

In the matter of the application to Scottish Ministers under the Electricity Act 1989

by

Scottish Hydro Electric Transmission plc

for Section 37 Consent and deemed planning permission

in relation to the

Skye Reinforcement Project - Fort Augustus to Ardmore

Section 3: Broadford to Kyle Rhea

**Derogation Case
under the Habitats Regulations**

Alternative Solutions

and

Imperative Reasons of Overriding Public Interest

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TRANSMISSION

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1. INTRODUCTION

1.1. Background

1.1.1. This Derogation Case is submitted by Scottish Hydro Electric Transmission plc (the **Applicant**) who operating and known as Scottish and Southern Electricity Networks Transmission (**SSEN Transmission**) own, operate and develop the high voltage electricity transmission system in the north of Scotland and remote islands. In this Derogation Case the Applicant and SSEN Transmission are used interchangeably unless the context requires otherwise.

1.1.2. The Applicant has applied for consent under section 37 of the Electricity Act 1989 (the **1989 Act**) to construct and operate 110 kilometres (km) of new double circuit steel structure supports for the proposed 132 kV overhead transmission line (**OHL**) between Fort Augustus Substation and Edinbane Substation, and 27 km of new single circuit trident H wood pole (**H pole**) supports for the 132 kV OHL between Edinbane Substation and Ardmore Substation, together with ancillary works. The project also comprises approximately 24 km of underground cable. In total, the transmission connection extends over a distance of 160 km. The project is estimated to cost approximately £400million. The Applicant also seeks that planning permission be deemed to be granted under section 57(2) of the Town and Country Planning (Scotland) Act 1997 (the **1997 Act**) for those works and for ancillary works such as cable sealing end compounds, temporary and permanent access, tree and vegetation clearance. Finally, the Applicant has sought consent and permission for a temporary diversion of the existing 132 kV OHL at Inchlaggan for approx. 750m to facilitate construction of the new OHL in this location. Together these works are referred to as the **Skye Reinforcement Project** or the **Proposed Development**.

1.1.3. The Proposed Development has, for the purpose of assessment, been divided into geographical sections. These are:

- Section 0 – Ardmore to Edinbane;
- Section 1 – Edinbane to North of Sligachan;
- Section 2 – North of Sligachan to Broadford;
- Section 3 – Broadford to Kyle Rhea;
- Section 4 – Kyle Rhea to Loch Cuaich;
- Section 5 – Loch Cuaich to Invergarry; and
- Section 6 – Invergarry to Fort Augustus.

1.1.4. In Section 3 only, the Proposed Development includes the proposed route for the OHL and an alternative route; which are referred to as the **Proposed Alignment** and the **Alternative Alignment**. The Alternative Alignment follows the same alignment as the Proposed Alignment from Broadford Substation to

the minor road to Glen Arroch, but at that point, whereas the Proposed Alignment continues eastwards following a similar course to the existing OHL, the Alternative Alignment instead follows the minor road through Glen Arroch and Kyclerhea Glen, and prior to Kyclerhea it takes a northerly direction via the lower slopes of Beinn Bhuidhe and through commercial forestry to the existing crossing towers at Kyle Rhea.

1.1.5. The route of the Proposed Development, including the Proposed Alignment and the Alternative Alignment, are fully documented in the Environmental Impact Assessment Report (**EIAR**) prepared for the entire Proposed Development. This Derogation Case is intended to be read in the context of the EIAR. This Derogation Case deals only with one aspect of one Section of the OHL, namely Section 3 of the Proposed Development. This Derogation Case has not attempted to replicate discussion in the EIAR unless it is necessary to do so in the context of the Derogation Case set out below.

1.1.6. Section 3 of the route of the OHL includes a protected European Site – a Special Area of Conservation (**SAC**) – the Kinloch and Kyleakin Hills SAC (**the SAC**). The SAC is part of the National Site Network.¹ The EIAR included a Shadow Habitats Regulations Appraisal (**Shadow HRA**)² of the effect of the Proposed Development on the SAC. It was concluded that an adverse effect on the integrity of the SAC could not be ruled out for either route.

1.1.7. In consequence of the Shadow HRA's conclusion the Applicant considered that, due to the complexity and sensitivity of the issues, both alignments should be fully assessed in the EIAR and brought forward as alternatives in the application. The Proposed Alignment is the applicant's preferred option (**Route 3A**), and the Alternative Alignment (**Route 3B**) is the only other feasible alternative route in Section 3.

1.1.8. Giving detailed consideration to both the Proposed Alignment and Alternative Alignment is also in line with the request of NatureScot, who in their Scoping response of 11 March 2022 included the following comment: "*We continue to advise that all alternative route options and design solutions are kept open (including the possibility of undergrounding part or all of the Glen Arroch route) until further detailed assessment and a shadow HRA have been undertaken.*" Now that the EIAR including a Shadow HRA have been completed (and the Shadow HRA, in particular, considered the possibility of undergrounding), and as discussed further below, it has been concluded that there is no alternative solution to the Proposed Alignment or Alternative Alignment.

¹ The National Site Network is explained at fn.11, below.

² Volume 5, Appendix V2-4.7 of the EIAR.

1.2. Purpose of this Document

- 1.2.1. In the event that the Scottish Ministers were to reach the same conclusion³ as reported on in the shadow HRA that an adverse effect on the integrity of the SAC in view of the site's conservation objectives cannot be ruled out for the Proposed Development, this would have implications for the decision-making process. As described further in paragraph 2.4 below, pursuant to regulation 63 of The Conservation of Habitats and Species Regulations 2017 (the **Habitats Regulations**), Ministers would be unable to grant development consent unless:
 - 1.2.1.1. They are satisfied that there are no alternative solutions to the design of the Proposed Development for Section 3;
 - 1.2.1.2. The Proposed Development has to be carried out for imperative reasons of overriding public interest; and
 - 1.2.1.3. There are appropriate compensatory measures to ensure the overall coherence of the National Site Network.
- 1.2.2. This document therefore sets out the Applicant's case for the Scottish Ministers to grant development consent, notwithstanding the possibility that an adverse effect on the integrity of the SAC cannot be ruled out, on the basis of:
 - 1.2.2.1. There being no alternative solutions; and
 - 1.2.2.2. There being imperative reasons of overriding public interest in the carrying out of the Proposed Development.
- 1.2.3. This document is referred to as the Applicant's **Derogation Case**.
- 1.2.4. In summary, this Derogation Case sets out: the objectives of the project; undertakes an analysis of whether there are alternative solutions that may have no or a lesser effect on the SAC; and sets out the imperative reasons of overriding public interest in favour of the project being granted consent notwithstanding on the conclusion that adverse effects on the site integrity of the SAC cannot be ruled out. Compensatory measures are to be the subject of a separate document to follow in due course. However, to assist the Scottish Ministers, this Derogation Case provides an outline of possible compensatory measures that can be taken forward in a compensation plan.

³ If the Scottish Ministers did not reach the same conclusion, this Derogation Case would not require to be considered.

- 1.2.5. In setting out its case, as referred to in the EIAR,⁴ the Applicant's primary position in light of its own detailed examination is that the Alternative Alignment is not an alternative solution under the Habitats Regulations because the difference in effects on site integrity between the two alignments is so insubstantial. The Applicant therefore seeks consent for the project with the Proposed Alignment (in which case the Alternative Alignment would not be granted consent).
- 1.2.6. However, if, contrary to the Applicant's primary case, the Scottish Ministers were to conclude that the Alternative Alignment was an alternative solution within the meaning of the Habitats Regulations, then sufficient detail has been provided in the EIAR so that Scottish Ministers could consent the project with the Alternative Alignment, and refuse consent for the Proposed Alignment.
- 1.2.7. The Applicant may request to update this Derogation Case following representations by the Statutory Nature Conservation Body (**SNCB**) i.e. NatureScot, or other parties, and in light of discussions with stakeholders regarding compensatory measures.

⁴ See particularly Volume 1 section 1.2 in Chapter 1.

2. LEGAL AND POLICY CONTEXT

2.1. The Applicant's General and Environmental Duties

2.1.1. The Applicant is the holder of a transmission licence granted under section 6(1)(b) of the 1989 Act. Under section 9(2) of the 1989 Act, the Applicant, as a transmission licence holder, is placed under a general duty:

“(a) to develop and maintain an efficient, co-ordinated and economical system of electricity transmission; and

*(b) to facilitate competition in the supply and generation of electricity”.*⁵

2.1.2. The transmission licence is subject to conditions with which the Applicant must ensure compliance.⁶ These include obligations in relation to the duties above; for example, to plan and develop its transmission system in accordance with the National Electricity Transmission System Security and Quality of Supply Standard.⁷ As referred to in Chapter 2 of Volume 1 of the EIAR, the current state of the existing asset has required the Applicant to seek from Ofgem a derogation from the licence conditions.⁸

2.1.3. In addition to that general duty, there are other specific duties on the Applicant under Schedule 9 to the 1989 Act when formulating “relevant proposals” such as the Proposed Development, to:

“... have regard to the desirability of preserving natural beauty, of conserving flora, fauna and geological or physiographical features of special interest and of protecting sites, buildings and objects of architectural, historic or archaeological interest; and

*... do what he reasonably can to mitigate any effect which the proposals would have on the natural beauty of the countryside or on any such flora, fauna, features, sites, buildings or objects...”*⁹

2.1.4. The Schedule 9 duties are distinct, but complementary to, a range of other environmental duties and controls the Applicant is subject to under other legislation including e.g. to undertake environmental impact assessment of relevant projects.¹⁰

⁵ Sections 9(2)(a) and (b) of the 1989 Act.

⁶ The Standard Conditions for a transmission licence may be found at <https://www.ofgem.gov.uk/industry-licensing/licences-and-licence-conditions>.

⁷ Transmission licence Standard Condition D3.

⁸ EIAR Volume 1, Chapter 2, para.2.2.1. The effect of this is, among other things, at certain times electricity generators are constrained off the network.

⁹ Para 1(1)(a) and (b) of Schedule 9 to the 1989 Act.

¹⁰ The Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017. Other legislation includes the Water Environment (Controlled Activities) (Scotland) Regulations 2011. The Applicant's 1989 Act licence conditions also contain obligations relevant to the design of the Proposed Development such as Condition D3 that requires that the Applicant “...shall at all times plan and develop the licensee's transmission system in

2.2. Implementation of the Habitats Directive in Scotland

- 2.2.1. The SAC is part of a network of the National Site Network (formerly Natura 2000)¹¹ sites protected under EU derived legislation: the Habitats Directive.¹²
- 2.2.2. The principal legislation in Scotland to implement the Habitats Directive was The Conservation (Natural Habitats, &c.) Regulations 1994. The 1994 Regulations set out legal requirements to be followed in relation to projects that may affect SACs. Those requirements share some common features with, but are legally distinct from, the wider requirement for environmental impact assessment of the Proposed Development which are set out in Volume 1, Chapter 1 of the EIAR.¹³
- 2.2.3. However, the 1994 Regulations are superseded in relation to certain of the Scottish Ministers' functions in relation to reserved matters, including applications for consent under section 37 of the 1989 Act and deemed planning permission under section 57(2) of the 1997 Act. In those cases – which include the Proposed Development – the Conservation of Habitats and Species Regulations 2017 apply to the assessment of the application, and for that reason are referred to throughout this Derogation Case as the **Habitats Regulations**.
- 2.2.4. The Habitats Regulations transpose Article 6(3) and (4) of the Habitats Directive, which deal with the assessment of plans and projects that affect a site protected under the Habitats Directive, as set out below:

“3. 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

accordance with the National Electricity Transmission System Security and Quality of Supply Standard version 2.5...”. The Applicant was also required to submit to Ofgem an Initial Needs Case (referred to in Volume 1, Chapter 2 of the EIAR) and Final Needs Case to justify the system planning and financial aspects of the Proposed Development.

¹¹ Natura 2000 is the network of sites across the EU protected under the Habitats Directive. As a consequence of Brexit, the 2017 Habitats Regulations, below, were amended by the Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019 to introduce the concept of the National Site Network i.e. sites that were Natura 2000 sites immediately before exit day or have subsequently been designated as protected under *inter alia* the Habitats Regulations. References to Natura 2000 in pre-exit day guidance issued by the appropriate authority/appropriate nature conservation body are now to be construed as references to the National Site Network (Habitats Regulations, Reg 3(10)).

¹² Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206 22.7.1992, p. 7), known as the **Habitats Directive**.

¹³ Paragraphs 1.4.3 and 1.5.

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.

4. 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.”

2.3. Brexit

- 2.3.1. On “exit day”,¹⁴ the UK ceased to be a Member State of the European Union. Following a transitional period that ended with “IP completion day”¹⁵ most directly applicable EU legislation was saved and converted to UK law; and most EU derived domestic legislation was retained. Saving and/or retention were subject to repeals or amendments by UK legislative or executive bodies.¹⁶
- 2.3.2. Courts and tribunals are no longer bound by the European Court, but in broad terms may continue to have regard to anything done by the European Court or the EU whether before or after IP completion day.¹⁷ Questions as to the “validity, meaning or effect” of retained EU law are to be decided, so far as unmodified at IP completion day, and so far as relevant in accordance with the retained case law and retained general principles of EU law.¹⁸ Retained case law is, in summary, decisions and principles of the EU or UK Courts made immediately before IP completion day so far as it related to saved/retained legislation. Retained general principles of EU law are in summary the general principles of EU law as they existed immediately before IP completion day.
- 2.3.3. EU Directives were not directly applicable legislation and therefore the Habitats Directive was not converted to UK law. However, the domestic legislation that derived from it was retained with amendments to take account of Brexit.¹⁹ Where relevant the amendments are noted below.
- 2.3.4. The Scottish Ministers have also published a guidance document on changes made to the various habitats regulations that apply in Scotland.²⁰ In referring to how existing (i.e. pre-IP completion day) guidance should be used it says:

¹⁴ 31 January 2020 at 11.00pm: European Union (Withdrawal) Act 2018, s.20(1).

¹⁵ 31 December 2020 at 11.00pm.: European Union (Withdrawal Agreement) Act 2020 s.39(2).

¹⁶ See e.g. European Union (Withdrawal) Act 2018 ss.2- 4.

¹⁷ European Union (Withdrawal) Act 2018 s.6(1)-(2) – regard may not be had if specifically provided otherwise.

¹⁸ European Union (Withdrawal) Act 2018 s.6(3).

¹⁹ Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019 (SI no.579).

²⁰ EU Exit: habitats regulations in Scotland, Scottish Government, December 2020.

“There is a large body of existing EU-derived guidance documents, designed to aid interpretation and effective implementation of the Nature Directives.

This includes guidance from Scottish Ministers, Scottish Natural Heritage, the UK Government (in relation to offshore waters and reserved matters), the Joint Nature Conservation Committee and the European Commission.

In the longer term, guidance may be updated and/or new guidance may be produced, for example to replace guidance by the European Commission. However, in the shorter term existing guidance continues to apply and should still be used.”

- 2.3.5. The guidance does not address how post-IP completion day guidance published by the EU institutions may be used. In line with the approach of the European Union (Withdrawal) Act 2018 that courts and tribunals may, in general, have regard to post-IP completion day acts, the approach taken in this Derogation Case is to have regard to updated EU guidance so far as it is relevant to EU derived domestic legislation (and in particular, the Habitats Regulations).

2.4. The Habitats Regulations

- 2.4.1. Regulations 63 and 64 of the Habitats Regulations are of particular importance. They are referred to as the “assessment provisions”. They implement Articles 6(3) and (4) of the Habitats Directive. Regulation 63 states:

“63.— Assessment of implications for European sites and European offshore marine sites

(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 the site,

shall make an appropriate assessment of the implications for the site in view of that site’s conservation objectives.

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

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

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

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

(6) In considering whether a plan or project will adversely affect the integrity of the site, the competent authority must have regard to the 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.

...”

2.4.2. In relation to the Proposed Development, the Scottish Ministers are the “competent authority”.²¹

2.4.3. The Scottish Ministers are therefore directed to evaluate the effects of the Proposed Development by carrying out “...an appropriate assessment of the implications for the site in view of that site’s conservation objectives”.²² In light of the conclusions of that appropriate assessment “...subject to regulation 64, the [Scottish Ministers] shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site...”.²³

2.4.4. Regulation 64 of the Habitats Regulations (as amended) provides:

“64.— Considerations of overriding public interest

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

²¹ Habitats Regulations, Reg.7(2).

²² Regulation 63(1).

²³ Regulation 63(5).

implications for the European site or the European offshore marine site (as the case may be).

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

- (a) reasons relating to human health, public safety or beneficial consequences of primary importance to the environment, or*
- (b) any other reasons which the competent authority, having due regard to the opinion of the appropriate authority, considers to be imperative reasons of overriding public interest.*

(3) Where a competent authority other than the Secretary of State or the [Scottish]²⁴ Ministers desires to obtain the opinion of the appropriate authority as to whether reasons are to be considered imperative reasons of overriding public interest, it may submit a written request to the appropriate authority –

- (a) identifying the matter on which an opinion is sought, and*
- (b) accompanied by any documents or information which may be required.*

(4) In giving its opinion as to whether the reasons are imperative reasons of overriding public interest, the appropriate authority must have regard to the national interest, and provide its opinion to the competent authority.

(4A) Before giving its opinion as to whether the reasons are imperative reasons of overriding public interest, the appropriate authority must consult the following, and have regard to their opinion—

- (a) the Joint Nature Conservation Committee;*
- (b) where the appropriate authority is the Secretary of State, the devolved administrations;*
- (c) where the appropriate authority is the [Scottish] Ministers, the Secretary of State, and the other devolved administrations; and*
- (d) any other person the appropriate authority considers appropriate.*

(5) Where a competent authority other than the Secretary of State or the [Scottish] Ministers proposes to agree to a plan or project under this regulation notwithstanding a negative assessment of the implications for the site concerned –

- (a) it must notify the appropriate authority; and*

²⁴ Regulation 64 refers to the Welsh Ministers. However, for the purpose of applications under section 37 of the 1989 Act and section 57(2) of the 1997 Act, that is read as a reference to the Scottish Ministers per reg.69(3).

(b) it must not agree to the plan or project before the end of the period of 21 days beginning with the day notified by the appropriate authority as that on which its notification was received, unless the appropriate authority notifies it that it may do so.

(6) Without prejudice to any other power, the appropriate authority may give directions to the competent authority prohibiting it from agreeing to the plan or project, either indefinitely or during such period as may be specified in the direction.”

2.4.5. Regulation 69(3)(c) provides that in certain cases, including applications under section 37 of the 1989 Act and section 57(2) of the 1997 Act, if the competent authority is the Scottish Ministers, the reference to the appropriate authority is to be read as a reference to the Scottish Ministers; and under regulation 69(3)(b), references to the Welsh Ministers are to be read as being the Scottish Ministers. The combined effect is that in priority habitat cases, the Scottish Ministers act as the appropriate authority but with duties to seek the opinion of the Joint Nature Conservation Committee (**JNCC**), Secretary of State, and other devolved administrations for IROPI that fall under regulation 64(2)(b).

2.4.6. Regulation 68 provides that:

“Where in accordance with regulation 64—

(a) a plan or project is agreed to, notwithstanding a negative assessment of the implications for a European site or a European offshore marine site, or

(b) a decision, or a consent, permission or other authorisation, is affirmed on review, notwithstanding such an assessment, the appropriate authority must secure that any necessary compensatory measures are taken to ensure that the overall coherence of Natura 2000 is protected.”

2.4.7. Under Regulation 3(1), post-exit day, the reference to Natura 2000 is to be construed as a reference to the National Site Network, which means *“the network of sites in the United Kingdom’s territory”* that immediately pre-exit day formed part of Natura 2000 or were subsequently designated as European sites.

2.4.8. Read together, regulations 64 and 68 therefore transpose Article 6(4) of the Habitats Directive. The Habitats Regulations permit the Scottish Ministers to consent the Proposed Development even if there are assessed to be adverse effects on the integrity of the SAC (i.e. ‘derogate’ from the provisions of regulation 63) provided that:

2.4.8.1. There are no alternative solutions;

2.4.8.2. The Proposed Development must be carried out for imperative reasons of overriding public interest; and

2.4.8.3. They have secured any necessary compensatory measures to ensure the overall coherence of the UK's national site network.

2.4.9. The absence of alternative solutions to the Proposed Development is discussed in Chapter 4, below. The imperative reasons of overriding public interest (**IROPI**) in the Proposed Development are discussed in Chapter 5, below. On the basis of the matters set out in this Derogation Case, the Applicant submits that Scottish Ministers can be satisfied that they may consent the Proposed Development notwithstanding possible adverse effects on site integrity of the SAC. Appropriate compensatory measures will be proposed (outlined in Chapter 6 below, with a separate document to follow) so that the Scottish Ministers can be satisfied that all necessary compensatory measures to secure the overall coherence of the national site network can be secured.

2.5. National Policy

2.5.1. The Scottish Ministers have set out policy on their approach to questions of derogation.²⁵ This is found in Revised Circular 6/95.²⁶ Revised Circular 6/95 includes the following guidance:

“14. A development that would have an adverse effect on the conservation interests for which a Natura 2000 site has been designated should only be permitted where:

- there is no alternative solution; and*
- there are imperative reasons of overriding public interest, including those of a social or economic nature.*

An "alternative solution" could be the identification of suitable and available sites that are reasonable alternatives for the development or finding different approaches that would have a lesser impact. Scottish Ministers expect there to be few cases where it is judged that imperative reasons of over-riding public interest will allow a development to proceed which will have an adverse effect on the integrity of the internationally important SPA or SAC designations. This applies equally to new proposals and to developments with valid existing permissions. The judgement will involve an assessment of the importance of the development and whether it is sufficient to override the nature conservation importance of that site. Developments must pass the most stringent tests. In many cases, it may be possible to negotiate a

²⁵ This policy was adopted after the 1994 Regulations, to which it refers, but before the 2017 Habitats Regulations. However, as both regulations derive from the Habitats Directive, the policy is relevant to both.

²⁶ Scottish Executive, updated June 2000. Although it is no longer published, Revised Circular 6/95 remains referred to by NatureScot in its updated 2022 Natura Casework Guidance.

sustainable development solution that would remove or reduce apparent conflict. But where such possibilities have been explored and conflict remains, and where the local authority believes the development should proceed, the Habitats Regulations set out a procedure by which Scottish Ministers and, in certain cases affecting priority habitats or species as defined in Article 1 of the Habitats Directive, the European Commission, may consider whether the overriding public interest considerations should apply.

15. Where there is no alternative solution, each case will be judged on its merits but the following guiding principles will be relevant in deciding whether imperative reasons of overriding public interest are demonstrated:

- a need to address a serious risk to human health and public safety;*
- the interests of national security and defence;*
- the provision of a clear and demonstrable direct environmental benefit on a national or international scale;*
- a vital contribution to strategic economic development or regeneration;*
- where failure to proceed would have unacceptable social and/or economic consequences.*

When considering cases against these principles, in general, projects of national importance are most likely to be judged as giving rise to imperative reasons of overriding public interest. Important regional projects might also be so judged. While projects of more local significance are not ruled out, it is less likely that their potential benefits will be considered to override the nature conservation value of the sites.

16. The relative importance of the SPA or SAC within the European network will also weigh in the balance of considerations. Some sites are designated for habitat types and species that are listed as "priority" under the Habitats Directive. These must be subject to particularly stringent scrutiny. In these cases the Directive requires considerations other than human health and public safety or overriding environmental reasons to be subject to an opinion from the European Commission.

17. Where the importance of the development is judged to outweigh the nature conservation importance of the site, compensatory habitat measures must be taken to maintain the coherence of the Natura 2000 network. If the habitat types or species affected are relatively abundant and only part of the national resource has been designated or proposed for designation, it may be possible for an area of similar quality and character to be identified for designation which could, at least in part, replace the loss to the network. This will become increasingly difficult with rarer habitat types and species; in the cases of the most rare especially, all suitable sites are likely to already be designated or

proposed for designation. In these cases the possibilities for restoration of damaged habitat or creation of replacement habitat will need to be considered. This may be costly and often technically difficult or ecologically untried. In certain cases the habitat affected may be irreplaceable. Wherever possible, Scottish Ministers would expect the developer, under 'polluter pays' principles, to bear the cost of compensatory measures. If recreation or restoration is specified as compensatory measures, Scottish Ministers would expect the area concerned to become, within a clear timescale, of sufficient quality to ensure that the coherence of the Natura 2000 network is protected."

- 2.5.2. Revised Circular 6/95 remains relevant in setting out important principles, including that:
- 2.5.2.1. A stringent approach will be taken to alternative solutions.
 - 2.5.2.2. Projects of national importance are more likely to have IROPI.
 - 2.5.2.3. The developer should bear the cost of compensatory measures.
 - 2.5.2.4. Compensatory measures need not be immediately in place but should be in place within a clear timescale.
- 2.5.3. References to the European Commission in Revised Circular 6/95 have been superseded by Brexit. As seen in the Habitats Regulations discussed above, the opinion as to whether IROPI exist even in priority habitat cases now rests with the Scottish Ministers.²⁷ Nevertheless, as European derived legislation, EU guidance remains a relevant consideration and reference is made below to the relevant passages.
- 2.5.4. In relation to whether the Proposed Development is of national importance, it should be noted that it is considered in planning terms to be national development in both National Planning Framework 3²⁸ (**NPF3**) (National Development 4 - *High Voltage Electricity Transmission Network*) and National Planning Framework 4²⁹ (**NPF4**) (National Development 3 - *Strategic Renewable Electricity Generation and Transmission Infrastructure*). This is discussed further in Volume 1, Chapter 7 of the EIAR at paragraphs 7.4.1 – 7.4.11.³⁰

²⁷ Having complied with the duty to seek opinions, for certain IROPI – see 2.4.5.

²⁸ Scottish Government, June 2014.

²⁹ Scottish Government, November 2022. This was approved by the Scottish Parliament on 11 January 2023 and is anticipated to be adopted in February 2023.

³⁰ NPF4 referred to in the EIAR is the 2021 consultative draft. However, National Development 3 in the 2022 revised draft is very similar to National Development 12 in the 2021 consultative draft.

2.6. EU Guidance

2.6.1. The EU Commission has produced a number of relevant guidance documents including in particular:

- 2.6.1.1. *“Managing Natura 2000 sites: The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC”* (European Commission, 2018) (the **Article 6 Commission Guidance**);
- 2.6.1.2. *“Assessment of plans and projects in relation to Natura 2000 sites - Methodological guidance on Article 6(3) and (4) of the Habitats Directive 92/43/EEC”* (European Commission, revised 2021) (the **Methodological Guidance**);³¹ and
- 2.6.1.3. *“Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC”* (European Commission, 2007) (the **Article 6(4) Guidance**).

The EU Commission has also produced sector specific guidance for energy transmission projects: *“Guidance on Energy Transmission Infrastructure and EU nature legislation”* (European Commission, 2018) (the **ETI Guidance**).

2.6.2. The war in Ukraine and energy market volatility have also been the subject of EU guidance. This resulted in the May 2022 issue of the *“REPowerEU Plan”*³² (the **REPowerEU Plan**). While the REPowerEU Plan itself has no effect in Scotland, the Scottish Ministers may have regard to the Commission’s acts, and therefore the REPowerEU Plan and associated acts, in interpreting EU derived domestic legislation.³³ Alongside the REPowerEU Plan, the European Commission published a Recommendation on permitting procedures³⁴ (the **EU Permitting Recommendation**) and a proposal to amend Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources and other Directives (the **Proposal to Amend the Energy Directives**)³⁵. These are discussed further below.

2.6.3. In the Article 6 of the Commission Guidance, it is noted that:

“The application of Article 6(4) is not automatic. It is up to the authorities to decide whether the conditions for a derogation from Article 6(3) can be applied in the event that the appropriate assessment has concluded that the plan or project will adversely affect the integrity of the site concerned, or in case of doubt over the absence of such adverse effects.

³¹ It will be noted this post-dates IP completion day – see para.2.3.4 above.

³² European Commission, 18.5.2022, COM(2022) 230 final.

³³ See para.2.3.5 above.

³⁴ *Commission Recommendation on speeding up permit-granting procedures for renewable energy projects and facilitating Power Purchase Agreements*, European Commission 18.5.2022, C/2022/3219 final.

³⁵ Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources, Directive 2010/31/EU on the energy performance of buildings and Directive 2012/27/EU on energy efficiency, COM(2022) 222 final, 18.5.22.

...

The decision to go ahead with a plan or project must meet the conditions and requirements of Article 6(4). In particular, it must be documented that:

- 1. the alternative put forward for approval is the least damaging for habitats, for species and for the integrity of the Natura 2000 site(s), regardless of economic considerations, and that no other feasible alternative exists that would not adversely affect the integrity of the site(s);*
- 2. there are imperative reasons of overriding public interest, including “those of a social or economic nature”;*
- 3. all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected are taken.”*

Alternative solutions

2.6.4. The Article 6 of the Commission Guidance notes that the “...*first obligation of the Article 6(4) derogation procedure is to examine whether there are alternative solutions to the plan or project*”.³⁶ It goes on:

“In line with the need to prevent undesired impairment to the Natura 2000 network, the thorough revision and/or withdrawal of a proposed plan or project should be considered when negative effects on the integrity of a site have been identified. Thus, the competent authorities have to analyse and demonstrate the need of the plan or project concerned, considering the zero option too at this stage.

Subsequently, the competent authorities should examine the possibility of resorting to alternative solutions which better respect the integrity of the site in question. All feasible alternatives that meet the plan or project aims, in particular, their relative performance with regard to the site’s conservation objectives, integrity and contribution to the overall coherence of the Natura 2000 network have to be analysed, taking also into account their proportionality in terms of cost. They might involve alternative locations or routes, different scales or designs of development, or alternative processes.

As concerns the economic cost of the steps that may be considered in the review of alternatives, it cannot be the sole determining factor in the choice of alternative solutions (C-399/14, paragraph 77). In other words, a project proponent cannot claim that alternatives have not been examined because they would cost too much.

³⁶ Para.5.3.1 at pp54-55.

*In line with the principle of subsidiarity, it is for the competent national authorities to assess the relative impact of these alternative solutions on the site concerned. It should be stressed that the reference parameters for such comparisons deal with aspects concerning the conservation and the maintenance of the integrity of the site and of its ecological functions. In this phase, therefore, other assessment criteria, such as economic criteria, cannot be seen as overruling ecological criteria. The absence of alternatives must be demonstrated, before proceeding with the examination of whether the plan or project is necessary for imperative reasons of public interest (Court ruling in Castro Verde case C-239/04 paragraphs 36–39).*³⁷ [underline added]

2.6.5. In assessing under Article 6(4) (and therefore under the Habitats Regulations) the alternatives to a project, it is therefore key to demonstrate:

2.6.5.1. The **need** for the project. This involves considering the **project objectives**.

2.6.5.2. Whether there are **alternative solutions** to the project. This includes an assessment of the zero option or “do nothing alternative”.

2.6.6. This is expanded upon in the Methodological Guidance. It suggests that the alternatives may consist of different:

- “• *ways to achieve the objectives of the proposed development;*
- *locations that may be available for the development having regard to protected habitats and species, for example, by defining different land transportation corridors in master plans for roads and motorways or different housing development zones;*
- *scale and size of the development;*
- *design solutions for the development;*
- *techniques, methods of construction or operational methods for the implementation of the development;*
- *timetable of the various activities and tasks at each of the implementation stages, including during construction, operation, maintenance and, if applicable, decommissioning or reconditioning.*”³⁸

2.6.7. The ETI Guidance also discusses types of alternatives:

“The search for alternatives can be quite broad and should be linked to the public interest objectives of the plan or project. It could involve

³⁷ *Ibid.*

³⁸ Methodological Guidance, para.3.3.1, pp.68-69.

*alternative locations, different scales or designs of development, different methods of construction or alternative processes and approaches.*³⁹

2.6.8. The Methodological Guidance is clear that the assessment of alternatives is an important step even if it is certain that the project is justified in terms of need:

*“The competent authorities must determine whether the alternative put forward for approval is the least damaging for habitats and species and for the integrity of the Natura 2000 site or sites concerned. The assessment of alternative solutions is necessary even if the investment is already justified in advance for imperative reasons of overriding public interest, e.g. through national law.”*⁴⁰

2.6.9. The assessment of alternatives in such circumstances is to ensure that the impacts are identified and are “*fully and precisely described and quantified as far as possible...in view of the site specific conservation objectives.*”⁴¹ Where there are alternatives that involve different impacts to the same site, an appropriate assessment must consider those impacts to allow a comparative analysis to determine “*which alternatives are the least damaging for Natura 2000 sites...in view of the site-specific conservation objectives*”.⁴²

2.6.10. Where there is an alternative solution that does not adversely affect the integrity of the SAC, then the solutions which do cause an adverse effect should not be considered further. However, in the case where all alternative solutions would involve an adverse effect on a Natura 2000 site, it does not follow that the least damaging alternative must be pursued. The least damaging alternative must be **identified** and described as above so that a comparative analysis can be undertaken between the listed alternative solutions. It is then for the competent authority to balance the harm caused to the site’s conservation objectives against the imperative reasons for the project; bearing in mind the principle of proportionality. It was put this way by an Advocate-General in European jurisprudence:

*“...the approving authority must ensure that at least those alternatives are examined that are not obviously – beyond reasonable doubt – out of the question. In selecting the alternative, **the decisive factor is whether imperative reasons of overriding public interest demand the implementation of this alternative or whether they can also be met by another alternative.**”*⁴³ [bold added]

2.6.11. The same Advocate-General reiterated the point in another opinion:

³⁹ ETI Guidance, para.7.4, p.67.

⁴⁰ Methodological Guidance, para.3.3.1, p.70

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Commission v Austria* (C-209/04) per Advocate-General Kokott at para.72.

*“Among the alternatives short-listed in that way, the choice does not inevitably have to be determined by which alternative least adversely affects the site concerned. Instead, **the choice requires a balance to be struck between the adverse effect on the integrity of the SPA and the relevant reasons of overriding public interest.**”⁴⁴ [bold added]*

Imperative Reasons of Overriding Public Interest (IROPI)

2.6.12. Just as IROPI are not exhaustively defined in the Directive or Habitats Regulations, nor are they exhaustively defined in European Guidance. However, the Article 6 of the Commission Guidance offers the following approach to the general principles of determining what may be IROPI:

“Having regard to the structure of the provision, in the specific cases the competent national authorities have to make their approval of the plans and projects in question subject to the condition that the balance of interests between the conservation objectives of the site affected by those initiatives and the above-mentioned imperative reasons weighs in favour of the latter. This should be determined according to the following considerations:

- a) There must be an **imperative reason** for implementing the plan or project;*
- b) the public interest must be **overriding**: it is therefore clear that not every kind of public interest of a social or economic nature is sufficient, in particular when seen against the particular weight of the interests protected by the Directive (see for instance recital 4, which refers to ‘Community’s natural heritage’);*
- c) in this context, it seems also reasonable to assume that the public interest can only be overriding if it is a **long-term interest**; short term economic interests or other interests yielding only short-term benefits for the society would not appear to be sufficient to outweigh the long-term conservation interests protected by the Directive.”⁴⁵*

2.6.13. The Article 6 Commission Guidance then goes on to summarise the approach to IROPI thus:

“It is reasonable to consider that the ‘imperative reasons of overriding public interest, including those of social and economic nature’ refer to situations where plans or projects envisaged prove to be indispensable:

⁴⁴ *Commission v Portugal* (C-239/04) per Advocate-General Kokott at para.44. Although the reference in this case and *Commission v Austria* above was to a Special Protected Area (SPA), SPAs are granted equivalent protection to SACs under Art.6(3) and (4).

⁴⁵ Article 6 of the Commission Guidance para.5.3.2 at p.56 [bold in original].

- *within the framework of actions or policies aiming to protect fundamental values for the citizens’ life (health, safety, the environment);*
- *within the framework of fundamental policies for the State and the society;*
- *within the framework of carrying out activities of an economic or social nature, fulfilling specific obligations of public service.*

*It is for the competent authorities to weigh up the imperative reasons of overriding public interest of the plan or project against the objective of conserving natural habitats and wild fauna and flora. They can only approve the plan or project if the imperative reasons for the plan or project outweigh its impact on the conservation objectives.*⁴⁶

2.6.14. The Methodological Guidance casts further light on when IROPI may be demonstrated:

*“Public interests can occur at national, regional or local level, but, whatever the level, the other elements of the test must also be met. In practice, plans and projects which are consistent with national or regional strategic plans or policies (e.g. identified within a national infrastructure plan) are more likely to be of public interest. However, consideration would still need to be given to whether, in a specific case, that interest outweighs the harm that will be done to the affected sites and therefore whether IROPI can be demonstrated.”*⁴⁷

2.6.15. The REPowerEU Plan proposes that one of the responses to the war in Ukraine and energy market volatility is to accelerate the EU’s transition to renewable energy. To this end, the REPowerEU Plan sets objectives of acceleration and simplification of permitting procedures for renewable energy projects. To accomplish these objectives, when published, the Proposal to Amend the Energy Directives included, among its other proposals, an amendment of the 2018 Renewable Energy Directive⁴⁸ (RED2) to include the following:

“Article 16d

Overriding public interest

By [three months from entry into force], until climate neutrality is achieved, Member States shall ensure that, in the permit-granting process, the planning, construction and operation of plants for the production of energy from renewable sources, their connection to the grid and the related grid itself and storage assets are presumed as being in the overriding public interest and serving public health and safety when balancing legal interests in the individual cases for the purposes of Articles 6(4) and 16(1)(c) of

⁴⁶ Article 6 Commission Guidance para.5.3.2 at p.57.

⁴⁷ Methodological Guidance, para.3.3.2 at p.76.

⁴⁸ Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast).

Directive 92/43/EEC, Article 4(7) of Directive 2000/60/EC and Article 9(1)(a) of Directive 2009/147/EC.”

2.6.16. While that remains a legislative proposal, one of the Commission’s Recommendations (the EU Permitting Recommendation) provided accompanying guidance to Member States in the following terms:

*“Member States should ensure that the planning, construction and operation of plants for the production of energy from **renewable sources, their connection to the electricity, gas and heat grid and the related grid itself** and storage assets qualify for the most favourable procedure available in their planning and permit-granting procedures and **are presumed as being in the overriding public interest and in the interest of public safety**, in view of the legislative proposal amending and strengthening the provisions of Directive (EU) 2018/2001 related to administrative procedures and without prejudice to the Union law.”⁴⁹ [bold added]*

2.6.17. A Commission staff working document⁵⁰ was produced to accompany the EU Permitting Recommendation. At page 23 of the guidance, it notes:

“The concept of ‘imperative reason of overriding public interest’ is referred to in several pieces of environmental legislation.

Under Article 6(4) of the Habitats Directive this concept implies that the competent national authorities have to make their approval of the plans and projects in question subject to the condition that the balance of interests between the conservation objectives of the Natura 2000 site affected by those initiatives and the imperative reasons weighs in favour of the latter. This requires a case by case assessment”;

and continues at page 24 to say:

*“A renewable energy project affecting the integrity of a Natura 2000 site can be authorised if there are no alternative solutions and if the balance of interests between the conservation objectives of the site affected and the public interests of the project weighs in favour of the latter, provided all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected are taken. It is for the competent authorities to take such decision, on the basis of the interests at stake in each specific case. Member States should establish clear guidance for competent authorities to take such decisions in the case of renewable energy projects, that could be justified in relation to different public interests, e.g. for their contribution to energy security (energy independence from imports) **or public safety***

⁴⁹ EU Permitting Recommendation, para.2

⁵⁰ Commission Staff Working Document Guidance to Member States on good practices to speed up permit-granting procedures for renewable energy projects and on facilitating Power Purchase Agreements, European Commission, 18.5.2022, SWD(2022) 149 final.

(ensuring heating and electricity needs) or as having beneficial consequences of primary importance for the environment (mitigation of climate change).” [bold added]

2.6.18. Council Regulation (EU) 2022/2577 laying down a framework to accelerate the deployment of renewable energy was adopted by the Council of the EU on 22 December 2022.⁵¹ For a period of 18 months (subject to proposals to extend its validity), it in effect implements the EU Permitting Proposal. Specifically, Article 3.1 states that, “*The planning, construction and operation of plants and installations for the production of energy from renewable sources, and their connection to the grid, the related grid itself and storage assets shall be presumed as being in the overriding public interest and serving public health and safety when balancing legal interests in the individual case, for the purposes of Article 6(4) and Article 16(1)(c) of Council Directive 92/43/...*”.

2.6.19. In the case of the Proposed Development, it is noted that an adverse effect on site integrity is predicted in the Shadow HRA for blanket bog, which is a priority natural habitat. The Habitats Regulations formerly required that IROPI in relation to priority habitat had to relate to human health, public safety or beneficial consequences of primary importance to the environment; otherwise, consent could be given only following the obtaining of an opinion from the European Commission. Post-Brexit, the Habitats Regulations as noted at paragraph 2.4.4 above, allow the IROPI to be those reasons, or any other having regard to the opinion of the appropriate authority. The Scottish Ministers are the appropriate authority. Accordingly, the question of weight to be given to any IROPI is therefore for the Scottish Ministers.⁵²

2.6.20. While the Scottish Ministers may have regard to any IROPI, it is useful to consider the meaning of IROPI that relate to human health, public safety or beneficial consequences of primary importance to the environment as interpreted by the European Court in the context of an electricity transmission system.

2.6.21. In *Inter-Environnement Wallonie asbl v Conseil des Ministres*,⁵³ the European Court of Justice’s Grand Chamber considered a project to restart a nuclear power station that involved assessment of its implications under the Habitats Directive. The judgment of the court contained the following:

“155 As regards the question whether the objective of ensuring the security of a Member State’s electricity supply constitutes an imperative reason of overriding public interest within the meaning of the first subparagraph of Article 6(4) of the Habitats Directive, it should be noted that an interest capable of justifying proceeding with a plan or project must be both ‘public’

⁵¹ Published in the OJEU on 29 December 2022.

⁵² Provided they have consulted and had regard to the opinion of the Joint Nature Conservation Committee and any other person/body they consider appropriate.

⁵³ Case C-411/17.

and ‘overriding’, which means that it must be of such an importance that it can be weighed against that directive’s objective of the conservation of natural habitats and wild fauna, including birds, and flora ...

156 In that regard, it may be noted that Article 194(1)(b) TFEU identifies security of energy supply in the European Union as one of the fundamental objectives of EU policy in the field of energy ...

157 Furthermore, and in any event, the objective of ensuring the security of electricity supply in a Member State at all times fulfils the conditions specified in paragraph 155 of the present judgment.

158 However, if a protected site likely to be affected by a project hosts a priority natural habitat type or species, within the meaning of the Habitats Directive, in circumstances such as those in the main proceedings, the only ground capable of constituting a public security ground for the purposes of the second subparagraph of Article 6(4) of that directive that would justify proceeding with the project is the need to nullify a genuine and serious threat of rupture of that Member State’s electricity supply.

159 It follows that ... the first subparagraph of Article 6(4) of the Habitats Directive must be interpreted as meaning that the objective of ensuring security of the electricity supply in a Member State at all times constitutes an imperative reason of overriding public interest, within the meaning of that provision. The second subparagraph of Article 6(4) of that directive must be interpreted as meaning that if a protected site likely to be affected by a project hosts a priority natural habitat type or priority species, a finding which it is for the referring court to make, only a need to nullify a genuine and serious threat of rupture of that Member State’s electricity supply constitutes, in circumstances such as those in the main proceedings, a public security ground, within the meaning of that provision.”

2.7. UK Government Policy

2.7.1. As described above, the Secretary of State must be notified by the Scottish Ministers of a proposed decision to derogate. The UK Government Policy for decision makers on “*Habitats regulations assessments: protecting a European site*”⁵⁴ (the **DEFRA Guidance**) may therefore be relevant for context.

2.7.2. The DEFRA Guidance notes that alternative solutions must meet the project objectives, and goes on to say:

“An alternative solution is acceptable if it:

- *achieves the same overall objective as the original proposal*

⁵⁴ DEFRA, 2021: <https://www.gov.uk/guidance/habitats-regulations-assessments-protecting-a-european-site>.

- *is financially, legally and technically feasible*
- *is less damaging to the European site and does not have an adverse effect on the integrity of this or any other European site”.*⁵⁵

2.7.3. In relation to IROPI, the DEFRA Guidance offers the following:

“If there are no feasible alternative solutions, you must next be able to show that there are imperative reasons of overriding public interest why the proposal must go ahead. These must justify the proposal, despite the damage it will or could cause to the European site.

You must decide if the proposal is:

- *imperative - it’s essential that it proceeds for public interest reasons*
- *in the public int–rest - it has benefits for the public, not just benefits for private interests*
- *overriding - the public interest outweighs the harm, or risk of harm, to the integrity of the European site that’s predicted by the appropriate assessment*

*National strategic plans, policy statements and major projects are more likely to have a high level of public interest and be able to show they are imperative and overriding. Plans or projects that only provide short-term or very localised benefits are less likely to be able to show imperative reasons of overriding public interest.”*⁵⁶

2.7.4. The UK Government has also published a series of National Policy Statements (**NPS**) for Energy. While they are policy statements made under the Planning Act 2008 which does not apply to this type of development,⁵⁷ as energy transmission is a reserved matter, they are included as relevant context.

2.7.5. The Overarching National Policy Statement for Energy (**EN-1**)⁵⁸ deals with the need for new electricity network infrastructure under paragraph 3.7. It notes:

“3.7.1 Much of the new electricity infrastructure that is needed will be located in places where there is no existing network infrastructure. This is likely to be the case for many wind farms, or where there may be technical reasons why existing network infrastructure is not suitable for connecting the new generation infrastructure.

3.7.2 The need to connect to new sources of electricity generation is not the only driver of need for new electricity network infrastructure. ... Lack

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ Most parts of the Planning Act 2008 apply to Scotland only so far as required for the purpose of the construction (other than by a gas transporter) of an oil or gas pipe-line that has an end in England/Wales and the other end is in Scotland (see s.240 of the Planning Act 2008).

⁵⁸ Department of Energy & Climate Change, July 2011.

of sufficiently robust electricity networks can cause, or contribute to, large scale interruptions. Existing transmission and distribution networks will have to evolve and adapt in various ways to handle increases in demand, but construction of new lines of 132 kV and above will also be needed to meet the significant national need for expansion and reinforcement of the UK's transmission and distribution networks.

*3.7.3 It is important to note that **new electricity network infrastructure projects, which will add to the reliability of the national energy supply, provide crucial national benefits, which are shared by all users of the system.***⁵⁹ [bold added]

2.7.6. The British Energy Security Strategy was published by the UK Government on 7 April 2022. It recognises the growing proportion of electricity demand that is, and requires in the future to be, met by the supply of renewable generation on to the transmission system, noting that “...*electricity demand is highly likely to double by 2050*” and with a goal of decarbonisation of the electricity system by 2035 subject to security of supply.

2.8. UK Case Law

2.8.1. In *R. (Mynydd Y Gwynt Ltd) v Secretary of State for Business, Energy and Industrial Strategy*,⁶⁰ the High Court of England and Wales held that, because the default position in an appropriate assessment is that consent must be refused – i.e. unless the competent authority are convinced that there will be no adverse effect on site integrity then consent must be refused – the burden of proof lay on an applicant to provide sufficient information for the competent authority to carry out an appropriate assessment:

“In effect, the burden upon [the applicant] is to ensure that the competent authority is provided with sufficient information to convince the authority, taking into account all material considerations and exercising an evaluative judgment in respect of them, that the project poses no real risk in respect of the integrity of the European Site as considered through the prism of the conservation objectives. “Information” is a broad concept, stretching beyond relevant raw material: it includes appropriate analysis. Where the authority is unconvinced by the information lodged at any particular time in the process, it may request further information from the applicant under reg.61(2) of the 2010 Regulations (see [16] above). The authority must necessarily have a wide discretion in the requests for information it considers appropriate to make. Once the applicant has been given a proper

⁵⁹ There is a draft revised NPS EN-1 that was published in September 2021. The emerging draft continues to support the need for onshore reinforcement works, in particular development of new transmission lines of 132kV and above: see Draft Overarching National Policy Statement for Energy (EN-1), Department for Business Energy and Industrial Strategy, paras.3.3.46 *et seq.*

⁶⁰ [2017] Env. L.R. 240.

opportunity to submit the information upon which it relies and all of the information is in, if that information does not convince the competent authority, then the authority may—indeed, must—refuse to make a DCO, irrespective of the cause of that deficiency.”⁶¹

- 2.8.2. The EIA Report, and in particular the Shadow HRA, represent the Applicant’s provision of sufficient information for the Scottish Ministers to reach conclusions on the effect of the project on the integrity of the SAC.⁶²
- 2.8.3. In *R (Plan B Earth) v Secretary of State for Transport*⁶³ (the ‘Heathrow 3rd runway case’), before the High Court and the Court of Appeal the claimants/appellants had argued that the Secretary of State had erred in their interpretation of the approach to whether an alternative was an “alternative solution” for the purpose of Article 6(4) of the Habitats Directive.
- 2.8.4. The claimants challenged the decision by the Secretary of State to adopt the “*Airports National Policy Statement: new runway capacity and infrastructure at airports in the South East of England*” (the **ANPS**).⁶⁴ The government had set up a commission to “*to examine the scale and timing of any requirement for additional capacity to maintain the UK’s position as Europe’s most important aviation hub...*”⁶⁵ The policy expressed therein – maintaining the UK’s position as Europe’s most important aviation hub – was referred to as the “hub objective”.
- 2.8.5. The Secretary of State had undertaken a strategic Habitats Regulations Appraisal (**HRA**) in connection with the ANPS. That had ruled out a second runway at Gatwick as an alternative solution to a 3rd at Heathrow. This was recorded in the ANPS at paragraph 1.32:

“Consideration has been given to alternative solutions to the preferred scheme, and the conclusion has been reached that there are no alternatives that would deliver the objectives of the [ANPS] in relation to increasing airport capacity in the South East and maintaining the UK’s hub status. In line with Article 6(4) of the Directive, the Government considers that meeting the overall needs case for increased capacity and maintaining the UK’s hub status, as set out in chapter two, amount to imperative reasons of overriding public interest supporting its rationale for the designation of the [ANPS].”
[underline added]

⁶¹ [2017] Env. L.R. 240 at 247, para.20(viii).

⁶² See in particular Volume 5, Appendix V2-4.7 the Kinloch and Kyleakin Hills SAC Shadow HRA; Volume 2 Chapters 4 (Ecology), 7 (Geology and Soils Environment) and 9 (Forestry); Volume 6 Chapters 4 (Ecology- Alternative Alignment), 7 (Geology and Soils Environment- Alternative Alignment) and 9 (Forestry - Alternative Alignment).

⁶³ [2020] EWCA Civ 214.

⁶⁴ 2018, HM Government.

⁶⁵ Para.1.3 of the ANPS.

2.8.6. However, the environmental report and appraisal of sustainability for the Secretary of State had retained the 2nd Gatwick runway as a “reasonable alternative”. The claimants argued in the High Court, in short, that there was no substantive difference between reasonable alternatives for the purpose of preparing environmental reports under the Strategic Environmental Assessment Directive (**SEA Directive**) on the one hand and alternative solutions under the Habitats Directive on the other. In rejecting that argument, the High Court said:

“...it is necessary to have well in mind fundamental differences in the operation of the Habitats Directive and the SEA Directive. Where a proposal (whether to adopt a policy or to grant consent for a project) adversely affects the integrity of a European site, the operation of article 6(3) and (4) of the Habitats Directive (and regulations 63 and 64 of the Habitats Regulations) determines the outcome of the process, according to the results of applying the tests laid down in those provisions. It is therefore rightly said by Mr Jaffey that these provisions are substantive in nature, and not merely procedural. In our judgment, an option which does not meet a core objective of a policy should not be allowed to affect the application of article 6(4). By contrast, the requirements of the SEA Directive for the content of an environmental report and for the assessment process which follows are entirely procedural in nature. Thus, the requirement to address ‘reasonable alternatives’ in the environmental report ... is intended to facilitate the consultation process under article 6 ... The operator of Gatwick and other parties preferring expansion at that location would be expected to advance representations as to why the hub objective should have less weight than that attributed to it by the Secretary of State or that, contrary to his provisional view, the Gatwick 2R Scheme could satisfy that objective. The outputs from that exercise are simply taken into account in the final decision-making on the adoption of a plan, but the SEA Directive does not mandate that those outputs determine the outcome of that process.”⁶⁶

2.8.7. The claimants/appellants appealed and argued, in short, before the Court of Appeal that the alternatives studied for the purpose of an EIA report under the SEA Directive should be treated as alternative solutions under Article 6(4) of the Habitats Directive. The Court of Appeal rejected that argument, and said:

“114. In this case, where—in the Secretary of State's judgment—the suggested alternative proposal would go against the “hub objective” as a “core objective” of the policy, its consideration as an “alternative solution” would not only have been unnecessary under article 6(4) of the Habitats Directive, but also inappropriate. As Mr Maurici and Mr Michael Humphries QC for HAL submitted, when the Secretary of State came to consider the designation of the ANPS, he was not obliged by the Habitats

⁶⁶ [2020] EWCA Civ 214 at para. 322.

Directive and the Habitats Regulations to consider other schemes already rejected as possible “alternative solutions” because of their failure to meet an essential objective of the policy.

115. The operation of article 3 of the SEA Directive, however, is different. In this case it enabled consultees to argue that the “hub objective” should not be decisive against the suggested alternative, and to have their representations to that effect taken into account under article 6. But it did not bind the Secretary of State to a particular outcome. If the Gatwick second runway scheme had been ruled out as an alternative at the beginning of the SEA process, consultees would have been denied the opportunity of making representations in support of it, and having those representations considered.

116. It follows that we accept the argument presented by Mr Maurici and Mr Humphries on this issue. The Secretary of State's approach to the procedure for considering alternatives under each of the two Directives is not to be criticised. It was not inconsistent, irrational or otherwise unlawful. Since the respective provisions were, in substance and effect, different, a difference in approach was justified. **Under the Habitats Directive, if a suggested alternative does not meet a central policy objective of the project or plan in issue, then it is no true alternative and will properly be excluded. It is not then, and cannot be, an “alternative solution”. In short, the Habitats Directive has a determining effect on the inclusion or exclusion of alternatives.** By contrast, the identification of “reasonable alternatives” under the SEA Directive is a requirement designed to inform the following consultation process. It was, therefore, permissible, in the preparation of the ANPS, to retain the Gatwick second runway scheme as a “reasonable alternative” in the Appraisal of Sustainability throughout the process. However good a plan or project the alternative in question might be in itself, and even if there may be a strong case on environmental grounds for preferring it to the plan or project actually proposed, the SEA Directive does not dictate that it be adopted and the proposed plan or project rejected.” [underline and bold added]

- 2.8.8. The claimants appealed to the Supreme Court but not on that point. The Court of Appeal judgment is therefore clear legal authority that government policy may be treated by a competent authority as constituting an objective for a proposed project; and that any alternatives which do not meet that objective are not “alternative solutions” for the purpose of the Habitats Directive as implemented through the Habitats Regulations, and hence do not need to be examined further.

2.9. Other projects

2.9.1. The Proposed Development must be considered on its own merits. However, the Applicant is aware of a number of projects in Scotland and England that have been considered for derogation from the Habitats Regulations or equivalent legislation. A non-exhaustive list of such derogation decisions is included at Appendix 1.

2.10. Process to be followed in light of legislative and policy context

2.10.1. Drawing together the above, the Applicant considers the Derogation Case should be approached as follows:

Stage	Details	Where considered?
1	Identify the potential for adverse effects on the integrity of the protected site, under reference to the conservation objectives for the SAC.	This is dealt with in the Shadow HRA submitted by the Applicant, but a summary of effects considered relevant for the derogation case is at paragraph 3.5 below. At paragraph 3.6 there is a comparison of effects as between the Proposed and Alternative Alignments.
2	Identify the need for the Project and the Project Objectives	Paragraphs 4.2 – 4.3.
3	Identify and assess alternative solutions	Paragraphs 4.4 – 4.10.
4	Consider the imperative reasons of overriding public interest	Paragraphs 5.1 – 5.6.
5	Consider compensatory measures	Paragraphs 6.1 – 6.5 (with further information to be provided).

3. DESCRIPTION OF THE SAC

3.1. Overview

3.1.1. A detailed description of the SAC is given in the Shadow HRA,⁶⁷ which should be referred to for full details. This chapter is provided as a summary only for the purposes of the first stage of the approach set out in paragraph 2.10 above.

3.1.2. Centred on National Grid Reference NG749201, the Kinloch and Kyleakin Hills Special Area of Conservation (the SAC) covers 5275.63 hectares (ha). According to the site citation, the general features of the site are:

- Heath, Scrub, Maquis and Garrigue, Phygrana (72.5%)
- Bogs, Marshes, Water fringed vegetation, Fens (19%)
- Broad-leaved deciduous woodland (4%)
- Inland rocks, Screes, Sands, Permanent Snow and ice (3%)
- Coniferous woodland (1%)
- Inland water bodies (Standing water, Running water) (0.5%)

3.2. Habitat and species types

3.2.1. The primary reason for selection of the site as a SAC was the presence of the Annex 1 habitat: *91A0 Old sessile oak woods with Ilex and Blechnum in the British Isles*.

3.2.2. Other Annex 1 qualifying features of the site, but not primary reasons for selection of the site as a SAC, are:

- 4010 Northern Atlantic wet heaths with *Erica tetralix*
- 4030 European dry heaths
- 4060 Alpine and Boreal heaths
- 7130 Blanket bogs (Priority habitat)
- 9180 Tilio-Acerion forests of slopes, screes and ravines (Priority habitat)

and the Annex 2 qualifying species:

- 1355 Otter *Lutra lutra*.

3.3. Habitat and Species Conservation Objectives

3.3.1. The Conservation Objectives of the SAC for qualifying habitats are:

⁶⁷ Volume 5, Appendix V2-4.7 of the EIA.

- To avoid deterioration of the qualifying habitats thus ensuring that the integrity of the site is maintained and the site makes an appropriate contribution to achieving favourable conservation status for each of the qualifying features; and
- To ensure for the qualifying habitats that the following are maintained in the long term:
 - Extent of the habitat on site;
 - Distribution of the habitat within site;
 - Structure and function of the habitat;
 - Processes supporting the habitat;
 - Distribution of typical species of the habitat;
 - Viability of typical species as components of the habitat; and
 - No significant disturbance of typical species of the habitat.

3.3.2. The Conservation Objectives of the SAC for the qualifying species are:

- To avoid deterioration of the habitats of the qualifying species or significant disturbance to the qualifying species, thus ensuring that the integrity of the site is maintained and the site makes an appropriate contribution to achieving favourable conservation status for each of the qualifying features; and
- To ensure for the qualifying species that the following are maintained in the long term:
 - Population of the species as a viable component of the site;
 - Distribution of the species within site;
 - Distribution and extent of habitats supporting the species;
 - Structure, function and supporting processes of habitats supporting the species; and
 - No significant disturbance of the species.

3.4. Summary of Qualifying Features and Conservation Status

3.4.1. The following table summarises the qualifying features of the SAC and their conservation status:

Feature	Identified Pressures	Condition & Date Last Assessed	Description
Alpine and subalpine heaths	Overgrazing (deer)	Unfavourable Recovering 17 February 2015	Annex I habitat
Blanket bog	No negative pressures	Favourable Maintained 13 November 2014	Annex I priority habitat
Dry heaths	Invasive species (bracken)	Favourable Maintained 17 February 2015	Annex I habitat
Mixed woodland on base-rich soils associated with rocky slopes	Invasive species Overgrazing	Unfavourable Recovering 9 October 2013	Annex I priority habitat
Western acidic oak woodland	Invasive species Overgrazing	Unfavourable Declining 9 October 2013	Annex I habitat
Wet heathland with cross-leaved heath	Overgrazing	Unfavourable Declining ⁶⁸ 11 September 2009	Annex I habitat
Otter	Dumping/storage of materials Forestry operations Other	Favourable Maintained 21 August 2011	Annex II species

3.4.2. The extent of the qualifying habitats within the SAC is as follows:

SAC Qualifying Feature	Extent (ha)
Alpine and subalpine heaths	89.68
Blanket bog	965.41
Dry heaths	448.41
Mixed woodland on base-rich soils associated with rocky slopes	33.24
Western acidic oak woodland	168.81
Wet heathland with cross-leaved heath	2215.69

3.5. Impacts with a possible adverse effect on site integrity and comparison between Proposed and Alternative Alignments

3.5.1. A range of potential impacts on qualifying features are considered fully in the Shadow HRA submitted with the application, which should be referred to for full details. These are not repeated here.

⁶⁸ Management measures are in place that should, in time, improve the feature to Favourable condition (Unfavourable Recovering Due to Management).

3.5.2. The Shadow HRA concluded⁶⁹ that an adverse effect on the integrity of the site cannot be ruled out as a result of the following impacts:

Direct Habitat Loss or Modification during Construction (on western acidic oak woodland, wet heathland, dry heath, and blanket bog habitats).

Direct Habitat Loss or Modification during Operation (on western acidic oak woodland habitat only).

- Indirect Habitat Loss or Modification (on blanket bog and wet heathland with cross-leaved heath habitats).

3.5.3. While in-combination impacts were identified in respect of western acidic oak woodland, those impacts were not predicted to cause an adverse effect on the integrity of the site.⁷⁰

⁶⁹ See Shadow HRA Section 12, in particular paras. 12.2.1 – 12.2.4.

⁷⁰ See Shadow HRA, Section 11.1, in particular the conclusions at pp.80-82 and table 11-6 (p.83).

3.5.4. The predicted impacts differ between the Proposed Alignment (3A) and the Alternative Alignment (3B). These impacts are quantified and compared in the Shadow HRA. Table 12-1 from the Shadow HRA that summarises the impacts and comparative effects of the first three impacts is reproduced here for ease of reference:

Qualifying Feature	Proposed Alignment Spatial Impact (ha)	Alternative Alignment Spatial Impact (ha)	Difference in ha between Proposed Alignment and Alternative Alignment	Proposed Alignment as a % of Qualifying Habitat	Alternative Alignment as a % of Qualifying Habitat	Difference in % of Qualifying Habitat Lost
Western acidic oak woo–land - Direct Loss	0.386	0.235	0.151	0.229	0.139	0.089
Western acidic oak woo–land - Modification	0.370	0.000	0.370	0.017	0.000	0.017
Dry heaths	0.888	0.374	0.514	0.198	0.083	0.115
Wet heathland with cross-leaved heath (direct)	4.882	5.607	-0.725	0.220	0.253	-0.033
Wet heathland with cross-leaved heath (indirect)	5.499	4.150	1.349	0.248	0.187	0.061
Blanket bog (priority habitat) (direct)	2.165	2.121	0.044	0.224	0.220	0.005
Blanket bog (priority habitat) (indirect)	2.527	1.527	1.000	0.262	0.158	0.104
NSA	0.000	0.481	-0.481			0.000
TOTALS	16.717	14.495	<u>2.222</u>	1.398	1.041	<u>0.357</u>

3.5.5. As seen from the table above, there is a total of 16.717ha of direct and indirect loss of habitat on the Proposed Alignment, or 14.495ha on the Alternative Alignment. The Shadow HRA describes these effects as follows:

“ Overall, the Proposed Alignment would result in the loss of an additional 2.22 ha of SAC qualifying habitat over the Alternative Alignment (or 2.30 ha if the estimated 0.078 ha of non-qualifying NSA habitat is removed). A difference of 0.357% in the sum of qualifying habitat impacted.

• Direct habitat loss and modification is marginally greater for the Proposed Alignment (8.691) than the Alternative Alignment (8.337) by 0.354 ha (or if NSA estimated qualifying habitats are included then 3B direct loss and modification is marginally greater than 3A by 0.052 ha).

- *Indirect habitat loss and modification is greater for the Proposed Alignment (8.026 ha) than the Alternative Alignment (5.677 ha) by 2.349 ha.*
- *Western acidic oak woodland: Combining both direct loss and modification, the Proposed Alignment would result in the loss of an additional 0.521 ha (0.37 ha (71%) of which is not loss but modification via potential crown reduction) over the Alternative Alignment. A difference of 0.106% of the total extent of qualifying habitat within the Site.*
- *Dry heaths (direct loss): the Proposed Alignment would result in the loss of an additional 0.514ha over the Alternative Alignment (0.455 ha if using apportioned NSA data). A difference of 0.115% of the total extent of qualifying habitat within the Site.*
- *Wet heaths (direct and indirect loss): the Proposed Alignment would result in the loss of an additional 0.624 ha over the Alternative Alignment (0.302 ha if using apportioned NSA data). A difference of 0.028% of the total extent of qualifying habitat within the Site.*
- *Blanket bogs (direct and indirect loss): the Proposed Alignment would result in the loss of an additional 1.044 ha over the Alternative Alignment (1.019 ha if using apportioned NSA data). A difference of 0.108% of the total extent of qualifying habitat within the Site.⁷¹*

- 3.5.6. In relation to the western acidic oak woodland habitat, the Shadow HRA notes that, while the spatial extent of habitat loss is presented a limitation, of that presentation is that most of the estimates relate to open woodland habitat rather than dense mature woodland.⁷²
- 3.5.7. Two effects, which apply only to the western acidic oak woodland habitat, are then described in the Shadow HRA as uncertain impacts but included as future precautionary estimates. These effects are modification during operations, and dismantling of the existing line.⁷³
- 3.5.8. The impacts of modification during operation, and dismantling, are described as future precautionary estimates because they depend on future tree growth, which is in turn dependent on a number of environmental factors.⁷⁴ For the purpose of a precautionary approach, they are presented in the Shadow HRA.
- 3.5.9. The impacts, including future precautionary estimates, are summarised in table 12-2 from the Shadow HRA and reproduced here:

⁷¹ Shadow HRA, para 12.2.8, at pp 90-91.

⁷² Shadow HRA, para.12.2.8 at pp.91-92.

⁷³ Discussed more fully at sections 8 and 9 of the Shadow HRA.

⁷⁴ Shadow HRA para.8.5.1.2 at p.48 (modification) and discussion in section 9 esp. at pp.68-71 (dismantling).

Western Acidic Oak Woodland	Proposed Alignment - Spatial Impact (ha)	Alternative Alignment - Spatial Impact (ha)	Difference in Spatial Impact (ha) between Proposed Alignment and Alternative Alignment
Western acidic oak woodland - Direct Loss	0.386	0.235	0.151
Western acidic oak woodland - Modification (construction)	0.370	0.00	0.370
Western acidic oak woodland - Modification (operations) Uncertain impact – future precautionary estimate	0.10	0.00	0.10
Western acidic oak woodland – Dismantling* Uncertain impact – future precautionary estimate	2.045 (gain)	2.045 (gain)	No difference
TOTAL (including future precautionary estimates)	1.189 (gain)	1.810 (gain)	0.621

* Mean value of lower and upper limit used.

3.5.10. The Shadow HRA concludes that an adverse effect on site integrity **can** be ruled out for:

3.5.10.1. Mixed woodland on base-rich soils associated with rocky slopes (priority habitat);

3.5.10.2. Alpine and subalpine heaths; and

3.5.10.3. Otter.⁷⁵

3.5.11. The Shadow HRA concludes that an adverse effect on site integrity cannot be ruled out on either the Proposed Alignment (Route 3A) or the Alternative Alignment (Route 3B) for:

3.5.11.1. Western acidic oak woodland (primary reason for Site selection);

3.5.11.2. Blanket bogs (priority habitat);

3.5.11.3. Wet heathland with cross-leaved heath; and

3.5.11.4. Dry heaths.

3.5.12. Effects on site integrity are measured by reference to their effects on the site's conservation objectives. The conservation objectives for the SAC are detailed above, and are intended to ensure that the features are maintained at, or restored to, favourable conservation status. The following paragraphs consider the scale of the difference between effects on a feature on the Proposed Alignment compared to the Alternative Alignment, and whether there is a meaningful difference on the effect on site integrity for that feature.

⁷⁵ Shadow HRA, para.12.3.

Discussion - Western Acidic Oak Woodland

- 3.5.13. In relation to the western acidic oak woodland, which was the primary reason for the SAC's site selection, once dismantling of the existing line is taken into account, there is a net-benefit predicted for both alignments in the long term. That net benefit is slightly greater on the Alternative Alignment (1.189ha for the Proposed Alignment as against 1.810ha for the Alternative Alignment).⁷⁶ However, an adverse effect on site integrity cannot be ruled out because of the uncertainty associated with that prediction, as against certain effects for direct loss and modification during construction, and the associated short to medium term effects of the losses.
- 3.5.14. The adversely impacted area of the western acidic oak woodland feature in the Proposed Alignment is 0.856ha,⁷⁷ or on the Alternative Alignment 0.235ha. Notably, of the 0.856ha affected by the Proposed Alignment, 55% is modification rather than loss, whereas in the Alternative Alignment, 100% is loss. This means the area of loss is only 0.151ha greater for the Proposed Alignment. The total area of western acidic oak woodland in the SAC is 168.81ha. For context, that difference in area is slightly less than six tennis courts; against a total habitat area of over six thousand tennis courts.
- 3.5.15. The Shadow HRA also notes that spatial area must be considered in the context that in the Proposed Alignment the route has tended to avoid the densest areas of tree growth.⁷⁸
- 3.5.16. For both the Proposed Alignment and Alternative Alignment, an adverse effect on site integrity due to the impacts on Western Acidic Oak Woodland cannot be ruled out. However, as between the two alignments, the difference in effect on site integrity – i.e. a loss of around six tennis courts' worth of qualifying feature against a total of more than six thousand – is insubstantial. In respect of the adverse effect on site integrity that cannot be ruled out for western acidic oak woodland, it is therefore submitted that the difference in effect on the integrity of the SAC as between the Proposed Alignment and the Alternative Alignment should be treated as insubstantial.

Discussion - Blanket Bog

- 3.5.17. The priority habitat of blanket bog would also be adversely impacted by the Proposed Development, with 4.692ha adversely affected by the Proposed

⁷⁶ Shadow HRA, para.12.2.8 at p.92.

⁷⁷ Proposed Alignment - including the uncertain future precautionary estimates of adverse modification, and excluding the uncertain future precautionary estimate which would result in a net beneficial impact.

⁷⁸ Shadow HRA, pp.91-92.

Alignment, and 3.648ha by the Alternative Alignment. This is against a total area of 965.41ha.

- 3.5.18. The difference in this case is greater – 1.044ha, or around the area of forty tennis courts. However, this must be seen against a much greater total area of the qualifying feature. The SAC hosts 965.41ha of blanket bog, or just over thirty-seven thousand tennis courts.
- 3.5.19. While a priority habitat, the blanket bog at this site was not the SAC's primary reason for site selection. Further, the Shadow HRA notes the blanket bog at the SAC has been assigned a global grade of C (on a scale of A – C).⁷⁹ Notably, its conservation status is also currently favourable maintained.
- 3.5.20. It is therefore submitted that in the circumstances of the site, and in particular against a background of the feature being in favourable conservation status, a difference as between the Proposed Alignment and Alternative Alignment of around forty tennis courts is insubstantial.

Wet heathland with cross-leaved heath

- 3.5.21. Wet heath was neither the primary reason for this site's selection nor is it a priority habitat. It has a global grade of C.
- 3.5.22. Wet heath would be the most impacted by area of the four affected qualifying features at 10.381ha on the Proposed Alignment, or 9.757ha on the Alternative Alignment. However, this is set against an even larger area than blanket bog: wet heath is present on 2,215.69ha of the habitat on the SAC. The difference between the impacted areas is 0.624ha, or just under 24 tennis courts – against a total habitat area that would fit well over eighty-four thousand tennis courts.
- 3.5.23. It is therefore submitted that the difference in adverse effect on the integrity of wet heathland with cross-leaved heath is insubstantial.

Dry heath

- 3.5.24. Dry heath on the site is again a global grade of C, and neither the primary reason for site selection nor priority habitat. 0.888ha of habitat on the Proposed Alignment, or 0.374ha on the Alternative Alignment, would be affected. This is as against 448.41ha of habitat across the SAC, meaning the difference in area

⁷⁹ D is also used, but is not a formal global grade. The JNCC define global grade C as “*Examples of the feature which are of at least national importance (i.e. usually above the threshold for SSSI/ASSI notification on terrestrial sites) but not significantly above this. These features are not the primary reason for SACs being selected.*” – <https://sac.jncc.gov.uk/habitat/H7130/map>.

affected (of 0.514ha) represents about twenty tennis courts out of a habitat comprising over eighteen thousand tennis courts.

3.5.25. It is therefore submitted the difference in adverse effect on site integrity for dry heath is insubstantial.

3.6. Summary of comparative effects between Proposed and Alternative Alignments

3.6.1. As noted in the discussion above, the Applicant's position is that as between the Proposed Alignment and the Alternative Alignment, the difference in adverse effect is insubstantial. Before the uncertain future precautionary estimates are taken into account, the difference in area of impacted habitat as a percentage of the total qualifying habitat is no greater than around 0.1% for any habitat:

3.6.1.1. 0.115% for dry heath;

3.6.1.2. 0.108% for blanket bog, the priority habitat;

3.6.1.3. 0.106% for western acidic oak woodland, the primary reason for the site's selection; and

3.6.1.4. 0.028% for wet heathland with cross-leaved heath.

3.6.2. If the uncertain future precautionary estimates are taken into account for western acidic oak woodland, there is a small net benefit for both alignments, with a difference in impacted habitat of 0.368% (against the current habitat), i.e. in that scenario, the Alternative Alignment's habitat may benefit by 0.368% more under the compared to the Proposed Alignment.⁸⁰ For all other habitats including the priority habitat of blanket bog (which are not subject to those estimates), the difference in impacted habitat remains around 0.1%.

3.6.3. In relation to affected habitat, western acidic oak woodland is the only qualifying feature to be attributed a global grade⁸¹ of B; the remaining affected features have a global grade of C.

3.6.4. The effect of both the Proposed Alignment and the Alternative Alignment is essentially the same: an adverse effect on site integrity cannot be ruled out for the four qualifying features mentioned above on either alignment. It is acknowledged that there are differences in area impacted as between the two alignments, with the greater areas of impact for the Proposed Alignment.

⁸⁰ 0.368% being calculated as the sum of 0.621ha in affected habitat shown at Table 12-2 of the Shadow HRA (reproduced at 3.5.9 above) divided by the total western acidic oak woodland habitat of 168.81ha (x100).

⁸¹ Natura 2000 data forms assess the importance of qualifying features using three criteria (representivity, relative surface and conservation). An average ('global') grade is given based on these three individual scores. A = Excellent Value, B = Good Value, C = Significant Value.

However, the Applicant considers that those differences are insubstantial when seen in the context of the site overall.

- 3.6.5. The Scottish Ministers are invited to find that, when judged against the conservation objectives for the SAC as a whole, the difference in impacts on qualifying features as between the two alignments are insubstantial to the extent that there is no meaningful difference between them in terms of site integrity.

4. ALTERNATIVE SOLUTIONS

4.1. Approach to Assessment of Alternative Solutions

- 4.1.1. The approach to the assessment of alternative solutions is based on the legislation and policy outlined in Chapter 2 above, which should be referred to for context.
- 4.1.2. In terms of the process outlined at paragraph 2.10.1 above, this Chapter 4 discusses stages 2 and 3: the need for the project/project objectives; and alternative solutions.

4.2. Need for the project

- 4.2.1. The Applicant has set out a detailed needs case in its Planning Statement⁸² and in Volume 1, Chapter 2 of the EIAR, which should be referred to. This Chapter of the Derogation Case summarises the main elements of the needs case.
- 4.2.2. As described in Chapter 1 above, the Proposed Development consists of approx. 160km of overhead line and underground cable. The Proposed Development forms part of the national electricity transmission system, which performs an essential public interest function in the transmission of electricity throughout Great Britain for distribution to the public at large. The need for the Proposed Development is to ensure that essential system is modernised to meet current requirements. In particular, the need is driven by:
 - 4.2.2.1. The deterioration of the existing transmission asset components, most of which were constructed in the late 1970s and 1980s and are approaching the end of their economic and operational life.
 - 4.2.2.2. The additional capacity needed in the area for existing and future generation projects, including the contribution that the project will make to the UK and Scottish Governments' net zero targets.
 - 4.2.2.3. The need to maintain and improve security of supply to the residents of Skye and the Western Isles, which in turn reduces the need to rely on diesel generator backups on Stornoway, Loch Carnan and Barra and further complements net zero objectives.
- 4.2.3. The 'reinforcement' aspect of the project name refers to the requirement to increase capacity of the transmission connection to reflect the substantial change to the electricity generation background since the existing line was

⁸² As supplemented by the Update Planning Statement (February 2023).

installed, particularly in connection with renewable generation technology including that located on Skye. The reinforcement aspect was identified as a need at the early stages of the project.

- 4.2.4. In its “**Skye Overhead Line Reinforcement Strategy**”,⁸³ the Applicant noted the significant growth of the north of Scotland’s transmission network over the past decade driven by renewables. In relation to Skye itself, it was noted at that time that the 137MW of generation capacity that was connected already exceeded the rating of the existing line. That required (and still requires) a derogation granted by Ofgem from the usual transmission licence standards.
- 4.2.5. At the time of the Skye Overhead Line Reinforcement Strategy, an additional 177MW was contracted to connect or offered connection, and a further 170MW at the scoping stage. Hence it was identified that the ‘new for old’ replacement needed upgrading of the existing connection to reflect the needs of a modern transmission system. The capacity requirements are now even more acute. As noted in the Applicant’s Planning Statement,⁸⁴ the Applicant is now contracted to provide 424MW of generation on the Skye circuit by 2027, with an additional 57MW in the connection application process.⁸⁵
- 4.2.6. The Skye Overhead Line Reinforcement Strategy also identified that the Proposed Development would be needed to contribute to net zero targets, calculating that to meet the area’s projected contribution to national net zero targets, the capacity required would be around double the existing connected, contracted and offered capacity. In addition, it was noted that the existing asset’s reliability was poorer than other transmission circuits because of the challenging terrain. The current backup for prolonged outages relies on mobile diesel generators on Skye, together with diesel generation at Stornoway, Loch Carnan and Barra. These generators have a high carbon intensity. As the existing asset requires replacement, in any event there is both an opportunity and a need to improve performance, which can be met by replacing the existing single circuit with a 132kV double circuit connection between Fort Augustus and Edinbane, and a modern 132kV trident wood pole single circuit from Edinbane to Ardmore.
- 4.2.7. Without replacement, the existing connection will no longer provide a secure supply to Skye. Condition studies have identified deterioration of wood poles and extensive corrosion and galvanisations in more exposed areas of steel lattice towers. The Skye Overhead Line Reinforcement Strategy identified that significant parts of the existing asset would need replacement by 2026 due to projected risk of asset failures.

⁸³ SSEN (2019) Document Ref.: T2BP-STR-0006. Published as an appendix to the Applicant’s public *Consultation Document: Route Options* of March 2020.

⁸⁴ At para.3.3.5.

⁸⁵ The nature of generation proposals means these figures may change.

4.2.8. Finally, while consent for the Proposed Development is sought under section 37 of the 1989 Act, and so compliance with the development plan is not the primary consideration, the Applicant notes that the development is within the class of national development in terms of both NPF3 and now NPF4. The need for it is established at a national policy level.⁸⁶

4.2.9. In developing the project objectives, the Applicant was guided by the intention to identify the best sustainable solution in the long-term public interest to comply with its statutory and licence duties with due consideration to the environment, security of supply and affordability. The Applicant has done so in the context of its regulatory framework, which has included submission of an initial needs case (**INC**) to Ofgem,⁸⁷ and the wider policy environment.

4.2.10. Ofgem gave its qualified approval to the INC.⁸⁸ In particular, Ofgem agreed that the Applicant:

4.2.10.1. Had provided sufficient evidence of a clear needs case for the project;

4.2.10.2. Had made the case that replacement rather than refurbishment was the most cost-effective option; and

4.2.10.3. Had undertaken a cost-benefit analysis that was robust and considered the most relevant technical options.⁸⁹

4.2.11. The Applicant submitted its Final Needs Case (**FNC**) to Ofgem in July 2022. This reiterates the Applicant's case that there is a need for a significant increase in capacity that can only be delivered by its preferred option. The Applicant's view as expressed in the FNC is that, were the lower capacity option left open by Ofgem in its INC Decision pursued, the line would be oversubscribed as soon as it was energised.⁹⁰ The alternative previously considered by Ofgem is therefore ruled out in the analysis below because it does not deliver the Proposed Development's capacity objective. The Applicant's preferred technical solution as given qualified approval by Ofgem's INC Decision and

⁸⁶ See the Applicant's Planning Statement paras.4.2.1 – 4.2.32, and paras. 2.14.1 - 2.14.11 of the Update Planning Statement.

⁸⁷ SSEN Transmission, 30 July 2021. The INC contains confidential information, but a public version was published by the Applicant on its website, accessible at <https://www.ssen-transmission.co.uk/media/5705/skye-loti-initial-needs-case-30-jul-2021-redacted-final-31-aug-version.pdf>.

⁸⁸ Ofgem's decision on the INC was published on 8 April 2022: <https://www.ofgem.gov.uk/sites/default/files/2022-04/Isle%20of%20Skye%20-%20Initial%20Needs%20Case%20decision.pdf>.

⁸⁹ INC Decision, pp.3-4. 1.1.1. Ofgem reserved its position on whether the preferred option put forward by the Applicant (i.e. the Proposed Development) was the only solution, pending further review of the generation and demand forecast, whilst noting that the preferred option was "*reasonable and is likely to provide the optimal solution*". The forecast was to be reconsidered at the FNC stage.

⁹⁰ The FNC's conclusions are described further in the EIAR Volume 1, Chapter 2, paras.2.6.5 – 2.6.10.

further developed and the subject of the FNC submitted to Ofgem is the project for which consent is now sought.

4.3. Project Objectives

4.3.1. The Applicant has identified the drivers and project objectives for the Proposed Development to be as follows:

- 4.3.1.1. To develop and maintain an efficient, co-ordinated and economical system of electricity transmission within the Applicant's licence area;
- 4.3.1.2. To replace the existing transmission infrastructure including electric lines and plant between Fort Augustus and Ardmore with new transmission infrastructure, due to the age and deteriorating condition of the existing infrastructure;
- 4.3.1.3. To install additional transmission capacity to allow new electricity renewables generating stations to connect to the transmission network, by increasing the transmission capacity to a 348MVA double circuit from Fort Augustus to Edinbane and 176MVA single circuit from Edinbane to Ardmore;
- 4.3.1.4. To maintain security of supply of electricity to the residents of Skye and the Western Isles;
- 4.3.1.5. To contribute to and support the British Energy Security Strategy; and
- 4.3.1.6. To contribute to and support the delivery of UK and Scottish Government policy on a transition to net zero.

4.3.2. Legislative and policy support for the above objectives is to be found in the following:

Objective	Underlying Legislation/Policy
To develop and maintain an efficient, co-ordinated and economical system of electricity transmission at a regional and national level.	<ul style="list-style-type: none"> • Duty under section 9 of the 1989 Act.

<p>To replace the existing transmission infrastructure including electric lines and plant between Fort Augustus and Ardmore with new transmission infrastructure, due to the age and deteriorating condition of the existing infrastructure.</p>	<ul style="list-style-type: none"> • Duty under section 9 of 1989 Act. • Ofgem INC Decision, paras. 2.6, 2.15, 2.16, 2.21, 2.51. • Draft Energy Strategy and Just Transition Plan⁹¹
<p>To install additional transmission capacity to allow new electricity generating stations to connect to the transmission network, by increasing the transmission capacity to a 348MVA double circuit from Fort Augustus to Edinbane and 176MVA single circuit from Edinbane to Ardmore.</p>	<ul style="list-style-type: none"> • Duty under section 9 of the 1989 Act. • Ofgem INC Decision, paras. 2.7, 2.15, 2.16, 2.21, 2.51. • British Energy Security Strategy, p.24. • Net Zero Strategy,⁹² pp.19, 78, 88, 99. • Onshore Wind Policy Statement 2022⁹³ • Draft Energy Strategy and Just Transition Plan.
<p>To maintain security of supply of electricity to the residents of Skye and the Western Isles.</p>	<ul style="list-style-type: none"> • Duty under section 9 of the 1989 Act. • NPF3.⁹⁴ • NPF4.⁹⁵ • Ofgem INC Decision, paras. 2.8, 2.15, 2.16, 2.21, 2.51.

⁹¹ Draft Energy Strategy and Just Transition Plan, Scottish Government Consultative Draft, 10 January 2023 notes “*Significant infrastructure investment in Scotland’s transmission system is needed to ameliorate constraints and enable more renewable power to flow to centres of demand.*”

⁹² *Net Zero Strategy*, UK Government, October 2021.

⁹³ Scottish Government, December 2022

⁹⁴ National Development 4: High Voltage Electricity Transmission Network.

⁹⁵ See in particular: (a) National Development 3: Strategic Renewable Electricity Generation and Transmission Infrastructure – “*A large and rapid increase in electricity generation from renewable sources will be essential for Scotland to meet its net zero emissions targets. ... The electricity transmission grid will need substantial reinforcement including the addition of new infrastructure to connect and transmit the output from new on and offshore capacity to consumers in Scotland, the rest of the UK and beyond*”; (b) National Policy 1, significant weight to be given to global climate and nature crises; and Policy 11(a)(ii), Development proposals for all forms of renewable energy, together with enabling works such as transmission infrastructure should be supported in principle.

To contribute to and support the British Energy Security Strategy.	<ul style="list-style-type: none"> • British Energy Security Strategy, see esp. pp.16 and 24 – 26.
To contribute to and support the delivery of UK and Scottish Government policy on a transition to net zero.	<ul style="list-style-type: none"> • Climate Change (Scotland) Act 2009. • Climate Change Act 2008. • “Securing a Green Recovery on a Path to Net Zero”⁹⁶ see esp. pp.18, 78. • First Minister’s Declaration of Climate Emergency. • Net Zero Strategy, pp.19, 78, 88, 99. • Ofgem INC Decision paras.1.3, 2.45.⁹⁷ • NPF3. • NPF4. • Scotland’s Electricity and Gas Networks: Vision to 2020.⁹⁸ • Onshore Wind Policy Statement 2022. • Draft Energy Strategy and Just Transition Plan.

4.4. Consideration of Potential Alternatives

4.4.1. In developing the design of the project, the Applicant has considered a number of potential alternatives to the Proposed Development. The Applicant has considered whether potential alternatives would deliver the project objectives and, if so, whether they are feasible, particularly from a *legal, technical* and *financial* perspective. In considering these matters, the Applicant has been mindful that factors of more inconvenience or additional costs themselves

⁹⁶ Update to the Climate Change Plan 2018 – 2032 *Securing a Green Recovery on a Path to Net Zero*, Scottish Government, 2020

⁹⁷ At para.1.3: “The transition to a Net Zero economy will see increased demand on transmission boundary capability, which will need to be facilitated by critical network reinforcements.”

⁹⁸ See e.g. p.17: “...we will need more investment in new transmission infrastructure to connect the levels of renewable generation we want by 2030. We expect this to include new links between Scotland and England, as well as within Scotland – including those needed to connect the huge marine renewables potential around our coasts, and wind generation on the Western Isles, Shetland and Orkney.”

cannot render an alternative option unfeasible. The following paragraphs summarise the Applicant's approach to feasibility.

- 4.4.2. The Applicant considers that an alternative would not be legally feasible if it would be unlawful, or that it is unlikely that a necessary development consent or other legal instrument required for the Proposed Development would be granted, or that a legal process even if available would involve disproportionate delay and/or cost.
- 4.4.3. The Applicant considers that an alternative would not be technically feasible if it would be impractical or disproportionately challenging in engineering, safety or system planning terms.
- 4.4.4. The Applicant has considered that an alternative would not be financially feasible if it would render the project unviable, or the financial cost is disproportionate to the aim sought to be achieved.
- 4.4.5. Against this, the Applicant has considered five alternatives:
 - 4.4.5.1. Do nothing;
 - 4.4.5.2. Smaller scale of development;
 - 4.4.5.3. Different technology;
 - 4.4.5.4. Different route or alignment; and
 - 4.4.5.5. Different construction methodology.
- 4.4.6. If a potential alternative would both meet the project objectives and be feasible, further consideration is also required as to whether it amounts to an alternative solution under the Habitats Regulations, (i.e. one that either avoids or reduces the adverse effects on site integrity).

4.5. Alternative 0 – Do Nothing

- 4.5.1. The do nothing alternative or 'zero option' has been considered by the Applicant but has been discounted.
- 4.5.2. In particular, doing nothing would not address security of supply issues to Skye identified as a result of the deterioration of the existing assets. As detailed above, most of the existing assets need to be replaced in the short-term.

4.5.3. Doing nothing would also mean that additional capacity for the connection of new renewable generation would not be provided, which would mean that the Skye region would be unable to contribute further to renewable generation and net zero targets.

4.5.4. While Ofgem did not consider a do nothing option, within the INC submitted to Ofgem, “option 0” considered replacement of the existing single circuit with a new single circuit on a ‘like for like’ basis or “do-minimum”. Ofgem agreed that the do-minimum option was not suitable for the following reasons:

“Option 0 does not allow the connection of any additional generation which, given the levels of potential renewable generation coming forward, would not seem an appropriate outcome for consumers. It would also not support the contribution that the generation would make towards delivering Net Zero and would risk the need for reinforcement at a later date.”⁹⁹

4.5.5. The zero option does not meet any of the project objectives. It is therefore discounted and not considered further.

4.6. Alternative 1 – Smaller scale of development

4.6.1. One potential alternative would be a different design in terms of the scale of development. For example, instead of double circuit steel structure 132 kV overhead transmission line, an alternative option would be two 132kV single circuit overhead lines supported by trident wood poles. Ofgem’s INC decision required the Applicant to maintain this as an option.¹⁰⁰

4.6.2. The INC is primarily focused on a cost-benefit analysis before consumer funding is committed to a project. The INC validated the scale of the Proposed Development on the assumption that the growth in renewable generation predicted by the Applicant would come forward.¹⁰¹ It did also include an alternative cost-benefit analysis based on an assumption that the growth in renewable generation would not come forward as anticipated by the Applicant. In the latter case, only the cost-benefit analysis favoured a smaller scale design option.¹⁰²

4.6.3. A smaller scale design option would not meet the project objective of increasing transmission capacity on the Skye circuit. It therefore can be discounted on that ground alone.

⁹⁹ Ofgem INC Consultation 16 December 2021, para.2.49. Ofgem did not change that position in their INC Decision.

¹⁰⁰ Known in the INC as Option 1b. See INC, para.2.34 at p.17.

¹⁰¹ INC, para.5.28 at p.39-40.

¹⁰² INC, para.5.30 at p.41.

- 4.6.4. In any event, the Applicant does not consider that a smaller scale of development is a feasible alternative. The INC identified the current scale as the optimal technical solution. While the INC retained an option based on assumptions of more conservative growth in renewable generation, the Applicant considers it improbable that those assumptions will be borne out. In order to meet net zero commitments, the electricity network requires a rapid move to decarbonisation.
- 4.6.5. As part of the INC submission work, the Applicant undertook stakeholder engagement and additional analysis that identified a potential for 1,071MW of potential new generation projects, i.e. double the current contracted capacity. The current capacity contracted by 2027 is itself more than double the current existing generation capacity. Further work was undertaken for the Applicant's FNC submission. The Applicant considers it likely that when considering the FNC (submitted by the Applicant in July 2022), Ofgem will conclude that cost-benefit analysis definitively favours the current design of the preferred technical solution and best delivers the project drivers. On that basis, it is considered the smaller scale alternative design option would not be feasible because Ofgem would not commit funding to such a smaller scale – sub-optimal – project.

4.7. Alternative 2 – Different technology

- 4.7.1. The Applicant has studied whether a different type of technology would offer a feasible alternative solution. The Applicant considered three alternative technologies that might conceivably avoid or reduce adverse effects on the site integrity of the SAC: 1) New Suite of Transmission Structures (NeSTS); 2) subsea cables; or 3) underground cables within the SAC. The Applicant has concluded that the technologies do not represent alternative solutions for the purposes of the Habitats Regulations for the reasons explained below.

NeSTS

- 4.7.2. The Applicant considered the use of an alternative type of steel structure support for the Proposed Development, including within Section 3 of the proposed route, known as New Suite of Transmission Structures (**NeSTS**). In the right conditions (e.g. relatively flat terrain), NeSTS towers can be taller than traditional steel lattice towers, thus allowing greater lengths of line spans; and so, theoretically, a reduction of the number of towers and associated infrastructure. However, the challenging terrain and topography along Section 3 of the proposed route meant that the greater line spans that could be anticipated would be unlikely to be achieved and it would be more likely that there would be little reduction in tower numbers. It was considered that, theoretically, the number of towers may have been reduced by only 1 or 2, but for the purpose of comparison, the Applicant estimated a reduction of 3 towers would be possible.

- 4.7.3. The nature of NeSTS means they were anticipated to require greater civil engineering works during construction. A crane and drilling pad would be required at each tower. For the purpose of comparison, the Applicant has estimated the construction footprint at each tower would be the same (50m x 50m). That was estimated to result in a theoretical decrease in the overall footprint (to 4.75ha instead of 5.5ha). However, being in the nature of monopole structures, NeSTS could not be delivered to site by helicopter and would need delivered by road. To deliver NeSTS by road, the Applicant estimated that access tracks would need widened to 6m width (compared to the Proposed Development's 4m). This would result in a theoretical increase in access track footprint (to 4.5036ha instead of 3.0024ha). The anticipated small reduction in tower numbers in Section 3, coupled with an increase in construction footprint, meant that NeSTS were estimated to result in a greater affected area overall. Therefore, even if NeSTS could theoretically be used in such challenging terrain, NeSTS towers would not offer a solution to the likely significant effects on the SAC.
- 4.7.4. The Applicant also considered that use of NeSTS had further drawbacks. In the topography of Section 3, it was considered that NeSTS would have created landscape and visual impact concerns not present with traditional steel lattice construction. Further, use of NeSTS is a more costly method of construction, which could only be justified by increased benefits. The Applicant did not consider the increased cost would be proportionate given the likely significant effects that would be incurred in the SAC, along with the additional landscape and visual drawbacks. NeSTS were therefore not considered further.

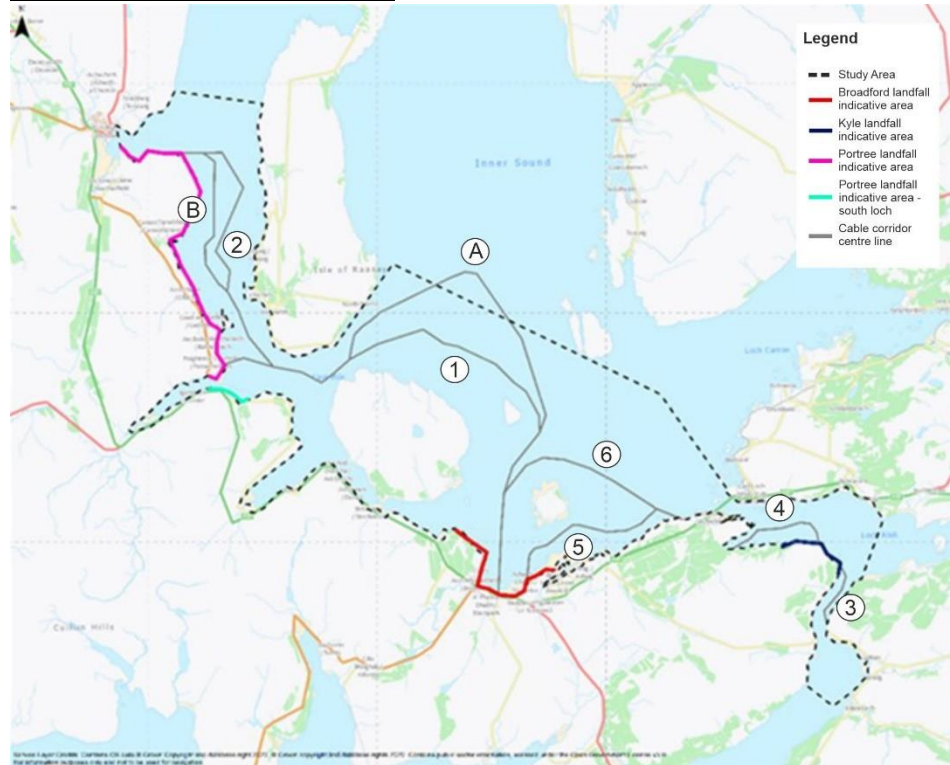
Subsea cables

- 4.7.5. In response to stakeholder feedback, in 2020 the Applicant commissioned a desktop study into the possibility of utilising subsea cables to avoid routing the Proposed Development through Section 3. The final report¹⁰³ was received by the Applicant in March 2021, and the results were consulted upon in September 2021,¹⁰⁴ at which time the Applicant advised statutory bodies and the public that subsea cabling was not to be taken forward as an option.
- 4.7.6. A full discussion is contained within Appendix V1-4.1 of the EIA Report. In summary, Options 3 and 4 shown on Plate 1.4 of Appendix V1-4.1 (reproduced below) were considered in the desk study for the potential to avoid or reduce impacts on the SAC from these Options:

¹⁰³ MarineSpace Ltd (2021) *Skye Reinforcement Project: Subsea Cable Option between Kyle Rhea, Broadford and Portree – Desktop Route Selection*.

¹⁰⁴ *Skye Reinforcement Project Consultation Document: Alignment Selection*, SSE Transmission September 2021.

Plate 1.4 of EIAR Appendix V1-4.1



4.7.7. Option 3 involved approximately 3 km of cable from the existing OHL on the Scottish mainland to the Kyle landfall indicative area, and Option 4 involved approximately 4.7 km of cable from the Kyle landfall indicative area to Loch na Beiste.

4.7.8. The results of the study indicated that subsea cable installation would likely involve substantial technical challenges. Option 3 involved extremely high tidal current velocities, meaning dynamic positioning was precluded and anchor positioning would be required with associated impacts on the seabed. This underscored the ecological challenges, as Option 3 was located entirely within two marine SACs¹⁰⁵ (one of which was primarily designated for its Annex I reef habitat) and in close proximity to a nature conservation Marine Protected Area¹⁰⁶. Option 4 also involved high tidal current velocities that precluded the use of dynamic positioning vessels to lay the cable. Additional technical challenges for Option 4 included slopes descending to the middle of Loch na Beiste with steep gradients of over 20°, together with the need to avoid a number of wrecks and an existing distribution cable. As well as being located within the two marine SACs, Option 4 was also within the nature conservation Marine Protected Area. The study noted that the reason for designation of the MPA had been flame shell beds, which are a priority marine feature; extensive flame shell beds such as at the MPA are considered rare. The study therefore considered Options 3 and 4 as unsuitable.

¹⁰⁵ Inner Hebrides and Minches SAC and Lochs Duich, Long and Aish Reefs SAC.

¹⁰⁶ Lochs Duich, Long and Aish MPA(NC).

- 4.7.9. In addition to the factors mentioned above, the Applicant has further considered subsea installation but considers there is no reason to depart from the desktop study's conclusion that it was unsuitable. The significant tidal current velocity, both in isolation and when combined with the relatively shallow depths and the geological features of the seabed, present substantial technical and engineering challenges, such that it is clear a subsea cable is not a feasible alternative. These include that:
- 4.7.9.1. Remotely operated vehicles (**ROVs**) which are often required to support the surveying and safe installation of subsea cables would also have difficulty operating in the strong currents.
 - 4.7.9.2. The cable would likely be exposed to higher levels of strain during installation, increasing the likelihood of damage during installation.
 - 4.7.9.3. The cable would require significant engineering works to ensure it remained in position. Seabed conditions in Kyle Rhea are typical of those found in high energy environments with the seabed morphology suggesting exposed bedrock and hard substrates, which in the Applicant's view are not suitable for cable burial. Cable would therefore require additional protections, for example rock berm installation. Given the extreme tidal current velocities, it is reasonable to assume the rock berm installation would need to be larger than usual. The relatively shallow waters mean that a higher than usual rock berm installation may be expected to have an effect on the local hydrodynamics, i.e. by installing rock berm because of the already extreme current velocity the velocity would be expected to increase.
 - 4.7.10. Even if it were possible to overcome the technical challenges at reasonable cost, the consequence of the engineering works likely required to ensure the cable remained in position is that the Applicant considers standard cable repairs (i.e. replacing only the damaged element of the cable) are not likely to be possible. Instead, it would likely be necessary to replace the whole cable. Replacement would take months to organise and deploy, particularly given the difficult sea conditions. Accordingly, the Proposed Development's objective to maintain security of supply of electricity to the residents of Skye and the Western Isles would not be met by subsea cable installation.
 - 4.7.11. While the reasons that the Applicant has decided that the use of subsea cable is not an alternative are primarily technical, the challenges of installation in an ecologically sensitive environment, and the disproportionately high cost of the subsea cable installation in such circumstances compared to the cost of the overhead line

have also been taken into account by the Applicant. The Applicant has therefore concluded that subsea cabling is not technically or financially feasible, and in any event, would not meet the project objective of security of supply. It is therefore not an alternative solution for the purpose of the Habitats Regulations.

Underground cables

4.7.12. The Applicant's September 2021 "*Skye Reinforcement Project Consultation Document: Alignment Selection*" reported that underground cabling had been regarded as a possible way to mitigate likely significant effects along the Alternative Alignment (Route 3B), but feasibility studies indicated that due to topography and ground conditions together with limitations on the viable length of cable route, undergrounding opportunities were limited to an area from approximately Bealach Udal to Kylerhea (RSPB hide), around 5km, meaning only part of the SAC could be undergrounded.

4.7.13. The *Consultation Document* noted that undergrounding in Route 3B had been considered because it provided the opportunity to mitigate long term likely significant adverse landscape and visual effects of an OHL through Glen Arroch and Kylerhea. However, it is reported in the *Consultation Document* that the Applicant's assessment is that undergrounding would create likely significant adverse effects in the short term on landscape and visual receptors during the construction period, with long-term effects as a result of the sealing end compound and OHL infrastructure associated with the transition from OHL to underground cabling. Together with the technical challenges, the Applicant did not consider undergrounding of Route 3B should be taken forward for further consideration. The Applicant also noted it was not feasible to underground the Proposed Alignment (Route 3A) due to the site's topography and sensitive habitat.

4.7.14. In response to the conclusions reported in the *Consultation Document*, NatureScot requested that "... *all options are kept open for this section of the route (including the possibility of undergrounding part or all of route 3B) until further detailed assessment and a shadow HRA has been concluded.*"¹⁰⁷ NatureScot maintained this position in the consultation response attached to the Scoping Opinion.¹⁰⁸

4.7.15. In line with NatureScot's requests, detailed evaluation of the possibility of underground cabling of the Alternative Alignment was undertaken within the Shadow HRA, whilst noting that undergrounding of the Proposed Alignment

¹⁰⁷ NatureScot's Letter of 13 January 2021 responding to the September 2021 SSEN *Skye Reinforcement Project Consultation Document: Alignment Selection*.

¹⁰⁸ "We continue to advise that all alternative route options and design solutions are kept open (including the possibility of undergrounding part or all of the Glen Arroch route) until further detailed assessment and a shadow HRA have been undertaken."

remained unfeasible.¹⁰⁹ A comparative analysis of the OHL versus undergrounding options showed that, in summary:

4.7.15.1. All four qualifying features of the SAC that, as discussed in Chapter 3 above, are impacted by the OHL option would sustain greater impacts from the undergrounding option; and

4.7.15.2. In total, the spatial extent of direct losses and modification associated with the undergrounding option were predicted to be at least 28.2ha¹¹⁰ compared with 8.74ha for the OHL option.¹¹¹

4.7.16. The conclusion of the Shadow HRA was that underground cabling is not a suitable construction method within the SAC due to its notably greater impacts compared to the OHL.¹¹²

4.7.17. Accordingly, even on the assumption it were technically feasible¹¹³ for part of the Alternative Alignment, the Applicant considers undergrounding is not legally feasible and is not an alternative solution because it would result in greater adverse impacts on the SAC than the use of overhead lines.

Conclusion – Different Technology

4.7.18. The Applicant has studied three different technologies to consider whether there is an alternative solution for the purpose of the Habitats Regulations. All of the technologies have been ruled out because of issues with technical, legal and/or financial feasibility. None of the technologies represent an alternative solution.

4.8. Alternative 3 – Different routes or alignments

4.8.1. The selection of the route is constrained by the project need and objectives. In particular, it must connect Skye and the Western Isles to the GB mainland electricity system. The selection of the route is also influenced by the Applicant's statutory duties under the 1989 Act to:

¹⁰⁹ Shadow HRA para.4.4.3 and Annex A.

¹¹⁰ The figure may have been greater because as noted in the Shadow HRA Annex A the location for horizontal direct drilling (HDD) compounds was excluded from the calculations undertaken. HDD compounds are typically 50x50m, and are necessary where drilling under watercourses is required, with two at each watercourse. Given the nature of the site, the Shadow HRA assumed at least 10 watercourses would be crossed, meaning 20 HDD compounds. These were not quantified in the figure of 28.2ha because some of the compounds may have overlapped with the construction corridor already taken into account. However, the Shadow HRA noted that there would be additional habitat loss on the undergrounding option.

¹¹¹ Shadow HRA Annex A, see esp. Table 13-1.

¹¹² Shadow HRA para.4.4.3.

¹¹³ Consideration of undergrounding in the Shadow HRA proceeded on the assumption that it was technically and financially feasible. System planning considerations mean that undergrounding may not have been technically feasible (and the additional costs may not have been financially feasible), but this is not considered further in light of the Shadow HRA's conclusions.

- “develop and maintain an efficient, co-ordinated and economical system of electricity transmission ... [and] facilitate competition in the supply and generation of electricity”;¹¹⁴
- “have regard to the desirability of preserving natural beauty, of conserving flora, fauna and geological or physiographical features of special interest and of protecting sites, buildings and objects of architectural, historic or archaeological interest”;¹¹⁵ and
- “do what [the Applicant] reasonably can to mitigate any effect which the proposals would have on the natural beauty of the countryside or on any such flora, fauna, features, sites, buildings or objects”.¹¹⁶

4.8.2. The need for the project and one of its main objectives is to connect Skye to the GB mainland electricity transmission system through this transmission connection to the Scottish mainland. Routes not involving a connection from the mainland to Skye can therefore be discounted.

4.8.3. The process for selection of the route to meet that need is set out in detail in Chapter 4 of Volume 1 of the EIA Report. A route (3C) across or adjacent to the Skye Bridge was discounted because it depended upon a route on the mainland that was itself discounted on environmental grounds (route 4C),¹¹⁷ and in any event would have been technically and legally problematic. This meant that any potential onshore route would inevitably involve crossing the SAC.

4.8.4. The options for Section 3 were narrowed to two main alternatives: routes 3A and 3B.¹¹⁸ As detailed in Chapter 4 of Volume 1 of the EIA Report, those options were consulted upon in March 2020 and September 2021. The Applicant’s preferred option was initially 3B but, following stakeholder/public feedback as a result of March 2020’s consultation and further technical analysis, route 3A (the Proposed Alignment) was chosen as the Applicant’s preferred option. However, in recognition of the likely significant effects of both the Proposed Alignment and the Alternative Alignment, in order to inform the Scottish Ministers as competent authority, the Applicant has i) studied both routes; ii) submitted an EIA Report that assesses both routes; and iii) undertaken a Shadow HRA as the Applicant’s own assessment of the ecological impacts of both routes.

¹¹⁴ 1989 Act s.9.

¹¹⁵ 1989 Act Sch.9, para.3(1)(a).

¹¹⁶ 1989 Act Sch.9, para.3(1)(b).

¹¹⁷ The reason for Route 4C being discounted is discussed in the EIAR Volume 1, Chapter 4 at paragraphs 4.7.36 – 4.7.38.

¹¹⁸ At this stage, the use of the alternative technology of subsea cabling, which would of necessity followed a different route was still under consideration, later ruled out for the reasons in paragraph 4.7 above.

- 4.8.5. As between the Proposed Alignment and the Alternative Alignment there is one type of impact that is present only on the Proposed Alignment. That is Direct Habitat Loss or Modification during Operation¹¹⁹ being the potential, and uncertain, 0.1 ha of future crown reduction associated with maintaining a safe distance of trees from the OHL. However, this impact affects the same conservation objectives as Direct Habitat Loss or Modification during Construction.¹²⁰
- 4.8.6. Overall, therefore, as between the Proposed Alignment and Alternative Alignment, there is no difference in the conservation objectives for which an adverse effect cannot be ruled out. As assessed within the Shadow HRA, and discussed in more detail at sections 3.5 and 3.6 above, adverse effects on site integrity of the SAC cannot be ruled out for both routes. Those adverse effects are in relation to the same qualifying features.

Conclusion – is there an alternative route avoiding the SAC?

- 4.8.7. Given the constraints on routeing discussed above and in the EIAR, the Applicant has concluded that there is no feasible alternative route for the Proposed Development that is capable of meeting the project objectives whilst avoiding or reducing (compared to the Proposed Alignment and Alternative Alignment) adverse effects on the integrity of the SAC.

Is the Alternative Alignment an “alternative solution”?

- 4.8.8. The Applicant’s primary position is to seek consent for the Proposed Alignment in preference to the Alternative Alignment. This requires the Scottish Ministers to determine whether the Alternative Alignment is an alternative solution for the purpose of the Habitats Regulations.
- 4.8.9. Having carried out a shadow HRA that includes a comparison of the adverse effects, the Applicant does not consider that the Alternative Alignment is an alternative solution under the Habitats Regulations. While it is a feasible alternative in the sense that it could be consented and constructed (i.e. it is a legally, technically and financially feasible alternative), it also has an adverse effect on the SAC’s site integrity which is comparable to that of the Proposed Alignment.
- 4.8.10. An alternative solution under the Habitats Regulations is a solution the delivers the project objectives but is less damaging to the site.¹²¹

¹¹⁹ Impact 1b in the Shadow HRA.

¹²⁰ Impact 1a in the Shadow HRA.

¹²¹ DEFRA Guidance, see 2.7.2 above.

4.8.11. The key issue is that it is the damage to the *site* – and in particular the integrity of that site as measured by reference to its conservation objectives – which is decisive to the consideration of whether an alternative is an alternative solution under the Habitats Regulations. As discussed above, while it is acknowledged that there are slight differences in the magnitude of impact as between the two alignments, the Applicant considers that those differences are insubstantial in the context of the adverse effects on site integrity that have been identified, the conservation objectives affected, and the net benefit that applies to both alignments in the longer term.

4.8.12. Impacts to individual qualifying features must be identified and assessed in order to consider the damage to the site, but the fact that there is a greater impact on one or more qualifying features associated with alternative X than Y does not, of itself, determine that alternative Y is less damaging.

4.8.13. The Applicant notes this approach to alternative solutions is supported Article 6 of the Commission Guidance:

“All feasible alternatives that meet the plan or project aims, in particular, their relative performance with regard to the site’s conservation objectives, integrity and contribution to the overall coherence of the Natura 2000 network have to be analysed, taking also into account their proportionality in terms of cost ...
... it is for the competent national authorities to assess the relative impact of these alternative solutions on the site concerned. It should be stressed that the reference parameters for such comparisons deal with aspects concerning the conservation and the maintenance of the integrity of the site and of its ecological functions. In this phase, therefore, other assessment criteria, such as economic criteria, cannot be seen as overruling ecological criteria.” [underline added]

4.8.14. The details of the impacts and effects on the SAC are detailed in full in the Shadow HRA and are summarised in Chapter 3, above. For the purpose of considering whether the Alternative Alignment is an alternative solution to the Proposed Alignment, i.e. is less damaging to the integrity of the SAC, the Applicant considers it significant that the Shadow HRA concluded adverse effects on site integrity could not be excluded in relation to the same qualifying features on both alignments.

4.8.15. The question for the competent authority is therefore whether, having regard to the factors described in the Commission’s Guidance, the Alternative Alignment is less damaging. In that regard, the Applicant submits that the difference in magnitude of impact between the sites is so small as to be insubstantial, and the effect on site integrity is comparable having regard to the conservation

objectives affected. To recap, in abridged form, the figures from Chapter 3, above, are as follows:

Qualifying Feature	Difference in ha between Proposed Alignment and Alternative Alignment	Difference in % of Qualifying Habitat Lost
Western acidic oak woodland - Direct Loss	0.151	0.089
Western acidic oak woodland – Modification	0.370	0.017
Dry heaths	0.514	0.115
Wet heathland with cross-leaved heath (direct)	-0.725	-0.033
Wet heathland with cross-leaved heath (indirect)	1.349	0.061
Blanket bog (priority habitat) (direct)	0.044	0.005
Blanket bog (priority habitat) (indirect)	1.000	0.104
NSA	-0.481	0.000
TOTALS	<u>2.222</u>	<u>0.357</u>

4.8.16. As noted above, the Proposed Alignment has no greater than a 0.115% greater impact for any one feature. While both alignments result in the Applicant being unable to exclude adverse effects on site integrity, the Applicant considers that as between the Proposed Alignment and the Alternative Alignment the difference between the effect on site integrity, having identified and assessed the impacts on the individual features and the conservation objectives of the site, is insubstantial. Neither alignment, considered from the perspective of site integrity, is less damaging than the other. The IROPI for both alignments is dealt with in Chapter 5 below. Both the Proposed Alignment and the Alternative Alignment have the same IROPI in their favour.

4.8.17. The Applicant therefore considers that for the purpose of the Habitats Regulations, the Alternative Alignment is not an alternative solution. In the event that the Scottish Ministers, as competent authority, disagree with that conclusion, it is open to the Scottish Ministers to consent the Alternative Alignment as it is included within the section 37 application as an alternative that has been fully assessed. It is the Applicant's position that either Alignment is justified by IROPI (as considered in more detail below).

4.9. Alternative 4 – Different construction methodology

4.9.1. The Applicant has carefully considered different methods of construction for the Proposed Development. These are dealt with in the EIA Report¹²² and Shadow HRA.¹²³ In summary, the Applicant has sought to avoid or reduce adverse effects on site integrity through the use of a range of construction techniques in line with its duty under Schedule 9 to the 1989 Act to do what it reasonably can to mitigate any effect of the Proposed Development. This has included, for example, the use of helicopters in construction of the Proposed Alignment¹²⁴ or within the identified routes taking a path through uphill land to avoid the densest areas of woodland.¹²⁵ The Applicant does not consider that construction methodological changes alone can avoid all adverse effects on site integrity; for example, as described at paragraph 4.7.2 of the Shadow HRA, temporary trackway can be used for some parts of the construction where ground conditions permit, but overall have only a slightly lesser impact compared to floating stone tracks. The Applicant considers there are no feasible alternative construction methodologies to those which have already been identified, which would result in a lesser impact on the SAC, whilst also meeting the project objectives.

4.9.2. The Applicant therefore considers there are no alternative solutions offered by different construction methodologies.

4.10. Summary of alternatives

4.10.1. This Chapter has considered whether there is an alternative solution to the Proposed Development that would be less damaging to the integrity of the SAC.

4.10.2. The Applicant has in particular considered:

4.10.2.1. Doing nothing;

4.10.2.2. A smaller scale of development such as two 132kV wood pole single circuits;

4.10.2.3. Different technologies such as alternative structures, subsea cables and underground cables;

4.10.2.4. Different routes or alignments including the Proposed Alignment and Alternative Alignment; and

¹²² Including, for example, standard mitigation measures such as a CEMP.

¹²³ See in particular paras.4.5 – 4.9 of the Shadow HRA for a discussion of different construction techniques.

¹²⁴ As discussed at para.4.7.4 of the Shadow HRA the use of helicopters on the Alternative Alignment has been ruled out on legal and technical grounds, specifically the need (or otherwise) for helicopters in the context of maintaining a safe method of construction.

¹²⁵ Shadow HRA, para.12.2.8 at pp.91-92.

4.10.2.5. Different construction methodologies including use of helicopters in construction.

4.10.3. The Applicant has done everything it reasonably can to mitigate the adverse effects of the Proposed Development. Whether there is an alternative solution under regulation 64(1) of the Habitats Regulations is a question for the Scottish Ministers as competent authority to determine. However, the Applicant's primary position is that although the Alternative Alignment is a feasible option, it does not amount to an alternative solution. Indeed, for the reasons discussed above, it is considered that there is no feasible alternative that would both meet the project objectives and have no, or a less damaging, effect on the site integrity of the SAC.

4.10.4. As adverse effects on site integrity of the SAC cannot be ruled out, but (on the Applicant's analysis) there is no alternative solution to the Proposed Development, the Applicant requests that the Scottish Ministers proceed to consider granting the development consents on the basis of the IROPI in the Proposed Development on the Proposed Alignment. While, as with the determination of alternative solutions, whether IROPI justify consent is a question for the Scottish Ministers as competent authority, the Applicant's case that IROPI justifying the Proposed Development exist is detailed in Chapter 5 below.

Applicant's Position if the Alternative Alignment is determined an alternative solution

4.10.5. As explained, the Applicant's primary position is the Proposed Development within Section 3 of the route should be consented on the Proposed Alignment. However, in the event that the Scottish Ministers as competent authority determine, contrary to the Applicant's view, that the Alternative Alignment is an alternative solution within the meaning of the Habitats Regulations, the Applicant accepts that the legal effect of the Habitats Regulations is that the Proposed Alignment cannot be consented within Section 3. Therefore, in the event that the Scottish Ministers did determine the Alternative Alignment is an alternative solution, the Applicant requests that the Proposed Development be granted consent on the Alternative Alignment within Section 3. As noted above, the IROPI for the Proposed Development applies with equal force to both the Proposed Alignment and Alternative Alignment within Section 3.

5. IMPERATIVE REASONS OF OVERRIDING PUBLIC INTEREST (IROPI)

5.1. Approach to assessment of IROPI

5.1.1. The legislative requirements and policy context for IROPI are considered in Chapter 2, above.

5.1.2. Of note is that the SAC features priority habitats. As the Scottish Ministers are both a competent authority and the appropriate authority, regulation 64(2) empowers them to permit IROPI which are either:

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

(b) any other imperative reasons of overriding public interest,

provided that in either case they have consulted, and had regard to the view of, the Secretary of State, other devolved administrations, the JNCC, and any other person/body the Scottish Ministers consider should be consulted.¹²⁶ In determining whether IROPI exist Scottish Ministers must have regard to the national interest.¹²⁷

5.1.3. This Chapter will approach IROPI by considering:

5.1.3.1. Whether the Proposed Development is undertaken for imperative reasons;

5.1.3.2. Whether those reasons are in the long-term public interest; and

5.1.3.3. Whether those reasons are overriding?

5.1.4. Reference is made to the Planning Statement submitted with the Application and the Needs Case set out therein (read with the Update Planning Statement), and Volume 1, Chapter 2 of the EIAR “*Project Need and Strategy*”. This Chapter is intended to be read in the context of the full Needs Case and EIAR Chapter.

5.2. Whether the Proposed Development is undertaken for imperative reasons?

5.2.1. The Proposed Development is being undertaken in part because the condition of the existing infrastructure, which is necessary for the supply of electricity to the public, is deteriorating and at increased risk of failure. The threat is both genuine – as demonstrated by *inter alia* Ofgem’s acceptance of the INC’s

¹²⁶ Habitats Regulations, r.64(4A).

¹²⁷ Habitats Regulations, r.64(4).

grounds of deterioration of the existing transmission asset – and serious. The asset is the primary link between Skye and the Western Isles¹²⁸ and the national electricity transmission system. The current OHL was mainly built in sections between 1956 and 1989, with limited replacements since then. Despite intensive maintenance, there is an increasing risk of failure. The Applicant's INC considered the current condition of the asset and risk of failure. A summary taken from the INC is as follows:

- 5.2.1.1. The 64km Quoich to Broadford section of the OHL is a double circuit supported by steel lattice towers constructed in 1979. A significant presence of surface rust is noted on the tower structure steelwork of this section in the more exposed and coastal regions towards the Kylesha crossing between the mainland and Isle of Skye. Approximately 23% of earthwire fittings and attachments are graded as poor overall asset condition with medium to high levels of rusting and component wear. The mechanical condition of insulator dishes has highlighted moderate to severe corrosion across the ferrous components of almost all insulator bodies, which considered in conjunction with the age of the insulator string components (47 years against a 40-year design life), indicates that they are within their 'end of life' window.
- 5.2.1.2. Failure of an insulator shackle at the middle crossarm of a single tower (Tower 92) in the Quoich to Broadford section during March 2021 was due to mechanical wear over the life of the asset. This resulted in the circuit being out of service for an extended period while repair and maintenance activities were conducted at Tower 92 on all three phases and adjacent suspension towers.
- 5.2.1.3. The 68km Broadford – Edinbane – Dunvegan – Ardmore section of the OHL is a single circuit supported by trident wood poles constructed in 1989. Testing of the wood poles in 2010/2011 identified that they have a lower structural capability than expected of assets of this type, when subject to bending moments. This indicates that there is a significant increase in the risk of wood pole failure, particularly on single wood pole configurations in the exposed extreme environmental conditions typical to the location of these assets.
- 5.2.1.4. A pole failure on the Broadford - Edinbane circuit in February 2021 confirmed the presence of white rot fungi (Basidiomycetes) along the length of a section of the failed pole recovered from the field. This form of wood decay results in significant loss in strength through Pocket rot.

¹²⁸ The Western Isles are connected by subsea cable from Ardmore.

- 5.2.2. Scottish Hydro Electric Power Distribution plc (**SHEPD**) own and operate backup static and mobile diesel generators that are used in the event of faults on the primary link. In the event of outages caused by asset failures, the backup diesel generators are reliant on SHEPD's generators (which are themselves ageing and carbon intensive).
- 5.2.3. The serious and genuine threat of interruption to the supply of electricity to the public is an IROPI that, consistent with the European Court of Justice's view in *Inter-Environnement Wallonie asbl* above, would by itself justify approval of the project.
- 5.2.4. When replacing the infrastructure, it will be upgraded to accommodate significant additional capacity. The existing asset is already operating under a derogation from the normal transmission licence standards due to overcapacity issues. Without the upgrade afforded by the Proposed Development, the anticipated additional renewable generation capacity – 424MW contracted for connection by 2027, with an additional 57MW in the connection application process – will not be capable of connection to the grid, and will not therefore materialise. Enabling renewable capacity is essential to decarbonisation of the national electricity transmission system, with 2030 set as a target for renewable energy generation to account for 50% of energy demand in Scotland, and 2030 also being the interim target of a 75% reduction in carbon emissions over the 1990 baseline. The UK Net Zero Strategy¹²⁹ set out that the power system should be fully decarbonised by 2035. It is therefore imperative that the grid is upgraded to accommodate the additional renewable capacity and enable decarbonisation of the power system which will, in turn, have beneficial consequences of primary importance for the environment.

5.3. Whether those reasons are in the long-term public interest?

- 5.3.1. Both the imperative reasons above, the replacement of the existing line to ensure security of supply of electricity to the public, and, enabling the growth in renewable generation to assist decarbonisation of the UK and Scottish energy networks, are reasons which are in the long-term public interest. This is recognised both in policy discussed in this Derogation Case and further policy provision detailed in the Planning Statement and Update Planning Statement, and Volume 1, Chapter 2 of the EIAR.
- 5.3.2. In the policy guidance at paragraph 2.6.15 above, it was recognised that projects "...consistent with national or regional strategic plans or policies (e.g. identified within a national infrastructure plan) are more likely to be of public interest". A similar point was made in the guidance discussed at paragraph 2.7.3, above and the reasons are consistent with paragraph 15 of Revised Circular 6/95 set out at paragraph 2.5.1, above. As discussed in the Planning Statement accompanying the application and the Update Planning Statement,

¹²⁹ HM Government, October 2021.

the Proposed Development is a national development in planning policy terms, being consistent both with both NPF3 and NPF4.¹³⁰

5.3.3. The Applicant therefore considers that the long-term public interest in the Proposed Development is well established.

5.4. Whether those reasons are overriding?

5.4.1. On the basis that the reasons to proceed with the project are both imperative and in the long-term public interest, the Scottish Ministers must still be satisfied that those reasons override the protection afforded to the qualifying interests. This is a balancing exercise for the Scottish Ministers.

5.4.2. The balancing exercise involves the assessment of the weight of the IROPI (and the existence of less harmful alternatives, if any) against the effect on site integrity.

5.4.3. The nature of this balancing exercise has been considered before the European Court of Justice in a number of cases. In *European Commission v Portugal*¹³¹ the Advocate-General's opinion¹³² was that, in the absence of alternative solutions,

“Among the alternatives short-listed in that way, the choice does not inevitably have to be determined by which alternative least adversely affects the site concerned. Instead, the choice requires a balance to be struck between the adverse effect on the integrity of the SPA and the relevant reasons of overriding public interest.”¹³³ [underlined added]

5.4.4. In *European Commission v Italy*,¹³⁴ the Court in its judgment said:

“Furthermore, Article 6(4) of Directive 92/43 can apply only after the implications of a plan or project have been studied in accordance with Article 6(3) of that directive. Knowledge of those implications in the light of the conservation objectives relating to the site in question is a necessary prerequisite for application of Article 6(4) since, in the absence thereof, no condition for application of that derogating provision can be assessed. The assessment of any imperative reasons of overriding public interest and that of the existence of less harmful alternatives require a weighing up against the damage caused to the site by the plan or project under consideration. In addition, in order to determine the nature of any

¹³⁰ See in particular paras.4.2.1 – 4.2.32 of the Planning Statement, and paras. 2.14.1 - 2.14.11 of the Update Planning Statement.

¹³¹ C-239/04 – the *Castro Verde* case.

¹³² Of 27 April 2006, A-G Kokott.

¹³³ Para.44.

¹³⁴ C-304/05 – the *Stelvio National Park* case.

*compensatory measures, the damage to the site must be precisely identified.*¹³⁵ [underline added]

5.4.5. This concept was summarised by Advocate-General Kokott in her opinion in *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others*,¹³⁶ where at paragraph 227 she said:

*“...the reasons for a project are imperative and overriding only if they have greater importance than its negative effects on the areas protected by the Habitats Directive.”*¹³⁷

5.4.6. It is submitted that the Scottish Ministers may be satisfied that the Proposed Development’s imperative reasons in the long-term public interest override the adverse effects predicted on the SAC.

5.4.7. The EU has concluded that its “*Member States should ensure that the ... the production of energy from renewable sources, their connection to the electricity ... grid and the related grid itself ... are presumed as being in the overriding public interest and in the interest of public safety.*”¹³⁸ Although that Recommendation was made in the context of proposed amendments to RED2, which does not apply in Scotland or the UK, it is submitted that this establishes the principle that grid projects that enable the production of energy from renewable sources may be treated, at least on a case by case basis, as being in the interest of public safety and in the overriding public interest.

5.4.8. The Proposed Development is, in any event, in the interest of public safety because it will meet the objectives of replacing the deteriorating assets and maintain the security of supply of electricity to residents of Skye and the Western Isles, as described above. It also has beneficial consequences of primary importance for the environment, because of the Proposed Development’s enabling role in adding capacity to the transmission system to facilitate competition among generators of renewable generation in the area through connection to the GB mainland system and thereby support of the meeting of net zero targets.

5.4.9. As against the IROPI, the adverse effect on site integrity which cannot be ruled out for the four qualifying features described in Chapter 3 must be seen in the context of the limited area affected by the Proposed Development. This is described by feature at paragraphs 3.5.13 – 3.5.24 in Chapter 3 above, but

¹³⁵ Para.83.

¹³⁶ Case C-43/10.

¹³⁷ A point endorsed by para.121 of the Court’s judgment: “*An interest capable of justifying, for the purposes of Article 6(4) of Directive 92/43, the implementation of a plan or project must be both ‘public’ and ‘overriding’, which means that it must be of such an importance that it can be weighed against that directive’s objective of the conservation of natural habitats and wild fauna, including birds, and flora...*”

¹³⁸ EU Permitting Recommendation, para.2.

taken overall the spatial extent of all affected habitat in the Proposed Alignment is 16.717ha. The SAC covers a total of 5275.63ha. To summarise the spatial impacts described at Chapter 3 above and the Shadow HRA, for the purpose of considering the relative significance of different impacts on the qualifying features qualifying features:

- 5.4.9.1. The primary reason for site selection of the SAC was the western acidic oak woodland. The adversely impacted area of that feature is 0.756ha¹³⁹ (which is mainly less dense woodland but comprises woodland habitat) against a total of 168.81ha or 0.45% of the total area of this habitat at the Site. It is relevant at the IROPI stage to consider that, although for the purpose of the Shadow HRA an adverse effect on integrity could not be ruled out, such an effect is not inevitable – there is an uncertain potential net beneficial effect in relation to this qualifying feature.
- 5.4.9.2. The priority habitat of blanket bog would also be adversely impacted, with 4.692ha, against a total area of 965.41ha representing 0.49% of this qualifying feature. While a priority habitat, the Shadow HRA notes the blanket bog at the SAC has been assigned a global grade of C (on a scale of A – C).¹⁴⁰ Its conservation status is also currently favourable maintained.
- 5.4.9.3. Dry heath, neither the primary reason for site selection nor priority habitat, had 0.888ha of impacted habitat, as against 448.41ha across the SAC, meaning 0.2% of the habitat across the SAC would be impacted.
- 5.4.9.4. Wet heath, neither the primary reason for site selection nor priority habitat, would be the most impacted by area at 10.381ha. However, when set against the 2,215.69ha of the habitat on the SAC it still represented only 0.47% of the total area of the qualifying feature.

5.4.10. These relatively small areas of habitat, though important, must be considered against the long-term public interest benefits of proceeding with the Proposed Development: particularly improving the security of supply of electricity to Skye and the Western Isles, whilst also assisting in meeting the challenging targets on decarbonisation of the grid through delivery of this proposed electricity grid infrastructure project of national importance. There is no alternative to the

¹³⁹ Proposed Alignment - not including the uncertain future precautionary estimates, which would result in a net beneficial impact.

¹⁴⁰ D is also used, but is not a formal global grade. The JNCC define global grade C as “*Examples of the feature which are of at least national importance (i.e. usually above the threshold for SSSI/ASSI notification on terrestrial sites) but not significantly above this. These features are not the primary reason for SACs being selected.*” (<https://sac.jncc.gov.uk/habitat/H7130/map>).

Proposed Development. Without it these benefits will not be delivered to the people of Skye, the Western Isles, and the nation as a whole.

5.4.11. The Applicant therefore submits that the IROPI in the Proposed Development considerably outweigh the possible negative effects on site integrity of the SAC.

5.5. IROPI and the Alternative Alignment

5.5.1. If satisfied that the Proposed Development should proceed for IROPI, the further question for the Scottish Ministers is whether the Proposed Alignment should be preferred to the Alternative Alignment. The IROPI described above apply with equal force to both alignments. As set out in the EIAR, the Alternative Alignment would have significant adverse landscape and visual impacts that would be avoided by the Proposed Alignment.¹⁴¹

5.5.2. If the Scottish Ministers conclude either that:

5.5.2.1. the Alternative Alignment is an alternative solution under the terms of the Habitats Regulations with the legal consequence that the Proposed Alignment within Section 3 cannot be consented; or

5.5.2.2. in the balancing exercise of the IROPI, and the damage to site integrity of the SAC, taking account of the two potential alignments the balance favours the Alternative Alignment,

it would be open to the Scottish Ministers to grant development consents for the Proposed Development with the Alternative Alignment. The Applicant has fully assessed the Alternative Alignment within the EIAR for that purpose.

5.6. The public interest favours the grant of development consent for the Proposed Development. If the Proposed Alignment has been ruled out by Scottish Ministers, there is no alternative solution to the Alternative Alignment. The considerations in paragraph 5.4, above, apply with equal force to the Alternative Alignment. In that event, the Applicant seeks the consent of the Scottish Ministers to the Proposed Development with the Alternative Alignment.

¹⁴¹ See Volume 6, Chapter 3 of the EIAR particularly at paras.3.11.1 and 3.11.5-3.11.7.

6. COMPENSATORY MEASURES

- 6.1. In the event that the Scottish Ministers consider that, notwithstanding an adverse effect on the integrity of the SAC, in the absence of alternative solutions the Proposed Development should proceed for IROPI, they must adopt compensatory measures to ensure the coherence of the national site network. This requirement applies whether or not it is the Proposed Alignment of the Alternative Alignment that is the subject of the development consent.
- 6.2. The Shadow HRA identifies a range of possible compensatory measures that could be taken to ensure coherence.¹⁴² The possible measures include:
 - 6.2.1. Extension of the SAC to include further adjoining areas of existing habitat types of the same, or better-quality, equivalent to that lost or damaged;
 - 6.2.2. Create SAC qualifying habitats within areas of non-qualifying habitat within the SAC, for example bracken control and management and subsequent replanting and management for qualifying woodland;
 - 6.2.3. Restore SAC qualifying habitats within areas of degraded or potential qualifying habitat within the SAC;
 - 6.2.4. Create or restore qualifying habitats within the non-designated land parcels that are completely enclosed by the current SAC extent, and designate these as part of the SAC;
 - 6.2.5. Extend the SAC into adjoining areas where it is feasible to create or restore equivalent SAC qualifying habitat types, for example extending into former or existing commercial plantation areas and undertaking peatland and heathland restoration or native woodland expansion;
 - 6.2.6. Extension of another but nearby SAC to include further adjoining areas of existing habitat types of the same, or better-quality, equivalent to that lost or damaged; and/or
 - 6.2.7. Restoration of non-qualifying habitat to qualifying standard on another local SAC.
- 6.3. As noted in the Shadow HRA, the amount of land required for these compensatory measures would depend upon the compensation ratio to be applied. Where possible, preference would be given to measures deliverable within and adjacent to the SAC.
- 6.4. The Applicant remains in discussion with NatureScot and other key stakeholders regarding suitable compensatory measures. The Applicant intends to bring forward a

¹⁴² Section 13 of the Shadow HRA.

compensation plan with the strategic objectives for compensation. It is anticipated that the compensation plan will set out details of:

- The types and locations of measures, including the compensation ratio to be applied;
- How those measures will be funded;
- How any necessary legal rights and consents are to be dealt with;
- The timescales for delivery of the measures; and
- How the measures could be monitored.

6.5. Given the nature of the qualifying habitat, it would not be possible to achieve compensation prior to commencement of development. The Applicant will therefore seek consent to be granted subject to a condition requiring compliance with appropriate compensation requirements. These will be the subject of a further document following completion of ongoing survey work and consultations with key stakeholders.

7. DEROGATION CASE (ALTERNATIVE SOLUTIONS AND IMPERATIVE REASONS OF OVERRIDING PUBLIC INTEREST) – SUMMARY AND CONCLUSION

- 7.1. The Applicant seeks consent for the replacement and upgrading of about 160km of existing electricity transmission line, plus cable, between Fort Augustus and Ardmore substations.
- 7.2. One Section of the route for the Proposed Development affects the Kinloch and Kyleakin Hills SAC. The Applicant has concluded that an adverse effect on the integrity of the SAC cannot be ruled out as a consequence of the Proposed Development. Pursuant to the Habitats Regulations the Proposed Development can therefore be granted consent only if the Scottish Ministers, as both as the competent authority and the appropriate authority, are satisfied that, there being no alternative solutions, the Proposed Development must be carried out for imperative reasons of overriding public interest (IROPI) notwithstanding a negative assessment of the implications for the SAC.
- 7.3. The Applicant has studied and reported upon a range of potential alternatives, and has concluded that there are no alternative solutions to the Proposed Development which would result in no adverse effect, or less damaging effects, on the SAC. The only feasible alternatives are the Proposed Alignment and the Alternative Alignment, which have been subjected to detailed examination in the EIAR and the Shadow HRA. The comparative effects on the SAC as between the Proposed Alignment and Alternative Alignment are set out in the Shadow HRA and summarised above.
- 7.4. The Applicant requests that the Scottish Ministers determine that there is no alternative solution, within the meaning of the Habitats Regulations, to the Proposed Development which is capable of meeting the project objectives.
- 7.5. If the Scottish Ministers are satisfied there is no alternative solution, the Applicant further requests that the Scottish Ministers go on to consider whether IROPI exist that mean the Proposed Development must be carried out notwithstanding the negative implications for the SAC.
- 7.6. The Applicant considers there are compelling policy reasons to find that IROPI exist in the national interest, being:
 - 7.6.1. The security of supply afforded to the residents of Skye and the Western Isles, in the interest of public safety.
 - 7.6.2. The connection of renewable capacity to the national electricity system, being in the interest of public safety and having beneficial consequences of primary importance to the environment.

- 7.7. The Applicant, while acknowledging the importance of the ecological features affected by the Proposed Development, and fully mindful of its statutory duties, considers that there are compelling reasons for the Scottish Ministers to conclude that the IROPI outweigh the effect on the SAC, and to grant consent.
- 7.8. For the reasons discussed in detail above, the Applicant's primary position is that within Section 3 the Alternative Alignment is not an alternative solution to the Proposed Alignment. However, in the event that the Scottish Ministers as competent authority determine, contrary to the Applicant's view, that for Section 3 of the Proposed Development the Alternative Alignment is an alternative solution within the meaning of the Habitats Regulations, the Applicant requests that the Proposed Development be granted consent with the Alternative Alignment for Section 3.
- 7.9. If the Scottish Ministers determined that the Alternative Alignment was not an alternative solution, but that in undertaking the balancing exercise at Stage 4 of the decision-making process, the Proposed Development should nonetheless be refused consent for the Proposed Alignment, the Applicant requests that the Scottish Ministers consent the Alternative Alignment.
- 7.10. The Applicant acknowledges that the granting of any development consent should be subject to a section 37 condition requiring compliance with the compensatory measures that are to be brought forward in its compensation plan.

8. APPENDIX 1– Non-exhaustive list of derogations considered under habitats legislation

Project/Plan Name	Year of Decision	Competent Authority	Principal Effect(s)	Outcome
A830 Fort William – Mallaig	2006	Scottish Ministers	Road improvements to 7.9ha of Glen Beasdale SAC equivalent to just under 1.6% of the total site area, was considered to adversely affect the integrity of the site. The affected qualifying feature was Western Acidic Oak Woodland.	Derogation granted on basis of no alternative solutions and IROPI. Compensatory habitat of approx. 14ha (1.77:1) secured.
Lewis Wind Farm	2018	Scottish Ministers	Adverse effect on significant numbers of qualifying bird species of the Lewis Peatlands SPA.	Consent refused due to alternative solutions.
Hornsea Three OWF	2020	Secretary of State	Adverse effect on kittiwake a qualifying feature of the Flamborough and Filey Coast SPA in combination with other projects or plans; adverse effects on sandbanks that are slightly covered by seawater all the time, a qualifying feature of North Norfolk Sandbanks and Saturn Reef SAC and The Wash and North Norfolk Coast SAC both alone and in combination with other projects or plans.	Development consent order granted as no alternative solutions and IROPI. Compensation secured by (a) condition requiring <i>inter alia</i> Secretary of State's approval of a Kittiwake Implementation and Monitoring Plan based on the Kittiwake Compensation Plan submitted pre-consent, and (b) condition requiring <i>inter alia</i> Secretary of State's approval of Sandbanks Implementation Plans based on sandbanks compensation strategy submitted pre-consent.
Norfolk Boreas OWF	2021	Secretary of State	Adverse effect on lesser black-backed gull a qualifying feature of the Alde-Ore Estuary SPA/ Ramsar, in-combination with other projects or plans; on kittiwake a qualifying feature of the Flamborough and Filey Coast SPA in combination with other projects or plans; on Annex 1 reef and sandbank features of the Haisborough, Hammond and Winterton SAC both alone and in combination with other projects or plans.	Development consent order granted as no alternative solutions and IROPI. Compensation secured by (a) condition requiring <i>inter alia</i> Secretary of State's approval of a lesser black-backed gull implementation and monitoring plan based on lesser black-backed gull compensation plan submitted pre-consent (b) condition requiring <i>inter alia</i> Secretary of State's approval of a Kittiwake Implementation and Monitoring Plan based on the Kittiwake Compensation Plan submitted pre-consent, and (c) condition requiring <i>inter alia</i> Secretary of State's approval of benthic implementation and monitoring plan based upon Haisborough, Hammond and Winterton SAC compensation plan submitted pre-consent.

Norfolk Vanguard OWF	2022	Secretary of State	Adverse effect on lesser black-backed gull a qualifying feature of the Alde-Ore Estuary SPA/ Ramsar, in-combination with other projects or plans; on kittiwake a qualifying feature of the Flamborough and Filey Coast SPA in combination with other projects or plans; on Annex 1 reef and sandbank features of the Haisborough, Hammond and Winterton SAC both alone and in combination with other projects or plans.	Development consent order granted as no alternative solutions and IROPI. Compensation secured by (a) condition requiring <i>inter alia</i> Secretary of State's approval of a lesser black-backed gull implementation and monitoring plan based on lesser black-backed gull compensation plan submitted pre-consent (b) condition requiring <i>inter alia</i> Secretary of State's approval of a Kittiwake Implementation and Monitoring Plan based on the Kittiwake Compensation Plan submitted pre-consent, and (c) condition requiring <i>inter alia</i> Secretary of State's approval of benthic implementation and monitoring plan based upon Haisborough, Hammond and Winterton SAC compensation plan submitted pre-consent.
East Anglia ONE North	2022	Secretary of State	Adverse effect on lesser black-backed gull a qualifying feature of the Alde-Ore Estuary SPA/ Ramsar, in-combination with other projects or plans; on kittiwake a qualifying feature of the Flamborough and Filey Coast SPA in combination with other projects or plans; and on red-throated diver a qualifying feature of the Outer Thames Estuary SPA both alone and in combination with other projects or plans.	Development consent order granted as no alternative solutions and IROPI. Compensation secured by (a) condition requiring <i>inter alia</i> Secretary of State's approval of a lesser black-backed gull implementation and monitoring plan based on lesser black-backed gull compensation plan submitted pre-consent (b) condition requiring <i>inter alia</i> Secretary of State's approval of a Kittiwake Implementation and Monitoring Plan based on the Kittiwake Compensation Plan submitted pre-consent, and (c) condition requiring <i>inter alia</i> Secretary of State's approval of a red-throated diver implementation and monitoring plan based on red-diver compensation plan submitted pre-consent.
East Anglia TWO	2022	Secretary of State	Adverse effect on lesser black-backed gull a qualifying feature of the Alde-Ore Estuary SPA/ Ramsar, in-combination with other projects or plans; on kittiwake a qualifying feature of the Flamborough and Filey Coast SPA in combination with other projects or plans; and on red-throated diver a qualifying feature of the Outer Thames Estuary SPA both alone and in combination with other projects or plans.	Development consent order granted as no alternative solutions and IROPI. Compensation secured by (a) condition requiring <i>inter alia</i> Secretary of State's approval of a lesser black-backed gull implementation and monitoring plan based on lesser black-backed gull compensation plan submitted pre-consent (b) condition requiring <i>inter alia</i> Secretary of State's approval of a Kittiwake Implementation and Monitoring Plan based on the Kittiwake Compensation Plan submitted pre-consent, and (c) condition requiring <i>inter alia</i> Secretary of State's approval of a red-throated diver implementation and monitoring plan based on red-diver compensation plan submitted pre-consent.

Offshore Wind Leasing Round 4 Plan	2022	The Crown Estate	Adverse effects on site integrity could not be ruled out for kittiwake a qualifying feature of Flamborough and Filey Coast SPA in combination with other projects or plans; and on the sandbank features of Dogger Bank SAC both alone and in combination with other projects or plans.	Plan approved on basis no alternative solutions and IROPI. Notice of proposal to approve given by competent authority to appropriate authority (Secretary of State); no negative response within 21 day period. Strategic compensation plans for kittiwake and Dogger Bank to be developed that will provide for development and delivery of strategic compensation to ensure the coherence of the UK Sites Network.
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