

**NatureScot's
implementation of the
mitigation options stage of
Habitats Regulations
Appraisals**

Case Reference IESS.23.006

December 2023

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1. Executive summary

1.1 Habitats Regulation Appraisal (HRA) assessments are a legal requirement under The Conservation (Natural Habitats, &c.) Regulations 1994¹ ('the Habitats Regulations'), where any proposal² is likely to have a 'significant effect' on a European site³. A competent authority⁴ must not authorise a proposal unless it can be shown beyond reasonable scientific doubt, through an appropriate assessment, that the proposal will not adversely affect the integrity of a European site.

1.2 Environmental Standards Scotland (ESS) received a representation relating to NatureScot's handling of a beaver translocation licence. Specifically, the appropriate assessment stage of a HRA and the securing of mitigation measures to prevent adverse impacts on protected species within a European site.

1.3 During the consideration of the representation, ESS engaged with NatureScot and scrutinised its relevant guidance policies, procedures and supporting information. On reviewing the evidence, ESS found that NatureScot's guidance could be strengthened to further protect the integrity of European sites, as intended by the requirements of the Habitats Regulations. ESS made recommendations for improvement which were accepted and implemented by NatureScot. ESS accordingly considers that informal resolution has been achieved.

¹ [The Conservation \(Natural Habitats, &c.\) Regulations 1994 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

² A proposal constitutes any plan or project that requires a HRA, for example a translocation licence application.

³ European sites (formerly known as Natura 2000 sites) are sites which include Special Protection Areas (SPAs) and Special Areas of Conservation (SACs), underpinned by the Habitats Regulations.

⁴ Competent authorities are those entitled to give authorisation or consent to a proposal. Competent authorities include, among many others: Scottish Ministers; local authorities; Scottish Environment Protection Agency (SEPA); Forestry and Land Scotland; and NatureScot.

2. Background to the representation

2.1 The representation was submitted by a Non-Governmental Organisation (NGO), acting on behalf of a community group concerned over the granting of a beaver translocation licence. Specifically, the relocation of a family of Eurasian beavers to the Loch Lomond catchment and the impact this decision may have on the status of SAC protected species (Atlantic salmon and brook and river lamprey) within the catchment. The representation alleged that insufficient assessments (including monitoring, mitigation option appraisals and management plans) had been carried out by NatureScot prior to approval of the licence.

2.2 Before approaching ESS, the NGO had raised its concerns with NatureScot. In response, NatureScot confirmed that a HRA and appropriate assessment had been conducted for the relevant locations. NatureScot explained that both assessments recognised areas of uncertainty, and confirmed that it could not be ascertained that no adverse effects on the site integrity of SACs designated for Atlantic salmon and lampreys would result through dam-building activities and other related activities. However, both assessments reached similar conclusions stating that such impacts could be assured through appropriate mitigation and monitoring. NatureScot's decision therefore relied upon mitigation being 'considered and secured'.

2.3 Within the assessments it was anticipated that mitigation measures were to be set out in a beaver management plan for the individual SACs. However, to date such plans have not been prepared. It was also anticipated that a wider catchment monitoring plan would be required. This has yet to be finalised despite the application having been approved and the release of beavers having taken place. The NGO raised concerns as to how NatureScot was able to fully assess the preventative effects of the proposed mitigation measures without such plans.

2.4 The outcome sought in the representation was for ESS to undertake an investigation into these issues, with a view to withdrawing or revoking the translocation licence until such time as NatureScot can demonstrate compliance with the requirements of the Habitats Regulations. It is important to note that such an outcome is not within ESS' powers to secure. Supporting information submitted with the representation, included:

- previous correspondence with NatureScot, seeking clarification on specific points relating to the licence decision

- relevant legislation, background information on the impacts of beavers on migratory fish, and other policies/documents in respect of translocation licencing

2.5 ESS considered this case to be within its remit, due to the following factors:

- the representation relates to a public authority – NatureScot
- the representation relates to environmental law – primarily the Habitats Regulations
- NatureScot’s decision-making and assessment processes, as described in the representation, may constitute a failure to comply with environmental law or a failure to implement environmental law effectively
- while the representation relates specifically to an individual regulatory decision (which ESS cannot overturn), ESS considered that broader concerns were raised over NatureScot’s policies and guidance in this area

3. Translocation licencing

3.1 In 2009 beavers were released at a trial site in Knapdale, Argyll. This was the first licensed reintroduction of a mammalian species in Britain. Since this time, there have been increasing numbers of reports of beavers in Tayside, resulting from accidental or illegal releases.

3.2 Under translocation licencing, beavers can be moved from one site to another where their presence is causing adverse impacts to other interests. This licencing process allows landowners to apply to NatureScot to have beavers moved to another location as an alternative to culling. This option has gained support since beavers became a European protected species⁵.

3.3 To date, three licence applications have been approved for the translocation of beavers within Scotland. The first related to the reintroduction site at Knapdale. The second involved the relocation of beavers from agricultural land in Tayside to a working farm in Perthshire. The third is the current Loch Lomond licence⁶ involving the translocation of a pair of beavers and their five young offspring from an area in Tayside in January 2023.

3.4 Prior to November 2021, translocations to Scottish sites outside the Tayside and Knapdale areas were not supported. This changed when the Scottish Government announced a policy change to actively promote translocations to support the expansion of the beaver population⁷. It was intended that this would help establish a presence in areas of Scotland outside their current range, and beyond where natural expansion would be expected to reach in the short term.

⁵ In 2019 the Eurasian beaver was added to the list of European Protected Species of Animals that are given protection in Scotland under the Habitats Regulations.

⁶ This licence was classified by NatureScot as a reinforcement project, as beavers have been present in the catchment since at least 2019.

⁷ [Protecting Scotland's beaver population - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/protecting-scotland-s-beaver-population/pages/1-10.aspx)

3.5 NatureScot's 2045 vision for Scotland's Beaver Strategy⁸ states: 'Throughout Scotland, communities are supported in working together to maximise the ecosystem and wider benefits of beavers while minimising negative impacts. The beaver population is actively expanded into appropriate areas; adaptive management and mitigation is used to protect assets and interests.'

⁸ [Scotland's Beaver Strategy 2022-2045 | NatureScot](#)

4. The Habitats Regulations

4.1 Under the European Union (EU) Habitats Directive (Council Directive 92/43/EEC)⁹, national governments are required to specify areas that are expected to ensure the conservation of flora and fauna species. This led to the setting up the Natura 2000 network of protected areas across the EU to protect species and habitats. This network included Special Areas of Conservation (SACs) and Special Protected Areas (SPAs). Articles 6(3) and 6(4) of the Habitats Directive set out that, where a plan or project could affect a SPA or SAC, there are certain considerations that must be made before the proposal can proceed.

4.2 The requirements of Articles 6(3) and 6(4) have been transposed into Scots law, principally through regulations 48 and 49 of the Habitats Regulations (as amended). This provides the legal framework for protected sites, now defined as 'European sites'¹⁰ and for species requiring strict protection.

4.3 Regulation 48 of the Habitats Regulations requires any proposal not directly connected, or necessary, to the management of a European site, but which may have a significant effect on such a site (either individually or in combination with other proposals), to be the subject of an appropriate assessment of its impacts.

4.4 The competent authority can only agree to the proposal if it has established that it will not adversely affect the European site. The level of evidence required during this assessment is 'beyond reasonable scientific doubt' as determined by a European Court ruling¹¹. It follows that the appropriate assessment must be sufficiently detailed and reasoned to demonstrate the absence of adverse effects, in light of the best scientific knowledge in the field.

⁹ [Council Directive 92/43/EEC](#)

¹⁰ As a result of EU exit, several changes have been made to the Habitats Regulations in Scotland. The Habitats Regulations remain in force, collectively all protected sites are defined as 'European sites'.

¹¹ European Court of Justice in the Waddenzee judgement (C-127/02 paragraph 59, 61, 67) - [LexUriServ.do \(europa.eu\)](#) and other case law

4.5 Regulation 48 also permits that mitigation strategies may be implemented as part of the proposal to prevent negative impacts on the identified interests. The implementation of this function is at the discretion of the competent authority. However, EU guidance¹² clearly states that any mitigation measure should be sufficiently detailed within the appropriate assessment stage, including an explanation based on scientific evidence of how it will eliminate or reduce the adverse impacts which have been identified. Information should also be provided of how, when and by whom measures will be implemented, and what arrangements will be put in place to monitor their effectiveness and take corrective measures if necessary.

¹² [Managing and protecting Natura 2000 sites - European Commission \(europa.eu\)](#)

5. Initial engagement with NatureScot

5.1 The material issue within the representation relates to NatureScot's decision-making processes and procedures when assessing and securing the mitigation actions stage of an appropriate assessment, where potential adverse impacts on a European site and/or species remain uncertain.

5.2 ESS approached NatureScot to improve its understanding of how NatureScot assesses the mitigation options stage, with a view to determining the following:

- does NatureScot have sufficiently detailed and robust policies and guidance in place to ensure compliance with its duties under the Habitats Regulations, specifically when assessing against the beyond reasonable doubt principle?
- do the concerns raised in the representation point towards a potential wider systemic issue in how NatureScot complies with or implements the broader HRA regulatory/assessment regime?

5.3 Following NatureScot's response, it remained unclear to ESS how the mitigation options were considered during the appropriate assessment stage before reaching a decision of whether adverse effects on the integrity of a site can be avoided.

5.4 In the case of the translocation licence application, the assessments reported that mitigation measures had been considered and secured during the consent process. However, the detail provided was limited. In ESS' view, the requirements set out above at 4.5 were not included within NatureScot's HRA casework guidance.

5.5 It was also clear that a level of scientific uncertainty remained during the mitigation options stage of the appropriate assessment relating to potential adverse impacts of beaver activity on the European site and SAC interests. In respect of this, ESS remained uncertain of NatureScot's decision-making process at this stage, given that the level of proof required throughout the appropriate assessment is 'beyond reasonable scientific doubt'.

5.6 Having reviewed all the evidence received in this case, and notwithstanding that the issue raised in the representation relates to an individual regulatory decision, ESS considered that broader concerns were highlighted relating to NatureScot's existing policies surrounding the mitigation options stage of the appropriate assessment process.

5.7 For these reasons, ESS concluded that NatureScot's decision-making process for assessing the mitigation options of an appropriate assessment, raised issues concerning the effectiveness of how environmental law is being implemented by NatureScot. In view of this, ESS invited NatureScot to resolve matters informally.

6. Informal resolution process

6.1 Following the assessment of NatureScot's response to ESS' enquiries, an initial meeting was held between ESS and NatureScot to relay concerns over the current HRA guidance documents, and to seek clarity on existing uncertainties. During the meeting NatureScot agreed with these concerns, relating to an identified gap within the existing HRA guidance in respect of the mitigation factors stage. NatureScot also confirmed its willingness to enter into informal resolution on this issue.

6.2 As a result of this meeting, NatureScot agreed to revise and strengthen its guidance to provide clearer instructions in respect of the mitigation actions stage for NatureScot officers. NatureScot confirmed it would also reflect the changes on relevant NatureScot website guidance pages for reference by competent authorities, stakeholders and the general public.

6.3 A follow-up meeting was held between ESS and NatureScot, to discuss any concerns, and for NatureScot to provide ESS with an update on progress and a timescale for completion.

6.4 In August 2023, NatureScot provided ESS with a copy of its revised European site casework guidance (primary HRA guidance) and revised HRA proforma. The relevant website links^{13,14} for the guidance and proforma were updated in early November 2023.

¹³ [NatureScot: European Site Casework Guidance](#)

¹⁴ [NatureScot: Habitats Regulations Appraisal Proforma](#)

7. Conclusion

7.1 Assessing the mitigation options, with the level of evidence required, is an essential part of protecting European sites and species within Scotland from adverse impacts. When assessing or proposing new plans/projects, it is essential that NatureScot's guidance is sufficiently clear and comprehensive in detailing what is required by staff, competent authorities and relevant stakeholders when assessing the mitigation options stage of a HRA.

7.2 In ESS' view, the revised guidance provides:

- a clearer understanding of the requirements at the mitigation options stage of the HRA process. This stage is now outlined in a separate, titled section within the European site EU casework guidance
- reference to 'scientific certainty' by which the mitigation measures will work and can be secured, in accordance with the EU guidance
- additional detail required when assessing the effectiveness of the mitigation options. For example, how, when and by whom will the mitigation be implemented and what arrangements are proposed for ongoing monitoring and corrective measures, if required as outlined in the EU guidance

7.3 For these reasons, ESS considers that NatureScot has taken reasonable steps to address the concerns raised in respect of how it implements its duties and, accordingly, considers that informal resolution has been achieved.

7.4 ESS would like to thank the community group and NGO for raising their concerns, and NatureScot for the assistance it provided in resolving this matter.

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