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Submitted to HRA guidance consultation
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Confidentiality and questions about you

1 Would you like your response to be confidential?

No

Please explain your reasons for requesting confidentiality. :

2 What is your name?

enter name:
Phill Bamford

3 What is your email address?

enter email address:
phillb@lpdf.co.uk

4 Please tell us who you are responding as, selecting from the following: (please tick as many as relevant)

Other (Please specify)

Additional information if required :

The LPDF is a trade body which seeks to represent the UK's leading land promoters, home builders and commercial developers. LPDF members support the housebuilding and commercial development sectors by promoting sites through the planning system, providing "shovel ready" land with a planning permission which can facilitate the delivery of infrastructure and serviced land parcels.

5 If responding on behalf of an organisation, please provide the name of the organisation you are responding for. If you are responding for more than one organisation, please say how many organisations you represent and their category (as set out in the previous question).

enter organisation details:

Land, Planning and Development Federation (LPDF).

6 If you are a business, how would you identify based on your number of employees?

Micro (1 - 9 employees)

7 If you are a Small and Micro Business (SMB) (qualified as 1-49 employees), are you able to provide any information on impacts, including on additional costs, from the proposed guidance?

Do not know or not applicable

Please provide further information to support your response and attach supplemental evidence if you wish :

8 If you are a Medium-sized business (50-249 employees), are you able to provide any information on impacts, including on additional costs, from the proposed guidance?

Do not know or not applicable

Please provide further information to support your response and attach supplemental evidence if you wish :

9 Do you foresee impacts to business from the proposed guidance being different between regions across the UK?

Do not know

Please provide further information to support your response and attach supplemental evidence if you wish:

10 Please select the geographical coverage of your organisation or the area that your response relates to from the following: (Please tick as many as are relevant)

England

If other please specify:

Section 1 – Principles to follow in the HRA process

11 How helpful are these principles in setting out the overall approach and expectations for how Habitats Regulations Assessments should be undertaken?

4 – somewhat helpful

Please provide any reasoning or evidence to support your response. Where relevant, please suggest alternative wording you consider clearer or more effective, including draft text where possible.:

While the principles represent common sense and sensible decision-making, and should aid in that respect, the principles are not as helpful as they could be with regard to the aims set out by Defra of "focussing especially on areas where applicants and decision makers face uncertainty, and to encourage the efficient application of the [Habitats] regulations."

For example, guidance telling decision makers they are empowered to seek "opportunities to use innovative approaches where these have potential to resolve issues more effectively", while laudable in principle, will always come up against the strict legal framework which provides that no plan or project can be approved (save for derogation cases) unless competent authorities are certain beyond reasonable scientific doubt there will not be an adverse impact on a protected site's integrity. This will be the case even where an innovative approach will improve decision-making efficiency, increase strategic gains for nature, and reduce operational / implementation costs. Please see our answer to questions 12, 16 and 24 for further detail.

Telling competent authorities they should consider taking a strategic approach is not helpful when they are typically dealing with individual projects as they come forward. To this end, consideration of HRA at the plan-making stage is the only realistic means by which a strategic approach and standardised mitigation would provide certainty to applicants at the site selection stage and work efficiently in providing strategic nature protection. Formally including all relevant infrastructure and nature conservation stakeholders such as water and energy infrastructure providers and SNCBs in the examination in public process is also essential (this would aid both strategic solutions to HRA and ensure inadequate infrastructure investment – such as water infrastructure – does not subsequently hold up development). This point would get lost in guidance on HRA and should therefore be made clear in guidance relating to the development of local plans.

It should also be made clear in the HRA guidance that there is nothing unlawful in taking a strategic approach to mitigation at plan-making stage. Joined Cases C-293/17 and C-294/17 Coöperatie Mobilisation for the Environment UA v College van gedeputeerde staten van Limburg ("Dutch Nitrogen") confirmed that a programmatic approach, including strategic mitigation, is an appropriate solution provided a thorough and in-depth examination of the scientific soundness of that assessment makes it possible to ensure that there is no reasonable scientific doubt as to the absence of adverse effects of each plan or project (i.e. each development) on the integrity of the site concerned.

In practice, any inherent risk in proposed mitigation measures tends to result in a conclusion that there will be an adverse impact (because the decision maker cannot be reasonably certain of a lack of impact). This means cases where mitigation would ensure no adverse impact would occur, are wrongly routed down the derogation route. We suggest the principles set out in the guidance regarding innovative approaches should empower decision makers to approve conditions providing for monitoring of effects and a plan to adjust mitigation efforts where monitoring results show effects above predicted levels, even where mitigation measures are novel. Two preconditions must be satisfied: (1) there must be sufficient time to take effective action after obtaining robust monitoring results and before an adverse impact could occur, and (2) it must be known the package of secured mitigation measures is capable overall of being adjusted in an effective manner and in sufficient time to avoid an adverse impact. The consequences of the sentence "Applicants can use untested or new mitigation measures if appropriate monitoring and triggers are in place over the lifetime of the plan or project" on page 27 of the draft guidance should accordingly be expanded upon.

Finally, on appropriate "triggers", we would recommend clarity is provided in the guidance on the acceptability of the use of Grampian conditions in principle. Applicants regularly seek to rely on Grampian pre-commencement conditions to secure compliance with the Habitats Regulations at a later stage in the process. For example, appeal decision APP/A1720/W/21/3273119 was granted outline planning permission for 38 dwellings subject to a Grampian condition referring to the specific number and location of credits which would be purchased by the developer to ensure that the site achieved nutrient neutrality (Land at Eyersdown Farm Quarantine Kennels, 285 Botley Road, Burridge SO31 1ZJ, decision of Inspector Bale MA MRTPI: §§35, 43-45 and condition 4). In appeal decision APP/Z3825/W/23/3321658, a Grampian condition allowed outline permission to be granted for 133 dwellings despite the appropriate assessment demonstrating that increased water abstraction caused by the development would result in a likely significant effect on the Arun Valley SAC, SPA and Ramsar sites (Land at Lower Broadbridge Farm, A281, Broadbridge Heath, West Sussex, RH12 3GP, decision of Inspector Coffey BA(Hons) BTP MRTPI: §§40-44 and condition 12. See also the recovered appeal APP/Z3825/W/23/3333968 at §§14-21 of the decision letter and §§10.92-10.114 of the Inspector's Report, on the issue of water neutrality).

However, despite the above positive examples of a pragmatic approach being taken, there is profound inconsistency in approaches that guidance can helpfully resolve. To demonstrate: a search previously carried out for "nutrient neutrality" + "Grampian condition" on a database of appeal decisions provided 14 results, of those, in 13 decisions, the Inspector determined that it was not possible to impose a Grampian condition to secure nutrient neutrality. Four of these decisions related to outline planning permission. Most of the decisions refused to impose a Grampian condition on the grounds that it would not provide sufficient certainty or would otherwise fail the PPG test. Two of these decisions determined that a Grampian condition could not be imposed in principle because that would be in direct contravention of the Habitats Regulations which requires the competent authority to reach a definitive conclusion before granting planning permission: APP/K2610/W/23/3324445 and APP/Y2620/W/23/3321477. An example of Natural England taking the approach of requiring that an applicant demonstrated secured nutrient credits at the grant of outline permission stage was set out in the consultation response for an application of up to 150 dwellings at Land at Denhams Corner, Snakemoor Lane, Eastleigh, SO32 2BW.

The law only requires that any mitigation measures are effective before the proposal adds additional nutrients to the catchment (i.e. before houses are occupied). There is no legal principle precluding the use of Grampian conditions to deal with uncertainty.

In Abbotskerswell Parish Council v Secretary of State for Housing, Communities and Local Government, Teignbridge District Council, Antony Rew, Steven

Rew and Jill Rew, Torbay and South Devon NHS Foundation Trust [2021] EWHC 555 (Admin) Lang J (at paragraph 154) confirmed:

"...it forms no part of the ratio of the Dutch Nitrogen cases that the competent authority may not take into account conditions and limitations in contributing to the avoidance of adverse effects to the integrity of the site."

Indeed, this is precisely what the legislation itself contemplates: see reg. 63(6) and reg.s 70(2) and (3) of the Habitats Regulations. It is lawful to leave details to a future decision: see Case C 461/17 Holohan and Sweetman where at paragraph 47 of the CJEU decision it was held:

"In the light of the foregoing, the answer to the eighth question is that Article 6(3) of the Habitats Directive must be interpreted as meaning that the competent authority is permitted to grant to a plan or project development consent which leaves the developer free to determine later certain parameters...only if that authority is certain that the development consent granted establishes conditions that are strict enough to guarantee that those parameters will not adversely affect the integrity of the site."

It should be noted there is no "earliest possible stage" requirement under the Habitats Directive (No Adastral New Town Limited v Suffolk Coastal District Council, Secretary of State for Communities and Local Government [2015] EWCA Civ 88 at paragraph 68 per Richard LJ giving judgment for the Court).

Despite the fact that the same law is in issue, the trend when granting planning permission on appeal is the opposite for water neutrality cases where compliance with the Habitats Regulations is in issue. A search for "water neutrality" + "Grampian" gave rise to results consistently showing the grant of planning permission where a Grampian condition was requested.

There is no reason for this inconsistency, nor for refusing Grampians as being contrary to the Habitats Regulations in principle. If the condition is not satisfied (i.e. a nutrient neutrality scheme is not submitted and approved), then no development can take place, and no harm will occur.

The relevant case law does not require full details of mitigation proposed at outline permission stage where competent authorities impose conditions enabling them to be certain that the terms of the consent are strict enough to guarantee no adverse effect on the integrity of the site. Nor does policy. Nor does the PPG. There is, accordingly, no principled basis in law, policy or guidance, to insist that final details of mitigation are identifiable and secured at the outline / full planning permission stage. Grampian conditions precluding harm (eg. occupation) until a suitable scheme is approved by the LPA, in consultation with NE, and implemented prior to the risk of harm arising, are acceptable in principle across all applications potentially affected by the Habitats Regulations. What matters is the legal decision-making framework, not the kind of case it is. To repeat what Holgate J (as he then was) said in R (Together Against Sizewell C Limited) v Secretary of State for Energy Security and Net Zero v NNB Generation Company (SZC) Limited [2023] EWHC 1526 (Admin) (cited in the Court of Appeal judgment [2023] EWCA Civ 1517, which upheld Holgate J's decision) at paragraph 91:

"...decisions on those development projects would have to be delayed until the company is able to define and decide upon a proposal. That approach would lead to sclerosis in the planning system which it is the objective of the legislation and case law to avoid (R (Forest of Dean (Friends of the Earth)) v Forest of Dean District Council [2015] PTSR 1460 at [18]).

That challenge was based on an alleged failure to comply with reg. 63 of the Habitats Regulations on the basis that a supply of water was a core component of the overall Sizewell C consent "project". Holgate J rejected that, correctly (as held by the Court of Appeal), partly on the basis of the consequences of requiring final details of the water supply at the initial consent stage.

The broader point made by Holgate J applies here too: as the entire nation has seen, the requirement to identify mitigation measures at the outline / full planning permission stage has indeed led to "sclerosis" of the planning system. While Grampian conditions are not the solution in every case, they do allow otherwise acceptable development to proceed in a number of cases. Clarity should accordingly be provided within the guidance to confirm that Grampian conditions are acceptable in principle. That will assist in both ameliorating "sclerosis" and resolving the unprincipled inconsistency in the use of such conditions.

12 Do these principles strike the right balance between supporting users in complying with legal requirements and encouraging an efficient approach to decision-making?

No

Please provide any reasoning or evidence to support your response. Where relevant, please suggest alternative wording you consider clearer or more effective, including draft text where possible.:

To achieve this goal, a change in the law would be required. Guidance cannot change the law; moreover, guidance can be subject to legal challenge if it gets the law wrong: the Supreme Court in R (A) v Secretary of State for the Home Department [2021] UKSC 37 confirmed the reviewability of guidance, stating the test is whether the policy or guidance in question "authorises or approves unlawful conduct by those to whom it is directed". The Supreme Court identified three main categories where guidance may be unlawful:

1. The guidance contains a positive statement of law which is wrong and which, if followed, would induce a person to breach their legal duty;
2. The authority issuing the policy has a duty to provide accurate legal advice but fails to do so, either by misstatement or omission;
3. The authority, even if not obliged to issue a policy, publishes guidance purporting to be a full account of the law but which, due to misstatement or omission, presents a misleading picture of the true legal position.

Further, in R (Association of British Travel Agents Ltd (ABTA)) v Civil Aviation Authority [2006] EWCA Civ 1356 and R (Letts) v Lord Chancellor [2015] EWHC 402 (Admin) the courts have confirmed that guidance which misstates or is materially misleading about the law may be quashed or declared unlawful. Thus, it is very clear that guidance cannot go far enough to remedy the inefficiencies of the Habitats Regulations. The law must be changed first.

One example where improved efficiency of decision making could be improved – but where the law would need to change – is in relation to the

consideration of mitigation measures at screening stage. In the EIA context, decision makers may have regard to proposed remedial measures (Gillespie v First Secretary of State [2003] EWCA Civ 400 and R (Jones) v Mansfield District Council [2003] EWCA Civ 1408) when determining whether EIA is required. In fact, consideration of mitigation measures at the screening stage is legally required by the EIA Regulations. There is no principled reason the Habitats Regulations should be any different when determining if full appropriate assessment was required. This would mean reversing the assimilated decision of Case C-323/17 People Over Wind & Peter Sweetman v Coillte Teoranta to allow mitigation measures to be taken into account so as to obviate the need to carry out an appropriate assessment under reg.63 of the Habitats Regulations.

Guardrails would be required to eliminate the risk of using mitigation to inappropriately avoid the additional rigorous scrutiny of an appropriate assessment. Precisely that issue was considered by the courts in the EIA context. By analogy, it can also apply to appropriate assessment save that the public's involvement in the HRA process is much more limited, being at the entire discretion of the competent authority. In R (Lebus) v South Cambridgeshire DC [2002] EWHC 2009 (Admin), Sullivan J (as he then was) said at paragraphs 45 and 46:

"Whilst each case will no doubt turn upon its own particular facts, and whilst it may well be perfectly reasonable to envisage the operation of standard conditions and a reasonably managed development, the underlying purpose of the Regulations in implementing the Directive is that the potentially significant impacts of a development are described together with a description of the measures envisaged to prevent, reduce and, where possible, offset any significant adverse effects on the environment. Thus the public is engaged in the process of assessing the efficacy of any mitigation measures.

It is not appropriate for a person charged with making a screening opinion to start from the premise that although there may be significant impacts, these can be reduced to insignificance as a result of the implementation of conditions of various kinds. The appropriate course in such a case is to require an environmental statement setting out the significant impacts and the measures which it is said will reduce their significance … The proper approach was to say that potentially this is a development which has significant adverse environmental implications: what are the measures which should be included in order to reduce or offset those adverse effects?"

Lord Carnwath in R (Champion) v North Norfolk District Council and another [2015] UKSC 52 expressed his approval with the quotes cited above, stating (at paragraph 51):

"Those passages to my mind fairly reflect the balancing considerations which are implicit in the EIA Directive: on the one hand, that there is nothing to rule out consideration of mitigating measures at the screening stage; but, on the other, that the EIA Directive and the Regulations expressly envisage that mitigation measures will where appropriate be included in the environmental statement. Application of the precautionary principle, which underlies the EIA Directive, implies that cases of material doubt should generally be resolved in favour of EIA."

This reference to "material doubt" refers to cases falling outside the remit of the Court of Appeal decision in Gillespie where "tried and tested" mitigation measures to eliminate significant effects could be relied on at the screening stage to avoid carrying out a full EIA.

In the HRA context, reliance on "future benefits" was considered in Dutch Nitrogen, where the CJEU said at paragraph 130:

"The appropriate assessment of the implications of a plan or project for the sites concerned is not to take into account the future benefits of such 'measures' if those benefits are uncertain, inter alia because the procedures needed to accomplish them have not yet been carried out or because the level of scientific knowledge does not allow them to be identified or quantified with certainty."

This echoes the CJEU's decision in Case C 164/17 Grace & Sweetman v An Bord Pleanala at paragraphs 52-53:

"It is not the fact that the habitat concerned in the main proceedings is in constant flux and that that area requires 'dynamic' management that is the cause of uncertainty. In fact, such uncertainty is the result of the identification of adverse effects, certain or potential, on the integrity of the area concerned as a habitat and foraging area and, therefore, on one of the constitutive characteristics of that area, and of the inclusion in the assessment of the implications of future benefits to be derived from the adoption of measures which, at the time that assessment is made, are only potential, as the measures have not yet been implemented. Accordingly, and subject to verifications to be carried out by the referring court, it was not possible for those benefits to be foreseen with the requisite degree of certainty when the authorities approved the contested development."

In terms of the level of certainty that would be required for these decisions, the Court of Appeal has held that the question the competent authority must ask itself is whether it is convinced by the information before it that, taking into account all material considerations and exercising an evaluative judgment, the proposal generates no real risk to the integrity of the Habitats Site, considered in light of its conservation objectives (R (Mynnyd y Gwynt) v SSBEIS [2018] EWCA Civ 231 at paragraphs 8-9).

As indicated above, while ensuring consistency between approaches to EIA and HRA is desirable and would promote more efficient decision making, such a change cannot be achieved through guidance.

Another element in which the law may helpfully be amended would be to require that environmental data is standardised and placed on an accessible central database. Issues of commercial confidentiality would have to be overcome, but such effort is warranted as the current system is mind bogglingly inefficient and wasteful. At present, the world's best educated ecologists generate reams of bespoke and invaluable environmental information, but this information is used only once. It is then effectively hidden on obscure websites which only an extremely diligent researcher (who knows the relevant planning application references) would be able to locate. This information could be re-used by applicants, it would help SNCBs identify trends, and would enable everyone to design more effective monitoring and mitigation. Ireland and Hong Kong have established such systems, greatly improving both the efficiency and effectiveness of environmental decision making.

Section 2 – Making use of an existing HRA

13 How helpful is the detail in this section on when an existing HRA can and cannot be used?

Not Answered

Please provide any reasoning or evidence to support your response. Where relevant, please suggest alternative wording you consider clearer or more effective, including draft text where possible.:

14 Will this section give support to users in avoiding unnecessary repetition of work related to HRAs?

Not Answered

Please provide any reasoning or evidence to support your response. Where relevant, please suggest alternative wording you consider clearer or more effective, including draft text where possible.:

Section 3 – Checking for likely significant effects on a habitats site

15 How helpful is the detail in this section on determining whether a plan or project could have a significant effect on a protected site?

Not Answered

Please provide any reasoning or evidence to support your response. Where relevant, please suggest alternative wording you consider clearer or more effective, including draft text where possible.:

16 How helpful is the detail in this section on how a real (as opposed to hypothetical) risk should be identified and evidenced?

4 – somewhat helpful

Please provide any reasoning or evidence to support your response. Where relevant, please suggest alternative wording you consider clearer or more effective, including draft text where possible.:

We are concerned the section misses the opportunity to emphasise this key point. Case law has repeatedly confirmed that HRA cannot be based on the bare assertion of an expert. This has been lost in the overly cautious risk-averse approach taken by competent authorities. The test refers to “scientific” doubt, moreover, that (objective) doubt must be “reasonable”. This means there must be a reasonable scientific basis for considering that an adverse effect is likely: mere hunches, or wanting to be absolutely sure, or wanting to appease objectors threatening to judicially review the decision, would not suffice. This is exactly in line with existing case law: eg. Case C-461/17 Holohan v An Bord Pleanála at paragraph 33; Case C-127/02 Waddenzee at paragraph 44; Wyatt v Fareham BC [2021] EWHC 1434 (Admin) at paragraph 30.

However, we are content that the guidance does clearly reflect case law, specifically (the pre-People Over Wind) Court of Appeal decision of Boggis v Natural England [2009] EWCA Civ 1061 where Sullivan LJ (at paragraph 37) confirmed that anyone arguing that mitigation would not prevent an adverse impact on site integrity must produce credible evidence that there was a real as opposed to hypothetical risk.

Section 4 – Checking for in-combination effects with other plans and projects

17 How helpful is the detail in this section on how in-combination effects should be considered?

Not Answered

Please provide any reasoning or evidence to support your response. Where relevant, please suggest alternative wording you consider clearer or more effective, including draft text where possible.:

18 Should this section include further detail on what should be considered an in-combination effect?

Not Answered

Please provide any reasoning or evidence to support your response. Where relevant, please suggest alternative wording you consider clearer or more effective, including draft text where possible.:

Section 5 – How to use screening criteria

19 How helpful is this section at setting out the purpose of the screening criteria?

Not Answered

Please provide any reasoning or evidence to support your response. Where relevant, please suggest alternative wording you consider clearer or more effective, including draft text where possible.:

20 How helpful is the detail in this section on what criteria must be met for a plan or project to be screened out?

Not Answered

Please provide any reasoning or evidence to support your response. Where relevant, please suggest alternative wording you consider clearer or more effective, including draft text where possible.:

Section 6 – Assessing the potential effect of a plan or project on the integrity of a site

21 How helpful is the detail in this section on the definition of site integrity?

Not Answered

Please provide any reasoning or evidence to support your response. Where relevant, please suggest alternative wording you consider clearer or more effective, including draft text where possible.:

22 How helpful is the detail in this section on the role of conservation objectives?

Not Answered

Please provide any reasoning or evidence to support your response. Where relevant, please suggest alternative wording you consider clearer or more effective, including draft text where possible.:

Section 7 – Checking effects against a site's conservation objectives

23 How helpful is this section on how maintain and restore objectives should be handled when assessing an impact on site integrity?

Not Answered

Please provide any reasoning or evidence to support your response. Where relevant, please suggest alternative wording you consider clearer or more effective, including draft text where possible.:

Section 8 – Considering reasonable scientific doubt

24 How helpful is this section in explaining what constitutes reasonable scientific doubt?

2 – somewhat unhelpful

Please provide any reasoning or evidence to support your response. Where relevant, please suggest alternative wording you consider clearer or more effective, including draft text where possible.:

The guidance, particularly this sentence: "To be satisfied beyond reasonable scientific doubt, the competent authority does not always have to assess the reasonable worst case scenario, and it is not necessary for there to be no risk" may cause confusion and inconsistent approaches across decision makers.

Currently, the test is as follows: an appropriate assessment must be particularly robust to a high standard of investigation, based on the best up-to-date scientific knowledge. Any scientific uncertainty should be addressed by applying precautionary rates to variables (Wyatt v Fareham BC [2021] EWHC 1434 (Admin) at paragraph 45). In all, the assessment can have no gaps, and must contain complete, precise and definitive conclusions "capable of removing all reasonable scientific doubt" as to the effects of the proposal on the site (Dutch Nitrogen at paragraph 98).

In legal terms, that is an exceptionally high bar to pass. In our experience, this is a good example of law drafted by those without scientific training. Scientists will always indicate there is residual uncertainty. There is, by the very operation of the scientific method, no such thing as scientific certainty: a hypothesis is only "true" to the extent that it has not been disproved, and results are replicable. To some extent, criticism of the test for requiring that applicants "prove a negative" is valid, although well-trained ecologists will be able to predict likely impact pathways and should be able to provide adequate detail on circumstances where negative significant effects could arise. It must be made clear for those making the decision on behalf of competent authorities (who are unlikely to be scientifically trained), that absolute certainty is impossible to attain and is not the legal test. A proportionate, reasonable, precautionary approach is required.

The difficulty in surmounting the legal tangle of the current law led Fordham J in R (Caffyn) v Shropshire Council [2025] EWHC 1497 (Admin) to remark at paragraph 37 "[HRA duties] are an aid to effective environmental decision making, not a legal obstacle course". The aim of the regime is to protect nature, but a lack of clarity, inadequate opportunities for strategic efforts, and fear of a highly legalised regime within competent authorities, has contributed to this obstacle course for decision makers without commensurate improvement of underlying environmental conditions.

Having set out how hard it is for applicants to achieve the test, it can be seen how this is holding up decision making and delivery. Our answer to question 16 above sets out only the leading cases confirming that hypothetical harm is not a valid basis for a legal challenge. There are many further examples of this. More importantly, there are many more examples which do not reach litigation in which hypothetical and/or insignificant effects have been held to require appropriate assessment. That is not what the law requires. For the purposes of the guidance, it will assist if it confirms significant means just that: significant.

It may also assist, for the guidance to remind competent authorities that proportionality is a core guiding principle when interpreting and applying the Habitats Regulations. This was confirmed in the leading case of Case C-127/02 Waddenzee (AG Kokott's Opinion, which was not doubted in the judgment):

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

Thus, the guidance could remind competent authorities that the principle of proportionality applies and "a measure is proportionate where it is both

appropriate and necessary and not disproportionate to the objective pursued".

It is known how high the bar on the need to be satisfied beyond reasonable scientific doubt is. It is hard to achieve, and overly cautious competent authorities are setting this bar even higher than the legal threshold. This seeking of perfection and unreasonable (unobtainable) certainty, is holding up decision making and delivery where there is no corresponding environmental benefit. In fact, it may be diverting scarce resources away from decision making processes where environmental harm is genuinely an issue, and therefore may well positively contribute to environmental degradation and poor environmental decision making.

As indicated earlier, this legal test cannot be changed through guidance. The guidance can however assist, by making it very clear that competent authorities should apply the need to be satisfied beyond reasonable scientific doubt in a pragmatic way: just as the precautionary principle is a core principle of environmental law, so too is the proportionality principle. That should be made express in the guidance. Further, rather than simply stating "To be satisfied beyond reasonable scientific doubt,...it is not necessary for there to be no risk", the guidance should make sure that competent authorities realise there is no such thing as scientific certainty, and any "risk" must be objectively evidenced (see our answer to question 16 above).

Finally, the guidance should be perfectly clear that "significant" means significant: any effect at all, even when objectively evidenced, does not suffice to trigger an appropriate assessment under reg.63(1).

Section 9 – Securing compensatory measures

25 How helpful is the detail in this section on compensatory measures?

Not Answered

Please provide any reasoning or evidence to support your response. Where relevant, please suggest alternative wording you consider clearer or more effective, including draft text where possible.:

Section 10 – Habitats regulations assessments: guide for applicants

26 How helpful is this additional guidance at setting out how to engage with the HRA as an applicant?

Not Answered

Please provide any reasoning or evidence to support your response. Where relevant, please suggest alternative wording you consider clearer or more effective, including draft text where possible.:

Efficiency impacts of the updated HRA guidance

27 What impact do you expect the refreshed guidance to have on the overall time taken to complete an HRA?

Not Answered

Please provide any reasoning to support your response.:

Amending the HRA guidance to include the offshore

28 Do you agree with the proposal to draft the HRA guidance so that it applies to Habitats sites in the offshore waters of England, as well as the inshore waters?

Not Answered

Please provide any reasoning or evidence to support your response:

29 Are there any parts of the HRA process in the offshore which you would like us to focus on in the guidance?

Not Answered

Please provide any reasoning or evidence to support your response:

Further comments on the draft Habitats Regulations Assessment Guidance

30 The full updated draft Habitats Regulations Assessment Guidance can be found in the above fact bank. Are there any aspects of the draft guidance not already covered in the previous questions you would like to comment on?

Please provide any reasoning or evidence to support your response: