Recital 3 Habitats Directive and Recitals 1 and 3 NECD

⁴³ Recital 13 NECD and as embodied in Recital 10 and Article 6(3) Habitats Directive in relation to plans and projects potentially affecting Natura 2000 sites

⁴⁴ Articles 6(3) and 22 Habitats Directive and Article 6(4) NECD

⁴⁵ See, *inter alia*, Recitals 2, 9, 13, 18 NECD

⁴⁶ Article 20 Habitats Directive and Article 13 NECD

⁴⁷ Article 17 Habitats Directive, Article 12 Birds Directive and Articles 8 and 9 NECD

⁴⁸ Day, C (2015) 'The EU "Fitness Check" on Nature Legislation: Legal Analysis of certain Mandate questions', unpublished legal research for WWF-UK

⁴⁹ Article 191(2) TFEU

⁵⁰ Article 1 ELD

While the Habitats Directive refers to the PPP, it posited that it '*can have only a limited application in the special case of nature conservation*'⁵². The ELD was subsequently crafted to develop the PPP as a mechanism of widespread application to support the achievement of the objectives of the BHDs. In order to ensure coherence between the BHDs and the ELD (and indeed the WFD and the MSFD and the ELD), the ELD requires that when a concept derives from other Community legislation, the same definition should be used so that common criteria can be used and uniform application promoted⁵³.

In addition to the commonality of the central aim of the ELD, the Directive:

- Reinforces the importance of sustainable development⁵⁴;
- Adopts the definition of "favourable conservation status"⁵⁵ from the Habitats Directive;
- Strengthens opportunities for civil society to assist in the implementation of the Directives (the ELD includes explicit provisions for requiring relevant natural and legal persons to exercise rights under the Directive);
- Reinforces the crucial role of Community action in light of the trans-boundary nature of the Community's natural heritage and threats to it⁵⁶;
- Requires Member States and the Commission to report on progress made under the Directive⁵⁷.

Case Study C.3 (i): Coastal fixed-engine netting of salmon from SAC rivers in Scotland⁵⁸

The Salmon & Trout Association (S&TA) has long been concerned about the impact upon populations of Atlantic salmon in SAC rivers being impacted by coastal fixed engine netting of salmon, particularly in Scotland. These fixed engines are placed in coastal waters and their operation is based upon inherited property rights. There is no licensing system and no quota is set on the number of fish that can be taken.

These fisheries take salmon from mixed stocks, meaning that the fish are heading for a variety of different natal rivers including those designated under the Habitats Directive.

By way of formal complaint to the European Commission⁵⁹, the S&TA has been able to argue that the lack of a trigger in domestic legislation for an Appropriate Assessment pursuant to Article 6(3) of the Directive, makes the operation of these coastal netting stations unlawful.

The Scottish Government appears to have responded positively by indicating its intention, following the recent review of wild fisheries (the Thin Review), that it will introduce a system of licensing for the killing of all wild salmon.

The added value is that this licensing system will cover not only Atlantic salmon from SAC rivers, but

⁵¹ The WFD and the MSFD are major reference points for damage to water and another of the three categories of environmental damage under the ELD

⁵² Recital 11 of the preamble to the Habitats Directive

⁵³ Preamble 5 ELD

⁵⁴ Recital 3 of the preambles to the Habitats Directive and recitals 2 and 31 of the preambles to the ELD

⁵⁵ Article 2(4)(a) and (b) ELD

⁵⁶ Recital 28 and Article 15 ELD

⁵⁷ Recital 31 and Article 18 ELD

⁵⁸ <http://www.salmon-trout.org/c/mixed-stocks-coastal-nets/>

⁵⁹ http://www.salmon-trout.org/news_item.asp?news_id=315

all wild Atlantic salmon in Scotland.

Case Study C.3 (ii): Cypermethrin use in the Welsh Government Woodland Estate under FSC derogation⁶⁰

The Salmon & Trout Association and Afonydd Cymru have been concerned at the use of the toxic insecticide cypermethrin for post-planting control of pine weevil in coniferous forestry plantation in Wales.

There have been recorded incidents of runoff of cypermethrin from upland forested areas causing significant problems for invertebrate populations in the headwaters of SAC rivers in Wales.

Under the Forestry Stewardship Council, cypermethrin has to be used only under derogation and the S&TA and Afonydd Cymru have been able to argue successfully that the length of the revised derogation should be reduced to three years rather than the normal five on the basis that SAC rivers are likely to be affected, including those designated for invertebrates susceptible to cypermethrin such as native crayfish. Natural Resources Wales (NRW) were required to perform an Appropriate Assessment under Article 6(3) before the use of cypermethrin under the revised derogation obtained from the FSC. It is highly likely that the use of cypermethrin in Welsh Government forestry will end within the next three years.

Case Study C.3 (iii): Phosphate discharges from watercress and trout farms on the Itchen SAC⁶¹

The S&TA has been increasingly concerned about the impact of discharges of phosphate into the River Itchen SAC from point sources such as watercress beds and river-side trout farms.

The Review of Consents process carried out by Environment Agency in England, while being unduly delayed, has nevertheless led to a tightening of the permitted phosphate discharges from watercress farms and trout farms and the S&TA has been able to use the prospect of domestic litigation, based upon a failure to meet the requirements of the Habitats Directive, as a way to ensure there has been as little slippage as possible in bringing in the new standards through revised environmental permits.

Case Study C.3(iv): Plant protection products

Plant protection products (pesticides) used in agriculture can have both direct (i.e. toxic) and indirect effects on wild species⁶². For example, insecticide and herbicide use have been demonstrated to reduce chick survival in grey partridge in the UK at levels predicted to cause population declines, through the removal of vital food sources. Individual level effects have also been found for yellowhammer and corn bunting⁶³. The EU Directive on the Sustainable Use of Pesticides⁶⁴ aimed to set a framework by which Member States could minimise the impacts of pesticide use on human health and the environment, in particular by requiring governments to promote low pesticide-input farming systems including organic farming and integrated pest management. However, the Directive

⁶⁰ http://www.salmon-trout.org/news_item.asp?news_id=333

⁶¹ http://www.salmon-trout.org/news_item.asp?news_id=312

⁶² <http://www.sciencedaily.com/releases/2015/04/150422135754.htm>

⁶³ Bright, J.A., Morris, A.J. and Winspear, R. (2008) A review of Indirect Effects of Pesticides on Birds and mitigating land-management practices. A report for the Pesticide Safety Directorate by the Royal Society for the Protection of Birds

⁶⁴ Directive 2009/128/EC: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:02009L0128-20091125>

has been weakly implemented in many Member States, including in the UK where the bare minimum has been done to comply with the letter of the Directive⁶⁵.

Case Study C.3 (v): UK National Pollinator Strategy⁶⁶

The UK's National Pollinator Strategy sets out a 10 year plan to help pollinating insects survive and thrive. The Strategy recognises that pollinators are vital for food production and biodiversity and that they face a range of pressures from habitat loss to pests and diseases. The strategy includes information on the current evidence, and policy actions to support and protect the many pollinating insects which contribute to our food production and the diversity of our environment. It also explains what research is planned to find out more about the current state of our pollinators and how we can protect them. The Strategy;

- covers all wild and managed pollinator species across England and seeks to support generalist and specialist species.
- seeks to support rare and threatened species of conservation concern
- is relevant to all types of land uses across the country –from agriculture and forestry, through urban, retail and business areas, to public and private land. Everyone has a role
- is also relevant to protecting a wide range of natural or semi-natural land suitable for pollinators such as arable margins, species-rich meadows, calcareous grassland, hedgerows, scrub, heathland, fen and moorland, including designated sites such as Sites of Special Scientific Interest. “

In line with these principles, maintaining and improving the quality of current wild-flower rich natural or semi-natural habitats, including designated sites such as Sites of Special Scientific Interest, is an important priority for the National Pollinator Strategy.

Case Study C.3 (vi): Steart

The Severn Estuary will try to expand over the next 60 years as the sea level rises. But it will be hemmed in by the flood barriers that run parallel and either side of the estuary, meaning the saltmarsh along the estuary SPA/SAC that is currently temporarily flooded at high tide will become permanently submerged and lost, as the sea squeezes up to the flood barriers. More than 70,000 birds rely on this saltmarsh habitat.

It would have been unfeasibly expensive to move the barriers inland in order to keep the saltmarsh. But the SPA/SAC designations offered an alternative – to build replacement habitat nearby at the Steart Peninsula instead⁶⁷. The sea wall at Steart has been breached and the tide allowed to flood in and create a new saltmarsh that will protect new higher barriers, set further back on this stretch, which will last longer.

The saltmarsh will provide seasonal grazing land and the creeks will become nurseries to support the fishing industry. The 400ha saltmarsh will capture carbon and a new freshwater section will purify run-off from inland farms. The new saltmarsh will provide between half and £1m of ecosystem services each year – significantly more than when it was farmland – and form part of a network of flood defences that will protect 100,000 properties worth £5bn⁶⁸.

⁶⁵ As is made clear by the UK National Action Plan on pesticides,
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/221034/pb13894-nap-pesticides-20130226.pdf

⁶⁶ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/409431/pb14221-national-pollinators-strategy.pdf

⁶⁷ <http://steart.wwt.org.uk/background/>

⁶⁸ <http://www.sciencedirect.com/science/article/pii/S2212041614000795>

Case Study C.4 (i): Plant Protection Products Regulation

Article 4(2) of the Plant Protection Products Regulation (No 1107/2009) states that plant protection products “shall not have any unacceptable effect on the environment”.

Regulation 1107/2009 is also, as Article 1(4) provides, ‘underpinned by the precautionary principle, in order to ensure that active substances or products placed on the market do not adversely affect human or animal health or the environment’.

The mechanism of the Regulation, in effect, requires all pesticides available in EU Member States to undergo a two-stage approvals process.

At the first stage, ‘active substances’ (the active chemicals contained in plant protection products) are assessed at the European level. Article 4 lays down the criteria for approval of active substances. Active substances must be approved if it may be expected, in the light of current scientific and technical knowledge, that plant protection products containing that active substance (or residues of that substance) meet certain requirements. These include the requirement that at least one plant protection product containing the active substance must among other things (see paragraphs 3 and 5 of Article 4):

- a) be sufficiently effective;
- b) have no immediate or delayed harmful effect on human health, including that of vulnerable groups, or animal health, directly or through drinking water;
- c) have no unacceptable effects on the environment, having particular regard to the following considerations where the scientific methods to assess such effects are available:
 - i. its distribution in the environment;
 - ii. its impact on non-target species, including on the ongoing behaviour of those species; and
 - iii. its impact on biodiversity and the ecosystem.

Recent events relating to neonicotinoids and other systemic insecticides have again highlighted that the measures underpinning this stage of the safeguard process are inadequate. It has become apparent that the tests that active substances are put through prior to approval are inadequate to establish the environmental safety of the products. While some effort has been put into developing new tests to establish toxicity to bumblebees and solitary bees, and overwintering effects on honeybees, the long term effects of pesticides, their effects on non-target groups, particularly butterflies and moths, and the statistical robustness of the scientific procedures remain inadequate.

The correlations that are now becoming apparent between pesticide use, aquatic invertebrate declines and bird declines are a clear indication that pesticides remain a high risk activity requiring improved regulation. In addition the extreme secrecy around the pesticide approvals process is at jarring juxtaposition to the openness required for other environmental decision making processes.

There remains, however, a second stage, whereby plant protection products containing an active substance or substances must be approved at the national level before being placed on the market. The requirements for the authorisation of plant protection products are laid down in Article 29. Before approving the plant protection product, Member States must be satisfied that the active substances used in the product have been approved and that, in the light of current scientific knowledge, the substance complies with the requirements of Article 4(3) ‘it shall have no unacceptable effects on the environment’.

However, these regulations appear to not be well integrated with the Habitats Directive or the EU objectives for biodiversity. Article 6(3) of Directive 92/43/EEC (the ‘Habitats Directive’) requiring an ‘Appropriate Assessment’ to be conducted in relation to any plan or project not directly connected with a special areas of conservation but ‘likely to have a significant effect thereon’. Many pesticides

are water-mobile and spray and sowing dust can be air-borne, so there is a likelihood that they will be carried into Natura sites, significantly affecting them by causing damage to life therein. In addition the chemicals have the potential to suppress the populations of a range of protected species in the countryside – affecting their favourable conservation status or directly killing them. Despite this we are unaware of the provisions of the Habitats Directive being applied in relation to either EU or national pesticide authorisation processes.

Furthermore the efforts to date to implement the Sustainable Use Directive 2009/128/EC in the UK have been 'wholly inadequate to achieve the sustainable use of pesticides in the UK.'⁶⁹

The NGOs have recommended that targeted protection for specific areas/water catchments vulnerable to the impacts of pesticides, including protected areas designated under the Water Framework Directive (WFD) and the Birds and Habitats Directives. This could take the form of voluntary safeguard zones backed up by the possibility of regulation should a voluntary approach prove unsuccessful. The requirements of each safeguard zone would depend on specific issues identified in that catchment or area. Voluntary safeguard zones should be well supported by advice, training and assessments. But this recommendation has not been adopted, leaving a lack of integration between the objectives of the Sustainable Use Directive and the Habitats Directive.

Case Study C.4 (ii): Cross Compliance Failure in England

Cross compliance is one of the principal means of enforcing environmental legislation (and indeed for providing important extra levels of protection in areas covered by CAP payments). However, cross-compliance is only minimally enforced with only 1% of CAP payment beneficiaries subject to inspection each year. Whilst risk is incorporated into the system (so that those most likely to contravene the rules should be more likely to face inspection) figures suggest little difference between compliance rates for those selected on risk or random basis. A result that calls into question the adequacy of the risk assessment.. Irrespective of the selection criteria a 1% inspection rates equates to an average 1 in 100 year chance of inspection for most farmers. As such farmers little chance of sanction if they ignore the requirements.

A good example concerns water quality: Catchment Walkovers have been undertaken by the Environment Agency (EA) in various parts of the England to help understand what is driving Water Framework Directive failures and inform action. The design and coverage of the walkovers has been patchy but EA has reported that in the Northwest alone over 4,000 issues were found in catchments that had been identified as having diffuse pollution as a Reason for Failure (approximately 1 issue every 0.6 kilometre). This compares to just 1123 water-relevant cross compliance breaches recorded across the whole of England in 2013⁷⁰.

Enforcement of cross compliance is also poor with no requirement on those guilty of breaches to reverse/mitigate any environmental damage caused (for example by ploughing up species-rich permanent pasture). The level of 'penalty' (those guilty of breaches do not pay a fine but rather face a reduction in the CAP payments they receive – i.e. they still get paid, just less...) is also questionably low – further reducing the ability of such penalties to act as a meaningful incentive to abide by environmental legislation.

Case Study C.4 (iii): Regionally specific action to prevent UK extinction of the ciril bunting⁷¹.

In 1989, the UK population of ciril buntings fell to just 118 pairs in the South West of England. Rapid

⁶⁹ http://www.wcl.org.uk/docs/Link_pesticides_NAP_response_Oct12.pdf

⁷⁰ Defra (2014) Official statistics from Cross compliance inspections in 2013 - including most common failures.

⁷¹ <http://www.rspb.org.uk/whatwedo/projects/details.aspx?id=222509>

changes to farming practices and the loss of vital feeding habitat were identified as the major force behind the declines, with the birds' extremely small range (only moving up to 2 km between their breeding and wintering areas) further reducing their ability to find alternative places to nest and feed. A special project was implemented utilising the Countryside Stewardship Scheme (CSS) and farmers in target areas were supported to provide optimal habitat conditions for curlew buntings (and other farmland birds) alongside their farming businesses. By 2009, curlew buntings had increased to 862 pairs, with numbers increasing by 83% on farms under a CSS agreement – compared to just a 2% increase on adjacent, non-agreement farms.

Case Study C.4 (iv): Corn bunting recovery in Scotland.⁷²

The corn bunting is one of Scotland's fastest-declining birds. Eastern Scotland now holds most of the remaining Scottish population, but even here, they are declining rapidly. A recent study shows there has been an 83 per cent decline in singing males on 25 sites in Aberdeenshire and Tayside between 1989 and 2007. The combination of a late breeding season, a preference for nesting in growing crops and a seed diet centred on grains is likely to have made corn bunting populations especially vulnerable to modern agricultural practices. In order to tackle the declines, the RSPB initiated a special agri-environment scheme, support by Scottish Natural Heritage, which attempted to provide the right mix of nesting and feeding resources on farmland. On farms in the targeted scheme, corn bunting numbers increased by 5.6% per annum. In contrast, numbers showed no significant change on farms in the Scottish government's standard agri-environment scheme, and declined by 14.5% per annum on farms outside both schemes.

Case Study C.4 (v): Hope Farm and the potential of schemes to tackle declines of generalist farmland birds in the wider countryside.⁷³

Hope Farm, a 181ha arable farm in Cambridgeshire, was bought by the RSPB in 2000 in order to trial new agri-environment options and demonstrate that increases in biodiversity could be secured alongside a productive and profitable farm business. To this end, Hope Farm entered the English 'Entry Level Stewardship' scheme and implemented a range of land management options to deliver the 'big three' for farmland birds: appropriate and adequate nesting sites, spring food for chicks and over winter food resources. Ten years after buying the farm, farmland bird numbers had risen by 201%, in contrast to regional and national trends of ongoing decline. At the same time Hope Farm is as profitable and productive as equivalent farms that have not implemented these measures. This case study is not, however, a celebration of the Entry Level Stewardship scheme but rather of the land management options it contains, which when implemented well, can secure meaningful biodiversity benefit. It also highlights that broad and shallow schemes which allow entrants free choice over the options they implement are highly unlikely to deliver population recovery of declining species, or address wider environmental issues, as most applicants choose the easiest options and those which require the least modification to their current land management practices.

Case Study C.4 (vi): Yellowhammers in Northern Ireland.⁷⁴

Over the past 50 years Northern Ireland Agriculture has moved from being a predominantly mixed system to be one dominated by intensive grass, dairy, beef and sheep. This has led to a decrease in cereal production which provided a source of food for seed eating birds such as yellowhammers. As a result yellowhammers declined by as much as 90% in some places in Northern Ireland. East

⁷² <http://www.rspb.org.uk/whatwedo/projects/details/220860-corn-bunting-recovery-work-in-north-and-east-scotland-farmland-bird-lifeline-fbl>

⁷³ <http://www.rspb.org.uk/news/321246-rspb-farm-yields-hope-for-skylarks>

⁷⁴ <http://www.rspb.org.uk/news/310470-brighter-future-for-endangered-yellowhammers>

County Down is one of the remaining strongholds for cereal production in Northern Ireland. A recovery project was launched targeting AES measures where they were needed most, and coupled with advisory support. The result of a 5 year period was a 79% increase in yellowhammers, with a 21% increase on nearby farms which did not partake in AES or receive advisory support - showing an overspill affect into the wider countryside.

Case Study C.4 (vii): Trans-European Networks

Clearly, proposals in accordance with Treaty provisions on Trans-European networks and energy have the potential (both individually and collectively) to undermine the achievement of the aims of Article 191 of the Treaty on the Functioning of the European Union in respect of environmental preservation and protection. However, the various safeguards in place under the BHDs (essentially Articles 6 and 12) ensure that socio-economic and cultural considerations are at least consistently regulated throughout the territory of the EU.⁷⁵

Case Study C.5 (i): ERDF ignores the environment

The Commission Staff Working Document setting out elements for a Common Strategic Framework (CSF) of EU funds⁷⁶ sets out several key actions for different EU funds associated with the eleven Thematic Objectives of the CSF funds, now renamed as the European Structural and Investment (ESI) funds. These TOs are set out in Regulation 1303/2013.

The Working Document recognises that the Birds and Habitats Directives “together form the cornerstone of the EU’s nature protection policy”, and it therefore sets out key actions for the European Regional Development Fund (ERDF) and Cohesion Fund (CF) to invest in “green infrastructure, including Natura 2000 sites and other territories to promote the protection and restoration of biodiversity and ecosystem services” and to “decrease fragmentation of natural areas...and restore heavily modified sites and habitats”. These key actions are affirmed by Article 5(6)(c) and (d) of Regulation 1301/2013 and Article 4(c)(iii) of Regulation 130/2013.

However, despite nature conservation being a clear priority for these funds, initial analysis of investment strategies for the ERDF in England suggests that the environment does has been largely ignored by those responsible for the programming of these funds. This would seem to be counter to the purpose of the ESI funds process, which aimed to improve the coherence of spend across different EU funds. This has left achievement of the Nature Directives aims overly dependent on spending under the European Agricultural Fund for Rural Development (EAFRD) (see C7 below).

Case Study C.5 (ii): EFF not fit for purpose

The European Court of Auditors found that the European Fisheries Fund (EFF) did not offer effective support for the sustainable development of aquaculture.⁷⁷

Rather than generating a more sustainable fishing sector, the EFF (2007-2013) has worked significantly to its detriment. Less than one-quarter of the fund has been directed at fleet capacity reduction, instead available funds have been used to help vessel owners overcome economic problems at the expense of rebuilding fish stocks. In addition to poorly managed aid for vessel modernisation and fleet adjustment, nearly 40 percent of the EFF was committed to expanding port infrastructure, processing, and aquaculture by October 2010, representing an incoherent and

⁷⁵ Day, C (2015) ‘The EU “Fitness Check” on Nature Legislation: Legal Analysis of certain Mandate questions’ unpublished legal research for WWF-UK

⁷⁶ http://ec.europa.eu/regional_policy/sources/docoffic/working/strategic_framework/csf_part2_en.pdf

⁷⁷ http://www.eca.europa.eu/Lists/ECADocuments/SR14_10/QJAB14010ENC.pdf

contradictory set of measures that together significantly increased economic returns to enterprises and thus encouraged increased production irrespective of environmental carrying capacity⁷⁸.

Case Study C.5 (iii): Northern Ireland

In Northern Ireland, due to the complexity of effectively addressing cross-cutting issues that impact on more than one Department, the eNGO sector (including Ulster Wildlife Trust) has consistently recommended that the NI Government should form an independent Marine Management Organisation, similar to the approach adopted in Scotland. This would merge fisheries and environmental interests and should reduce the risk of similar problems arising in the future that could result in significant infringement fines from the EU for NI. The performance of the NI Departments should be reviewed in terms of collaboration to ensure better compliance with EU environmental legislation.

Case Study C.9 (i): Balance of Competences

The UK Government's Balance of Competences Review Environment Report⁷⁹ found that changes made to national law in order to comply with the requirements of the Birds and Habitats Directives have improved the legislative framework for wider conservation efforts at national level, and reported;

"The majority of respondents believed that EU competence has increased environmental standards in the UK and across the EU and that this has led to improved performance in addressing several environmental issues. The evidence showed that a large number of organisations representing all sectors considered that it is in the UK's national interest for the EU to have a degree of competence in the broad areas of environment and climate change because of the advantages that this brings for the Single Market and environmental protection."

Case Study C.10 (i): International Whaling Convention

The Habitats Directive has also formed the foundation of the agreed European Common Position within the International Whaling Commission which states that;

"Within the Union, Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora lists all cetacean species as species of Union interest and requires Member States to maintain those species in, or restore them to, a favourable conservation status in those parts of their territory to which the Treaty applies. All cetaceans are listed in Annex IV to that Directive. Therefore, all whale species are strictly protected from deliberate disturbance, capture or killing within Union waters. ...Cetaceans, and therefore whales, are migratory species. Consequently, Union policies and legislation relating to cetaceans will be more effective within Union waters if they are backed by coherent worldwide action".

EU Member States are therefore obligated to take a strong position on the protection of cetaceans at meetings of the parties to the IWC, which both strengthens global conservation commitments made by the EU, and enhances protection of cetaceans within European waters given their migratory nature. Similarly the Birds and Habitats Directive inform the EU position taken within other international conventions such as CMS and CITES.

⁷⁸ WWF 2011: Reforming EU fisheries subsidies: a joint NGO discussion paper and technical resource http://awsassets.panda.org/downloads/lr_reform_fisheries_subsidies.pdf

⁷⁹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284500/environment-climate-change-documents-final-report.pdf

Case Study C.10 (ii): Effective fisheries management in European Marine Sites (see also S.1.1)

Given the OSPAR (Northeast Atlantic Ocean) states commitment to effectively manage MPAs by 2016, the timing of the work that is being carried out by the UK in relation to managing fisheries in European Marine Sites ties in with current international MPA commitments. New CFP regulations also commit Member States to protect their own marine protected areas, and respect management measures by 3rd party states.

Case Study C.10 (iii): Cuilcagh Mountain Park

Cuilcagh Mountain Park takes in 2500 hectares on the northern slopes of Cuilcagh Mountain, and is managed by Fermanagh District Council at the heart of the Marble Arch Caves Global Geopark. Cuilcagh Mountain Park was opened in 1998 with assistance from the European Union's LIFE Peatlands Project and the Heritage Lottery Fund, to conserve pristine blanket bog, to restore damaged peat-land and to increase awareness of bog-land habitats and wildlife.

In 2001 the Marble Arch Caves and Cuilcagh Mountain Park jointly became the first European Geopark in the United Kingdom. The geopark concept was created to promote geological landscapes of international importance and to use that as a tool to benefit local economies through sustainable tourism. In 2004 it gained status of Global Geopark following the Madonie Agreement between UNESCO and the European Geoparks Network. In 2007 the Geopark was extended to cover many thousands of hectares of upland to the north west of Cuilcagh Mountain, and in September 2008 it became the world's first International Geopark in the European and Global Geoparks Networks as it was extended across the international border into County Cavan in the Republic of Ireland.

Cuilcagh Mountain lies within an Areas of Special Scientific Interest (ASSI) declared by the Northern Ireland Environment Agency because of the important peat land habitats, geology, geomorphology, flora and fauna of the mountain. The mountain is also designated a SAC. It is an area which has been given special protection under the European Union's Habitats Directive. SACs provide increased protection to a variety of wild animals, plants and habitats and are a vital part of global efforts to conserve the world's biodiversity⁸⁰.

⁸⁰ <http://www.marblearchcavesgeopark.com/attraction/cuilcagh-mountain/>