Analysis of the UK's International Nature Obligations – Phase 1

October 2023

Natural England Commissioned Report NECR513

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Catalogue code: NECR513

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1.4 Keywords

Obligations; Conventions; Biodiversity; Nature;

1.5 Acknowledgements

Many thanks to Tim Page, Natural England, for reviewing the draft and supplying suitably challenging questions.

1.6 Citation

Cork, Christina. 2023. Analysis of the UK's International Nature Obligations Phase 1. NECR513 Natural England.

Foreword

In September 2022, the Retained EU Law Bill was introduced to the House of Commons with the purpose of removing retained EU laws, and where required, integrating them into domestic legislation. Retained EU law is a category of domestic law created at the end of the transition period, made up of certain pieces of direct EU legislation that were 'cut and pasted' onto the UK statute book and certain domestic laws that implemented EU law.

The headline of the Bill was that all retained EU law was to be automatically sunsetted (repealed) on 31 December 2023, unless a government department exercised the power in the Bill to preserve it. The Bill provides powers to preserve, update, restate, revoke, or replace REUL although this must not increase the overall regulatory burden.

As the Bill progressed, two undertakings in relation to the process were provided by the government;

- Environmental protection would not be reduced by any actions undertaken as part of the process outlined by the Retained EU Law Bill;
- No regulations would be lost which were necessary for the UK to meet its international obligations, including those for nature conservation.

Natural England commissioned this work, focusing on the Conservation of Habitats & Species Regulations, to ensure that there was clarity in terms of what the UK's international obligations in relation to nature conservation were, what form those obligations took and what elements of the Conservation of Habitats & Species enabled those obligations to be met.

The work is split into two parts, with the written report providing an overarching view of the nature of the international conventions, an appraisal of each of the obligations stemming from those conventions and a conclusion in terms of the effectiveness of the obligations; the report is then supported by an annex which sets out, in detail all the elements of each of the obligations.

Natural England commission a range of reports from external contractors to provide evidence and advice to assist us in delivering our duties. The views in this report are those of the authors and do not necessarily represent those of Natural England.

Executive Summary

In September 2022, the Retained EU Law Bill was introduced to the House of Commons with the purpose of removing retained EU laws, and where required, integrating them into domestic legislation. As the Bill progressed through Parliament, two undertakings were provided by the government. Firstly, that no environmental protections would be reduced as part of the process and secondly, that no law would be lost which was necessary for the UK to achieve its international obligations, including those commitments concerning nature.

In the context of the Retained EU Law Bill, no clarification has been provided as to what is included within the term "international obligation" and therefore, the report commences with a review of the sources and nature of these obligations and their place within international law. International law is complex, and the report highlights the interplay which is present within the environmental realm between legislation, treaties, non-binding declarations and customary international law – practices that have grown up over time and which have become accepted as law. The options for securing compliance are varied but there is an emphasis on relying on the scrutiny of other nations to secure compliance rather than more confrontational methods.

The five conventions from which the UK's international obligations in relation to nature primarily stem are;

Ramsar Convention on Wetlands of international importance especially as Waterfowl Habitats 1971

Came in force in the UK in 1975 and is one of the earliest international agreements to encourage nature conservation. The main obligations are the designation of wetlands of international importance as Ramsar sites, the wise use of wetlands and the co-operation with other countries to futher the wide use of wetlands and their resources.

The Convention on the Conservation of European Wildlife and Natural Habitats (the Bern Convention) 1979

Came into force in the UK in 1982 and its aim "to conserve wild flora and fauna and their natural habitats"; with all contracting parties to take the "requisite measures to maintain the population of wild flora and fauna ….while taking account of economic and recreational requirements and the needs of sub-species, varieties or forms at risk locally."

Bonn Convention on the Conservation of Migratory Species of Wild Animals (CMS or Bonn Convention) 1979

The convention was ratified in the UK in 1985 and currently covers four legally binding agreements covering; Populations of European Bats (EUROBATS); African-Eurasian Migratory Waterbirds (AEWA); Small Cetaceans in the Baltic, Irish and North Seas (ASCOBANS) and Albatrosses and Petrels (ACAP).

And the following Memorandums of Understanding (non-legally binding); Management of Marine Turtles and their Habitats of the Indian Ocean (IOSEA Marine Turtle MoU), Migratory Sharks; Aquatic Warbler; Migratory Birds of Prey in Africa and Eurasia; and Cetaceans and their Habitats in the Pacific Islands Region, in respect of Pitcairn.

The Convention for the Protection of the Marine Environment of the North-East Atlantic (the 'OSPAR Convention')

OSPAR started in 1972 to cover dumping at sea and then was gradually broadened over time until it reached its current form, covering biodiversity and ecosystems in 1998 to cover non-polluting human activities that can adversely affect the sea. Contracting Parties to the Convention *shall* take the necessary measures to protect and conserve the ecosystems and the biological diversity of the maritime area, and to restore, where practicable, marine areas which have been adversely affected.

Convention on Biological Diversity

The Convention on Biological Diversity (CBD) 1992, was the first truly global instrument regulating the interaction of species and habitat, and of ecosystems, in a holistic way. The treaty has three main aims: to conserve biological diversity, to use its components sustainably, and to provide fair and equitable access to the benefits of using genetic resources. A framework is provided for countries to act on, implementation of these policies takes place at a national level as countries have control over their own resources. As a result, although the treaty is legally binding, it cannot compel signatories to protect their biodiversity in a certain way.

The detailed analysis of the obligations contained within each of the conventions put alongside an appraisal of how the Conservation of Habitats & Species Regulations contributes to the UK's ability to meet those obligations, provides a clear insight into the importance of those Regulations and the risks associated with undermining the way in which those obligations are currently met.

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Introduction

1.1 Background

The Retained EU Law Bill was introduced to the House of Commons with the purpose of removing retained EU laws, and where required, integrating them into domestic legislation.

As a piece of an EU-derived domestic legislation, which was preserved under Section 2 of European Union (Withdrawal) Act 2018 (EUWA), the Habitats Regulations are included within the proposed coverage of The Retained EU Law (REUL) (Revocation & Reform) Bill as introduced. The headline of the Bill is that all retained EU law is to be automatically sunsetted (repealed) on 31 December 2023, unless a department exercises the power in the Bill to preserve it. The Bill provides powers to preserve, update, restate, revoke, or replace REUL although this must not increase the overall regulatory burden. A commitment has been made by the Government that any law that is required to meet the UK's international obligations will not be sunsetted, including those covering nature conservation.

The proposed steps which are set out within the REUL Bill indicate that, as a piece of retained EU law, The Habitat Regulations will go through a process of reform and therefore, one of the objectives of the work is to;

- Understand the interplay between the key international nature obligations and the Habitats Regulations as they currently stand, highlighting:
  a) what form the obligations take and
  b) what aspects may be missing from existing domestic species and sites protection if key elements of the Habitat Regulations were lost.

In conjunction with this is the need to

- Pinpoint the duties within the Habitats Regulations which have been key in securing win-win solutions in terms of nature and the economy, considering:
  a) how they link in with the international obligations, and
  b) clearly illustrating the long-term value in their retention.

1.2 Structure of the report

The report provides an overarching analysis of all international nature conservation obligations to which the UK is currently subject and the nature and strength of those obligations. A comparison between the requirements of the Habitats Directive (as transposed into the Habitats Regulations) and the international nature conservation obligations and the relationship between them. An analysis of the degree to which other existing domestic sites and species legislation meet the international nature conservation obligations.

This report provides a written summary of the findings, together with DTA Ecology's recommendations of a holistic view of international obligations. It should be read alongside the supporting table, Annex 1, which provides a detailed log of all the UK's nature obligations, where they come from and what form they take.

Readers of this report should be aware that this Phase 1 report is focused on the effects of the Habitats Regulations being repealed, and the impacts on international obligations. The Phase 2 report provides further analysis of how the Habitats Regulations, in preserving the regime from the Habitats Directive, currently supports and enables the non-EU international regimes. Collectively the two reports thus present the difference between the current situation now and after repeal of the Habitats Regulations, by examining from both sides of the question – how the Habitats Regulations currently enable an effective conservation regime to deliver on UK non-EU international obligations and whether the domestic elements that remain after the repeal of the Habitats Regulations might be a satisfactory alternative.

1.3 Scope and limitations

The questions to be addressed are specific to international nature conservation obligations that overlap with the Habitats Regulations[1], that may be affected by their sunsetting. It is noted that there are international nature conservation obligations that are wider than the corresponding scope of the Habitat Regulations. This is particularly the case in the marine environment. It is beyond the scope of this work to consider these. The analysis is limited to the main international instruments which

[1] The Conservation of Habitats and Species Regulations 2017 No 1012

intersect with the EU Nature Directives – the Ramsar Convention, Bonn Convention, Bern Convention, OSPAR Convention and the Convention on Biological Diversity. We note that since the legislation of the EU and the domestic transposing instruments have developed over the preceding 40 years, the interplay with other Directives and international instruments gives rise to a complex picture.

The methods used in this analysis are desk-based research and the professional experience and opinions of its author. It is not intended to be comprehensive, in the broadest sense of the word, as the scope and timescales for delivery did not allow for a review of all documents produced under each of the international conventions/ treaties.

DTA Ecology has expertise in the interpretation and application of the EU Nature Directives. We use for the purposes of our advice here a practitioner's view, with the author's experiences working within the field, assisted by leading authors in the subject of International Environmental Law. Whilst this report covers matters of legal compliance it is not legal advice and should not be read or interpreted as such. Natural England will need to seek their own legal advice, as necessary.

2 International Law - background

2.1 Context

The headline of the REUL Bill is that all retained EU law is to be automatically sunsetted (repealed) on 31 December 2023, unless a department exercises the power in the Bill to preserve it. A commitment has been made by the Government that any law that is required to meet the UK's international obligations will not be sunsetted, including those covering nature conservation. Central to this report is an understanding of what is required to meet the UK's international obligations covering nature conservation. This section of the report is focused on providing context for determining 'an international obligation.' It is DTA Ecology's understanding that a definition has not yet been provided in the context of the REUL Bill and thus we refer to some first principles. International obligations, in effect can be wider than purely legal in nature. A common-sense dictionary definition '*an act or course of action to which a person is morally or legally bound; a duty or commitment.'*

Central to international nature conservation law (and its various institutions) is the need to work within the doctrine of state sovereignty – that is, within its territory, each

national-state has complete supreme and independent political and legal control over persons, businesses, entities and activities and over its environmental and natural resources. This creates a tension between a state's interest in protecting its sovereignty and the recognition that regional and global environmental problems require effective international cooperation.

National sovereignty over natural resources in often affirmed in international agreements and declarations. And the approach of international environmental law is thus to uphold nation states' sovereignty, whilst declaring an exception to that doctrine, that sovereignty does not protect states from responsibility for the results of their actions on the environment outside their jurisdiction/ territory. Thus, it is central that where sovereignty is paramount, international legal obligations are - at the point of entry - seen as voluntary. Moreover, compliance and enforcement of obligations is structured around self-restraint, negotiation and diplomacy; rather than strict penalties or litigation options or actions. This needs to be borne in mind when we consider the nature of legal obligations, often states will agree to 'softer' instruments which, whilst not 'legally' binding, create political or reputational expectations.

2.2 Sources and nature of international legal obligations

"There are generally three sources from which international law derives. Much of the contemporary international environmental law is the product of an essentially legislative process involving international organizations, conference diplomacy, codification and progressive development, international courts, and a relatively subtle interplay of treaties, non-binding declarations or resolutions ('soft law'), and customary international law."[2]

Customary international law

Customary international law is that which is built up over time and comprises rules that derive from a general practice accepted as law. Customary law can be useful in the interpretation of treaties , but also treaties can help to facilitate the creation of customary norms. Such norms are considered to be binding; such that national and

[2] Boyle and Redgwell, *Birnie, Boyle & Redgwell's International Law and the Environment*. (Oxford 2021) Page 14

international courts and tribunals will accept as binding. Principles that have entered into customary law include the prevention principle, and also that of due diligence to a national state's neighbours. Principle 2 of the Rio Declaration provides;

> *'*States have the sovereign right to exploit their own resources and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction*.'*

Whilst stated in a declaration, this is in fact customary international law.

Courts and tribunals

International courts can make rulings, which are often political in character, with the resolution of disputes by litigation between states, substantially dependent on the consent and good faith of states concerned, rather than being forced to comply. Such rulings can also provide an analysis of any developing legal doctrine. As Birnie et al state (P22)

> *"*International courts and tribunals do not enforce the law; they merely decide what it is, apply it to the facts, and make appropriate findings and orders, which it is the responsibility of the partis to carry out. Diplomatic pressure remains in practice the only real sanction for ensuring compliance. What institutional supervision offers, whether through international organizations, or autonomous treaty bodies, is the opportunity to organize this pressure on a multilateral basis."

Treaties and conventions

Treaties agreed between nation states are considered as 'hard law' instruments. The underlying principle is that of *pacta sunt servanda* - treaties are made to be kept. There are no rules prescribing the form treaties should take but the 1969 Vienna Convention on the Law of Treaties ('VCLT') codifies the law applicable. Treaties are normally opened for signature following their adoption, but unless there is specific agreement to be bound on signature, it is not until instruments of ratification or accession have subsequently been deposited (which generally requires measures approved by national parliamentary or other internal processes) and any other requirements for entry into force have been fulfilled that the treaty enters into force and becomes binding on the parties.

Treaties are the most frequently used instruments for creating generally applicable multilateral rules relating to the environment. Enforcement options favour softer procedures which make use of international institutions, treaty supervisory bodies or diplomatic methods to deal with non-compliance of a Treaty's obligations. Treaties will often provide for future agreements between contracting parties to be agreed to 'improve effective implementation.' Sometimes these agreements / resolutions are considered binding; often though others such as recommendations are more advisory in nature. Whether a nation state has agreed to be 'bound' by the terms of the instrument will depend on each case itself. 'Soft- law' is the term used for the non-binding international instruments introduced after a treaty is in force.

Declarations, resolutions or recommendations subsequently introduced by a Treaty Conference of the Parties (CoPs) usually form part of a subsequent programme of work within a Treaty framework that sets out future actions, or ways and means that signatories can achieve the outcomes required by the Treaty. Legal commentators have reflected that whilst they are easier to reach agreement on, and easier to amend or replace, whether soft law has the same effect in practice as a treaty depends very much on the instrument itself and how it relates to the treaty and any customary international law. Aside from legally binding obligations they might also raise expectations of a political and reputational nature.

Compliance options

Where obligations arising from Treaties are not implemented, processes may be set out within the Treaty to determine the steps that might be taken. Most often there is no recourse to a formal dispute (or court) procedure. The principal importance lies in facilitating multilateral solutions, usually within the Conference of Parties, both to resolve questions of treaty interpretation and allegations of breach or non-compliance with the Treaty. The fundamental approach is that community pressure and the scrutiny of other nations in an intergovernmental forum may be more effective in securing a higher level of compliance than more confrontational methods.

As Lyster observes, 'simply by requiring its Parties to meet regularly to review its implementation, a treaty can ensure that it stays at the forefront of its parties' attention.' […] The key tasks which treaty supervisory bodies perform are those of information and data collection, receiving and reviewing reports on implementation by

states, overseeing independent monitoring and inspection, and facilitating compliance with agreed standards of conduct.'[3]

Box 2.2.1 - General rule of interpretation -Vienna Convention on the Law of Treaties

Article 31

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
   (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) any relevant rules of international law applicable in the relations between the parties.

A special meaning shall be given to a term if it is established that the parties so intended.

2.3 Treaty oversight - international Institutions and organisations.

There is no central international authority on environmental issues, law making or central enforcement authority. A number of International Governmental Organisations (IGOs) are established both within and separate to the United Nations. But most

[3] Lyster, *International Wildlife Law* (Cambridge, 1985) Page 12.

often IGOs are created by a treaty which then has a degree of oversight or enforcement provision. For example, the UN Framework Convention on Climate Change Secretariat created by the Climate Change Treaty; the Secretariat on the Convention on Biodiversity created under that treaty; and the UNEP Convention on Migratory Species Secretariat (and related entities) created by the Bonn Treaty. In fact, most treaties will create a Conference of the Parties (CoP) and a secretariat. These bodies might also be supported by one or more technical committees.

The European Union is a regional IGO. The EU is the most advanced IGO globally and a 'supranational' legal entity – with the power to enforce compliance by its member states through its binding jurisdictional court which can apply fines. The Council of Europe (CoE) is another influential IGO having brought forward a range of treaties for environmental matters. Whilst the CoE is very influential it does not have any 'court' for enforcement.

3 International Treaties and Conventions – Nature Conservation

This part of the report now sets out each of the main international treaties for nature conservation, by summarising the main measures and the form those obligations take mindful of the preceding paragraphs. We provide a summary of the findings from the analysis presented in the table at Appendix 1. This focuses on the elements that might be missing to ensure obligations are met if key elements of the Habitats Regulations were repealed.

The main treaty obligations and subsequent instruments of the various CoPs are summarised. As discussed at section 2 above, international frameworks are based more on cooperation than the enforcement of legally binding provisions. This part should be read in conjunction with the full table.

3.1 Ramsar Convention on Wetlands of international importance especially as Waterfowl Habitats 1971

Box 3.1.1 Summary of treaty obligations – Ramsar Convention

The Ramsar Convention is one of the earliest international agreements relating to nature conservation. The convention seeks to promote the wise use of wetlands, encourage research and promote training in research and the management of wetlands. It also requires contracting parties to designate suitable wetlands to be included in the list of wetlands of international importance. It entered into force in UK on 5th May 1976 with the first Ramsar site to be identified.

It has three main 'pillars' of activity:

1. the designation of wetlands of international importance as Ramsar Sites;

2. the promotion of the wise use of all wetlands in the territory of each country; and

3. international co-operation with other countries to further the wise use of wetlands and their resources.

The headline obligations are to:

(i) record internationally significant wetlands on its List of Wetlands of International Importance;

(ii) ‘promote’ their conservation and, as far as possible, the ‘wise use’ of all wetlands within their territory, including by establishing nature reserves in wetlands; and

(iii) cooperate with respect to transboundary wetlands, shared water systems, and shared species.

What the Convention does not do is to prohibit or regulate the taking of wetland species but, wetland use must not adversely affect its ecological character, thus affording indirect protection to species and ecological communities through protection of their critical habitat.

The Criteria for Identifying Wetlands of International Importance were adopted by the 7th (1999) and 9th (2005) Meetings of the Conference of the Contracting Parties, superseding earlier Criteria adopted by the 4th and 6th Meetings of the COP (1990 and 1996). These guide implementation of Article 2.1 on designation of Ramsar

wetlands. There is an important interlinkage here with the 1979 Bonn Convention on Migratory Species ('Bonn Convention'), insofar as wetlands are a vital habitat for migratory birds and many other migratory species.

Parties to the Ramsar Convention, are required to submit a report to the Ramsar Secretariat every three years, ahead of each Conference of the Parties (CoP) to the Convention, on the UK's experience implementing the Convention. The last UK national report was dated May 2022.

Ramsar Sites which are potentially at risk as a result of technological developments, pollution or other human interference may be placed on "The record of Ramsar Sites where changes in ecological character have occurred, are occurring, or are likely to occur" - the Montreux Record. The Contracting Parties approved the Record as a means of drawing attention to Sites through Recommendation 4.8 in 1990. In 1996 they adopted Guidelines for Operation of the Montreux Record through Resolution VI.1.

At the request of a Contracting Party, the Secretariat may organize a Ramsar Advisory Mission to analyse the situation at one or more Sites and provide advice on measures to address the situation. Typically, a Mission consists of a visit by a team of two or more experts. When it receives a request from the competent authorities of a Contracting Party, the Secretariat agrees on terms of reference for the Mission and determines the range of expertise that the visiting team should have. The team's draft report is submitted for review by the Contracting Party, and the revised final report is then published. The findings and recommendations in the report can provide the basis for action at the Site.

Since 1988, the Ramsar Advisory Mission mechanism has been applied at over 90 Ramsar Sites or groups of Sites. Over the years the missions have become more formal and detailed. Two UK sites are currently on the list, The Dee Estuary Ramsar site and the Ouse Washes Ramsar site.

Deletions from the List

A Contracting Party may, because of its urgent national interest, delete or restrict the boundaries of wetlands already included in the List (Article 2.5 of the Convention). Article 4.2 states, however, that such deletions or restrictions should be compensated for by the creation of additional nature reserves or by the protection, either in the same area or elsewhere, of a suitable portion of the original habitat. No Ramsar Site has ever been "deleted" in this way, and Parties have only extremely

rarely restricted the boundaries of a Site on this basis. The Parties agreed guidance on issues relating to Article 2.5 through Resolution VIII.20.

Box 3.1.2 Analysis of risks – Ramsar Convention

If the Habitats Regulations were to be sunsetted the following matters are relevant considerations;

1. The listing of a Ramsar site is an administrative act by the Minister.
2. Since all Ramsar sites on land and in coastal waters tend to be underpinned by Site of Special Scientific Interest (SSSI)notification, the legislative framework provided by the Wildlife and Countryside Act 1981 (WCA) would provide a limited degree of legal protection, but it would not be equivalent to that provided for in Part 6 of the Habitats Regulations (in particular see bullets 4,5, 6 below) .
3. In terms of listing new or amending existing Ramsar sites, the provisions for site notification, together with the SSSI Guidelines which support NE decision making for birds and wetland habitats and species would likely be sufficient in conjunction with the Ramsar criteria themselves, to ensure an adequate coverage of wetlands of international importance.
4. However, since Ramsar sites receive the same protection as Special Areas of Conservation (SACs) and Special Protection Areas (SPAs), as a matter of policy, the general level of protection would be diminished because the policy would be of no effect. This is important because the policy to treat Ramsar sites as if they are fully designated European sites is clearly intended to ensure that Ramsar sites are fully protected in line with the requirements of the Convention, but this would clearly not be available if the Habitats Regulations were sunsetted.
5. Ramsar defines a wetland as an area to a depth of 6m into marine waters. This is not consistent with WCA and Marine and Coastal Access Act (MCA) 2009, which uses mean low tide. In practice this would only be an issue for those Ramsar sites, in the marine environment that were not already SSSI prior to the changes made by the MCA 2009. In a future without marine SACs or SPAs, a Marine Conservation Zone (MCZ) or other mechanism might be required to cover the thin strip in coastal waters beyond that over which a SSSI can be extended in order to establish a regulatory framework. A SSSI can only go to MLW whereas a Ramsar site can extend to 6m depth of sea.
6. The Ramsar convention accepts that loses may be necessary in the urgent 'national' interest. Similarly, Ramsar requires that provisions for compensation

or loss are put in place where there have been such losses. Without the Habitats Regulations, (which provide a framework for evaluation of whether loses can be tolerated where the public interest is overriding, with a subsequent requirement for compensation,) this would leave Ramsar sites vulnerable to a legislative gap unable to ensure that only developments that are clearly in the national interest are permitted. There is no equivalent step in the SSSI legislation, similar to stages 3 and 4 of the HRA process.

S.28G of WCA subjects statutory undertakers to a duty 'to take reasonable steps, consistent with the proper exercise of the authority's functions, to further the conservation and enhancement of the flora, fauna or geological or physiographical features by reason of which the site is of special scientific interest.'

Furthermore s.28i applies where the permission of a section 28G authority is needed before operations may be carried out. And before permitting the carrying out of operations likely to damage any of the flora, fauna or geological or physiographical features by reason of which a site of special scientific interest is of special interest, a section 28G authority shall give notice of the proposed operations to Natural England. The authority shall take any advice received from Natural England into account—
(a)in deciding whether or not to permit the proposed operations, and
(b)if it does decide to do so, in deciding what (if any) conditions are to be attached to the permission.

If Natural England advise against permitting the operations, or advise that certain conditions should be attached, but the section 28G authority does not follow that advice, the authority—
(a)shall give notice of the permission, and of its terms, to Natural England, the notice to include a statement of how (if at all) the authority has taken account of the Council's advice, and
(b)shall not grant a permission which would allow the operations to start before the end of the period of 21 days beginning with the date of that notice.

DTA Conclusions

The effect of sunsetting the Habitats Regulations would lead to a lower level of protection for Ramsar sites. The UK Government has a long standing policy to provide the same level of protection to Ramsar sites as is law for SPAs and SACS. Thus, without the Habitats Regulations Ramsar sites would not benefit from this standard. The SSSI framework is not designed to provide for a test for 'national interests' and 'compensatory measures' envisaged by Ramsar. S.28G and S.28I do not provide an equivalent with discretion remaining with decision makers, subject only to policy directions. A lack of coherence between the seaward boundaries might also give rise to future implementation issues in practice.

3.2 Bonn Convention on the Conservation of Migratory Species of Wild Animals (CMS or Bonn Convention) 1979

Box 3.2.1 Summary of treaty obligations – Bonn Convention

Bonn Convention was set up in 1979 under the auspices of the UN. The aim of the Bonn Convention is to conserve migratory species by ensuring that Contracting Parties take the necessary action, individually and collectively, to avoid species becoming endangered. It seeks to establish cooperation between joining parties for the conservation of migratory species that may currently be in an "unfavourable Conservation Status."

The UK ratified the Convention on Migratory Species in 1985 by notifying the Wildlife and Countryside Act 1981. The legal requirement for the strict protection of Appendix I species is provided by the Wildlife & Countryside Act (1981 as amended).

CMS is a framework convention which supports the development of agreements, and Memorandums of Understanding (MoU) to support cooperative action by two or more Countries. Parties to an Agreement or MoU do not have to be Parties to the main Convention.

The UK has currently ratified four legally-binding Agreements under the Convention:

- the Agreement on the Conservation of Populations of European Bats (EUROBATS);

- the African-Eurasian Migratory Waterbird Agreement (AEWA);

- the Agreement on the Conservation of Small Cetaceans in the Baltic, Irish and North Seas (ASCOBANS);

- the Agreement on the Conservation of Albatrosses and Petrels (ACAP).

The UK has also ratified the following MoUs: (non-binding)

- the Conservation and Management of Marine Turtles and their Habitats of the Indian Ocean (IOSEA Marine Turtle MoU), in respect of the British Indian Ocean Territory;

- the Conservation of Migratory Sharks;

- the Memorandum of Understanding on the Aquatic Warbler;

- the Conservation of Migratory Birds of Prey in Africa and Eurasia; and

- the Conservation of Cetaceans and their Habitats in the Pacific Islands Region, in respect of Pitcairn.

EUROBATS

This agreement is legally binding and amongst other measures requires that each party 'shall identify those sites within its own area of jurisdiction which are important for the conservation status, including for the shelter and protection, of bats. It shall, taking into account as necessary economic and social considerations, protect such sites from damage or disturbance. In addition, each Party shall endeavour to identify and protect important feeding areas for bats from damage or disturbance.'

AEWA

This agreement requires special attention to endangered species as well as those with an 'unfavourable conservation status.' It requires sites and habitats to be identified and encourage their protection, management, rehabilitation and restoration; and to ensure this forms a 'network.'

Box 3.2.2 Analysis of risks - Bonn Convention

The analysis suggests that the following matters are relevant to consider if EU retained legislation is sunsetted.

1. Bonn Convention is essentially a framework convention, which provides for contracting parties to draw up agreements for migratory species which are endangered or not at a favourable conservation status.
2. The definitions of conservation status align very closely to the Habitats Directives, as transposed into UK domestic law, having been the source of the Habitats Directive's original wording.
3. The Treaty text itself provides some clear and binding obligations to undertake measures to coordinate and achieve outcomes. It leaves the specific measures for contracting parties to decide. Our analysis has looked at the EUROBATS and AEWA agreements which similarly introduce binding requirements on contracting parties.
4. The main risk to meeting international obligation under Bonn, through the sunsetting of the Habitats Regulations and Offshore Regs is the removal of a legislative reference to 'Conservation Status' as a driver for measures and outcomes.
5. Regulation 16A of the Habitats Regulations provides for a duty on the appropriate authority
   "to manage the national site network with a view to contributing to the achievement of the management objectives of the national site network; being to maintain at, or where appropriate restore to, a favourable conservation status in their natural range (so far as it lies in the United Kingdom's territory, and so far as is proportionate)— (i)the natural habitat types listed in Annex I to the Habitats Directive; (ii)the species listed in Annex II to that Directive whose natural range includes any part of the United Kingdom's territory; (b)to contribute, in their area of distribution, to ensuring the survival and reproduction of— (i)the species of birds listed in Annex I to the new Wild Birds Directive which naturally occur in the United Kingdom's territory; (ii)regularly occurring migratory species of birds not listed in that Annex which naturally occur in the United Kingdom's territory; (c)to contribute, to securing compliance with the requirements of Article 2 of the new Wild Birds Directive

for the purposes of the duty in regulation 9(1) in relation to the species of birds in paragraph (b) within their area of distribution."

6. An overarching objective for the network (SSSI site series) is not found in the WCA 1981 terrestrially, or arguably the MCZ network under the MCA 2009. Whilst these domestic provisions would go some way to filling gaps through domestic derived legal frameworks achieving the outcomes envisaged by Bonn would require some clear policy direction.

DTA Conclusions

The effect of sunsetting the Habitats Regulations would lead to the loss of a legislative reference to conservation status (or the Article 2 Bird population equivalent) as an objective for conservation measures and furthermore as an objective of the national sites network to achieve.

3.3 The Convention on the Conservation of European Wildlife and Natural Habitats (the Bern Convention)

Box 3.3.1 Summary of treaty obligations – Bern Convention

The Convention on the Conservation of European Wildlife and Natural Habitats (the Bern Convention) was adopted in Bern, Switzerland in 1979, and came into force in 1982.

It is a binding international legal instrument for nature conservation that covers the European continent and some African states. The UK originally implemented through the Wildlife and Countryside Act 1981 (now as amended). A major driver for the introduction of the Habitats Directive itself was the EU being a signatory to the Bern convention. As might be expected there is considerable overlap between the obligations of the Habitats Directive and its parent Treaty.

The Bern treaty has been supplemented many times since its ratification, by a considerable number of resolutions and other instruments. Whilst these are strictly speaking 'soft law' many aspects are now reported on to the secretariat and are core parts of the conference programme of works.

Resolutions

- Resolution No. 1 (1989) on the provisions relating to the conservation of habitats
- Resolution No. 3 (1996) concerning the setting up of a pan-European Ecological Network
- Resolution No. 4 (1996) listing endangered natural habitats requiring specific conservation measures
- Resolution No. 5 (1998) concerning the rules for the Network of Areas of Special Conservation Interest (Emerald Network)
- Resolution No. 6 (1998) listing the species requiring specific habitat conservation measures
- Resolution No. 8 (2012) on the national designation of adopted Emerald sites and the implementation of management, monitoring and reporting measure

The stated aim of the Convention is

> “to conserve wild flora and fauna and their natural habitats;”

and Article 2 sets out that

> “The Contracting Parties shall take requisite measures to maintain the population of wild flora and fauna at, or adapt it to, a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements and the needs of sub-species, varieties or forms at risk locally.”

This wording is very similar to the main aim as set out in Art 2 of the Wild Birds Directive.

The Emerald network of Protected Areas is the ecological network set up under the Bern Convention.

In June 1989, the Standing Committee to the Bern Convention adopted an interpretative resolution [Resolution No. 1 (1989) on the provisions relating to the conservation of habitats] and three operative recommendations [Recommendations Nos. 14, 15 and 16 (1989)] aimed at the development of a network of areas under the Convention. A further recommendation [Recommendation No. 25 (1991) on the conservation of natural areas outside protected areas] was adopted at a later meeting of the Committee. In Recommendation No. 16 (1989) "on Areas of Special Conservation Interest" (ASCIs), the Standing Committee recommended Parties to "take steps to designate Areas of Special Conservation Interest to ensure that the necessary and appropriate conservation measures are taken for each area situated within their territory or under their responsibility where that area fits one or several of the following conditions.

Recommendation No. 16 (1989) requests that contracting parties “ensure, wherever possible that:

a. ASCIs "are the subject of an appropriate regime, designed to achieve the conservation of the factors" responsible for the designation of the area;

b. "the agencies responsible for the designation and/or management and/or conservation of ASCIs have available to it sufficient manpower, training, equipment and resources (including financial resources) to enable them properly to manage, conserve and survey the areas;

c. Appropriate ecological and other research is conducted, in a properly co-ordinated fashion, with a view to furthering the understanding of the critical elements in the management of ASCIs and to monitoring the status of the factors giving rise to their designation and conservation;

d. Activities taking place adjacent to such areas or within their vicinity do not adversely affect the factors giving rise to the designation and conservation of those sites."

Furthermore, the States are recommended to take steps, as appropriate, in respect of ASCIs to:

"a. Draw up and implement management plans which will identify both short- and long-term objectives (such management plans can relate to individual areas or to a collection of areas such as heathlands);

b. Regularly review the terms of the management plans in the light of changing conditions or of increased scientific knowledge;

c. Clearly mark the boundaries of ASCIs on maps and, as far as possible, on the ground;

d. Advise the competent authorities and landowners of the extent of ASCIs and their characteristics;

e. Provide for the monitoring of ASCIs and especially of the factors for which their conservation is important."

Compliance provisions

Investigation of compliance with Convention obligations is undertaken through a process of 'case files' supported by the Standing Committee of the Convention. Following complaints by third parties to the Standing Committee, a case file can be opened, analysing legal and policy reports prepared by independent experts.

The Groups of Experts set under the Convention also monitor the implementation of both the Treaty and the Recommendations adopted by the Standing Committee. These concern the conservation status of species or habitats, or specific conservation challenges.

Such reports are not binding as such but are made public.

Box 3.3.2 Analysis of risks - Bern Convention

The analysis undertaken through the desktop study suggests that these matters would arise on repeal of the Habitats Regulations.

1. Bern's main treaty obligations are adequately covered terrestrially by the Wildlife and Countryside Act. In the marine the MCA 2009 and MCZ would furthermore extend implementation into the Marine environment.
2. However, the provisions arising from the later made resolutions, to establish the Emerald network through a series of ASCIs (in particular Resolution 1,3,4,5,6,8,) would be put at risk should the Habitats Regulations and Offshore Regs be sunsetted.
3. It is not without some debate as to which provisions are strictly binding on contracting parties however in a situation where the UK has already committed to the establishment of the Emerald network and transferred a large number of sites for inclusion it would be difficult, politically, to then argue that the provisions are not considered to be obligations.
4. Unlike the Bonn Convention, the Bern Convention does not explicitly state that its Resolutions are binding. Therefore, we need to view all subsequent agreements and instruments through the lens of the Vienna Convention on the Law of Treaties. DTA Ecology does not hold expertise in the interpretation of International Legal Conventions but is of the 'lay-persons' view that once the decision is made to transfer any individual site (ASCI) to the Bern Secretariat, the provisions of Resolution 8 would be considered an obligation, politically if not legally. NE should take its own advice on this point. In such a scenario, sunsetting of the Habitats Regulations and Offshore Regulations[4], would leave the current UK sites on the Emerald network at risk of not receiving the protective measures envisaged by Resolution 8 – in particular the requirement for site based objectives, and to ensure their protection from threats with a regime that achieves a 'satisfactory conservation status of the species and habitats listed on Resolutions no 4 (19960 and no 6 (1998) .

[4] The Conservation of Offshore Marine Habitats and Species Regulations 2017 No 1012

DTA Conclusions

The Habitats Directive's provisions for site and species protection were designed by the EC and its advisory committees to meet what they considered in 1992 to be the requirements of the Bern Convention. Recognising that the Emerald network was 'developed' following the Habitats Directive, the effect of sunsetting the Habitats Regulations would leave the current UK sites on the Emerald network at risk of a lower level of protection and not receiving the protective measures envisaged by Resolution 8 – in particular the requirement for site based objectives, and to ensure their protection from threats with a regime that achieves a 'satisfactory conservation status of the species and habitats listed'.

3.4 The Convention for the Protection of the Marine Environment of the North-East Atlantic (the 'OSPAR Convention')

Box 3.4.1 Summary of treaty obligations – OSPAR Convention

OSPAR is a Treaty to protect the marine environment of the North-East Atlantic. OSPAR started in 1972 with the Oslo Convention against dumping and was broadened to cover land-based sources of marine pollution and the offshore industry by the Paris Convention of 1974. These two conventions were combined, up-dated and extended by the 1992 OSPAR Convention. The new annex on biodiversity and ecosystems was adopted in 1998 to cover non-polluting human activities that can adversely affect the sea. It is ratified by 15 national states & the EU,

The OSPAR Convention is characterised by the main Treaty articles providing for a number of outcomes that must (shall) be achieved in practice - but leaves to the Contracting Parties largely to decide on specific measures. Annex V to the Convention on the Protection and Conservation of Ecosystems and Biological Diversity of the Maritime Area Article 2a sets out that Contracting Parties to the Convention shall take the necessary measures to protect and conserve the ecosystems and the biological diversity of the maritime area, and to restore, where practicable, marine areas which have been adversely affected. The UK ratified OSPAR in 1998, and Annex V and Appendix 3 in June 2000.

The Sintra Ministerial Statement, adopted at the meeting of the OSPAR Commission in Sintra, Portugal (22-23 July 1998), included the commitment that the OSPAR Commission will promote the establishment of a network of MPAs to ensure the sustainable use, protection and conservation of marine biological diversity and its

ecosystems. This process has been enhanced by the Bremen Ministerial Statement, adopted at the first Joint Ministerial Meeting of the Helsinki and OSPAR Commissions in Bremen, Germany (25-26 June 2003), as it established the commitment to complete by 2010 a joint network of well-managed MPAs that, together with the Natura 2000 network, is ecologically coherent.

OSPAR's commitment to the precautionary principle was also expressed in its 2010 Bergen Statement which states that it will

> reaffirm the need for Contracting Parties to continue and to intensify their efforts to develop and facilitate the use of diverse approaches and tools for conserving and managing vulnerable marine ecosystems and protecting the biodiversity. This includes the establishment of marine protected areas (MPAs) and representative MPA-networks by 2012, in accordance with the Plan of Implementation of the World Summit on Sustainable Development, consistent with the United Nations Convention on the Law of the Sea (UNCLOS) and based on the precautionary principle and the best scientific information available.

At the OSPAR Ministerial Meeting in Cascais, Portugal (1 October 2021), Contracting Parties agreed to further expand the OSPAR network of MPAs and other effective area-based conservation measures (OECMs) to cover at least 30% of the whole OSPAR maritime area by 2030, which is over 4 million km2. The North-East Atlantic Environment Strategy (NEAES) 2030 sets out inter alia OSPAR's strategic objective S5.01. which states that:

> By 2030 OSPAR will further develop its network of marine protected areas (MPAs) and other effective area-based conservation measures (OECMs) to cover at least 30% of the OSPAR maritime area to ensure it is representative, ecologically coherent and effectively managed to achieve its conservation objectives.

It is recommended that sites in the OSPAR network have;

1. A management plan,
2. Management measures determined,
3. Adoption of management measures in practice

Whilst the designation of Marine protected areas under the OSPAR Convention is contained within a non-binding recommendation (Recommendation 2003/3) the UK

has agreed to the instruments at ministerial level and has made significant steps to implement in practice.

Box 3.4.2 Analysis of risks – OSPAR Convention

The analysis undertaken through the desktop study suggests that the following matters are relevant

1. Whilst the establishment of the ecologically coherent MPA network is contained in a recommendation - the requirement to take 'necessary measures' is binding. In a scenario where the Habitats Regulations are sunsetted, SACs and SPAs are not underpinned by any other designations, a significant reduction in the OSPAR MPA network would result. This would risk not achieving the CBD targets, and not achieving 30% by 2030, as well as the collective coherence of the OSPAR and Natura networks.
2. In terms of other domestic legislation available – existing SAC and SPA notified to OSPAR could be designated as MCZs, although this would take considerable time, resource and consultation, unless a legislative fix could be provided. The consideration of the Precautionary Principle might also need to be retained within the selection on MCZs.
3. The MCZ designation would likely provide an adequate level of protection envisaged by the OSPAR convention.
4. Sunsetting of the Offshore regulations would leave many marine species either unprotected or with much lower levels of protection.

DTA Conclusions

The main effect of sunsetting the Habitats Regulations would be to lose a significant coverage of the OSPAR marine protected area network unless existing SACs and SPAs were given a new designation. There are also risks to the protection of marine species outside territorial waters post 12nm which the legislative framework of the WCA 1981 and MCA 2009 would not adequately cover. The OSPAR requirement for the Precautionary Principle to be central to MPA network establishment would be lost.

3.5 Convention on Biological Diversity

Box 3.5.1 Summary of treaty obligations - CBD

The Conservation on Biological Diversity (CBD) 1992, was the first truly global instrument regulating the interaction of species and habitat, and of ecosystems, in a holistic way. United Nations Environment Programme perceived this 'biodiversity gap' and initiated negotiations in 1989. The CBD was presented for signature at the United Nations Conference on Environment and Development in Rio de Janeiro.

A marked feature of the 1992 CBD is that its provisions are mostly expressed as overall goals, rather than precisely defined obligations. Its language is also quite flexible in interpretation.

Like Bonn it is a 'framework' convention, laying down various guiding principles at the international level which states parties are required to take into account in developing national law and policy to implement its objectives, but to which can also be added subsequent ad hoc protocols on related issues laying down more specific and detailed requirements and standards.

The 1992 CBD specifically provided, in Article 28, that parties must cooperate in formulating protocols for adoption at the Conference Of Parties. To date two Protocols have been adopted: the 2000 Cartagena Protocol, trailed in Article 19(3) of the Convention; and the 2010 Nagoya Protocol on Access and Benefit Sharing.

There are only two Articles where the Habitats Regulations, are directly relevant to CBD implementation – these are Article 8 – In Situ Conservation and Article 14 Impact Assessment and minimizing adverse effects.

> Article 8. In-situ Conservation
>
> Each Contracting Party shall, as far as possible and as appropriate:
>
> (a) Establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity;
>
> (b) Develop, where necessary, guidelines for the selection, establishment and management of protected areas or areas where special measures need to be taken to conserve biological diversity;
>
> […]
>
> d) Promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings;

[…]

(f) Rehabilitate and restore degraded ecosystems and promote the recovery of threatened species, inter alia, through the development and implementation of plans or other management strategies;

Domestic SSSI and MCZ would provide a framework.

Article 14. Impact Assessment and Minimizing Adverse Impacts

1. Each Contracting Party, as far as possible and as appropriate, shall:

(a) Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures;

(b) Introduce appropriate arrangements to ensure that the environmental consequences of its programmes and policies that are likely to have significant adverse impacts on biological diversity are duly taken into account;

Box 3.5.2 Analysis of risks - CBD Convention

The analysis suggests that the following matters are relevant to consider if EU retained legislation is sunsetted.

1. Whilst the CBD is legally binding, the wording used leaves much discretion to contracting parties.
2. It is a framework convention whereby targets can be negotiated - albeit 'nonbinding' that sets up a process for dialogue and reporting.
3. Without the Habitats Regulations there are only two areas that are worthy of note.
    a. Firstly, although Article 14 requires an EIA/ HRA process it is much less rigorous than present legal requirements but is founded on a precautionary basis that proposed projects that are merely 'likely to have significant effects' require assessment. Sunsetting of both these provisions would require some other measure to be put in place, the trigger for which is precautionary.

b. Secondly, a very large area of the marine environment would no longer be covered by SAC or SPA designations, risking the UK's public commitment to achieving targets and future achievement of coverage of 30% Protected Areas by 2030.

DTA Conclusions

The main effect of sunsetting the Habitats Regulations, should the Town and Country Planning (EIA) (and the other EIA Regulations) also be lost, would be that there would be no legislative requirement for an EIA/ HRA procedure as required by Article 14. Furthermore, where SAC and SPAs in the marine were also lost the area of protected area the UK could no longer report to the CBD a significant extent of protected area in the marine environment.

4 Conclusions

The Wild Birds Directive and Habitats Directive were a response to parallel pressures and threats being felt outside the political boundaries of the EU. Furthermore, the Habitats Directive was the response of the EC in the 1990s to comply with the various international conventions to which the EC itself was a signatory. Thus, it is not surprising that there are many elements of associated provisions that overlap with non-EU international treaties and conventions, and that repealing of the Habitats Regulations risks the meeting of wider international nature conservation obligations.

The result of repealing the Habitats Regulations and Offshore Regulations would leave elements of international obligations either with a legislative void or with a lower level of legal protection. Whilst protected areas might still be covered by other domestic derived legislation, administrative measures would be required to operationalise (e.g., the replacement of SACs and SPAs in the marine by MCZ) and the level and security of protection would be much reduced. In many instances protection would cease to be guaranteed by law, and, as before the Habitats Directive, would ultimately be determined as a matter of policy. The periodic reports to the various international regimes would most likely illustrate this diminution in protection.

Box 4.1 Summary of Conclusions.

Conclusion	Summary of Issue
Conclusion 1	General - general reductions in protections across all non-EU international regimes as a result of repeal of the Habitats Regulations. A largely effective regime to achieve conservation outcomes would cease to be guaranteed by law with a reversion to protection as a matter of 'policy' in place prior to the introduction of the Habitats Regulations.
Conclusion 2	Ramsar – loss of all legal protections for Ramsar sites as if an SPA / SAC. Considerable lowering of protections whereby previously the UK considered the appropriate level of protection was under the Habitats Regulations and not the WCA.
Conclusion 3	Ramsar – no legal regime in place that ensures, as a matter of law, that wetland use does not adversely affect its ecological character.
Conclusion 4	Ramsar – loss of the Habitats Regulations provision that puts in place a transparent system to identify any 'likely' harm to Ramsar sites in view of its ecological character and weighs the 'urgent national interest' of allowing such proposals to proceed.
Conclusion 5	Bonn – loss of a legislative reference to reaching a favourable conservation status (or the Article 2 Bird population equivalent) as a legislative objective for conservation measures
Conclusion 6	Bern – loss of legal protection of the Emerald network as envisaged by Resolution 8; in particular, the requirement for site based objectives, and to ensure their protection from threats with a regime that achieves a 'satisfactory conservation status of

	the species and habitats listed on Resolutions no 4 (1996) and no 6 (1998) .
Conclusion 7	OSPAR – loss of a significant coverage of the OSPAR marine protected area network.
Conclusion 8	OSPAR - loss of protection regime for marine species outside territorial waters.
Conclusion 9	OSPAR - loss of the requirement for the Precautionary Principle to form a central element to MPA network establishment.
Conclusion 10	CBD – No domestic provision for a transparent EIA/AA procedure, the trigger for which is based on precaution and 'likely significant effect.'

5 Recommendations

Many international regimes are outcome based, relying on effective multi-component conservation systems to achieve their outcomes in practice. The specific design of each of the components are largely at the discretion of signatories. This is particularly the case for the Ramsar and Bern Conventions and (in the Marine) OSPAR. It is often for nations to decide what form each of the necessary components should take, to achieve a required outcome in practice.

Detailed analyses of nature conservation law have been published by several authors, for example, *Marren (2002),*[5] *Cook (2004)*,[6] *Bell and McGillivray (2008)*,[7]

[5] Marren, P. (2002), *Nature Conservation: A review of the Conservation of Wildlife in Britain*, Harper Collins London

[6] Cook, K. (2004) *Wildlife law: conservation and biodiversity*. Cameron May, London

[7] Bell, S. McGillivray, D. (2008) *Environmental law*. 7th edition. Oxford University Press, Oxford

Reid (2009)[8] *and Lyster (2010)*[9] and the law has often been critically reviewed and regularly commented upon in respected journals such as *The Journal of Planning and Environmental Law* (Sweet and Maxwell), '*In Practice: the Bulletin of the Chartered Institute of Ecology and Environmental Management*' and '*Ecos: A review of Conservation*', by the British Association of Nature Conservationists.

Taking a holistic view of international nature conservation obligations, both in terms of the hard and soft international instruments, through the lens of the critical components necessary for effective conservation systems, any redesigned framework for nature conservation following the repeal of EU derived legislation, would require the following list of components, which DTA Ecology considers to be necessary in a site-based nature conservation system for the protection of internationally / nationally important habitats and species in England, which merit the highest level of protection as required by non-EU international regimes.

Clear outcomes – geographically scalable objectives

Most international treaties focus on frameworks for delivering improved outcomes for ecosystems, habitats, species and the diversity within and between species. The intent of instruments is for cooperation to tackle unfavourable 'conservation status' and to reverse the fortunes of endangered species. Since this is central to a number of the treaties to which the UK is signatory – any domestic regime should have this approach at its centre.

Protected areas within coherent ecological networks

In addition to the protection regimes for species, protected areas – as part of a coherent ecological network - as a mechanism for conservation is fundamental to non- EU international regimes, either for habitats in their own right e.g., Ramsar and wetlands of international importance or as habitats of species.

Sites selected transparently for ecological value

[8] Reid, C.T. (2009), *Nature Conservation Law* Thompson W Green 3rd edition Edinburgh

[9] Lyster, S. (2010), *International Wildlife Law* Cambridge University Press, 2nd edition Cambridge

Respecting the sovereignty of contracting parties, whist there is some flexibility on which sites are selected for protection, most international regimes have adopted guidelines and recommendations which call for areas to be selected on the basis of science and ecological value (Ramsar, Eurobats, AWEA, Bern/ Emerald, OSPAR MPA network). Thus, any domestic system should have a scientifically rigorous, transparent and consistently applied approach to site designation and designation management, including:

- clearly stated and publicly / politically agreed objectives;
- evidence-based selection of the qualifying habitats and species to be protected;
- rigorous and transparent site / area selection criteria;
- comprehensive and consistent coverage over the specified area of jurisdiction of the system;
    - information about the site characteristics and environmental conditions which usually make each designated site unique;
    - a system for monitoring and updating the need for the designation and the designation process including extensions, new areas and de-designation of areas, and adaptation of the designation to changing circumstances; and
    - ‘public ownership’ through stakeholder engagement, publicity, news stories and media promotion.

Outcomes based – value of site objectives and management planning

Once protected areas are established international regimes are centred around achieving conservation outcomes, with contracting parties having the flexibility to decide the individual measures. Site objectives and management planning as a framework for the delivery of effective conservation measures is central. With this comes a requirement for the proper management, enhancement and where necessary the restoration of the protected species, habitats and natural features, by means of:

- engagement with landowners, occupiers and users of sites and those who value their amenities;

- coherent, comprehensive, integrated, site-specific conservation and restoration management planning;
- ‘carrots,’ including management agreements, nature reserve agreements, funding through grants and incentives, byelaws; and
- ‘sticks’ as a last resort through mechanisms such as Management Schemes, Management Notices, Nature Conservation Orders, Compulsory Purchase Orders (e.g., the Wildlife and Countryside Act).

Use of Assessment procedures

A framework for protection, with transparent impact (appropriate) assessment procedures. This necessitates consistency of protection, usually involving a scientifically rigorous and step-wise assessment of the implications of proposed changes that may affect the site, including:

- a clearly defined, usually step-wise process for the assessment of the effects of proposed developments, activities and operations and also ongoing uses, activities and operations, or other changes which may harm the qualifying features, triggered on a precautionary basis;
- a rigorous evidence-based methodology consistent with and proportionate to the purpose of the designation and the importance of the features protected;
- public consultation and access to information about the outcomes of assessments;
- consultation with and considerable weight being attached to the responses and advice of statutory bodies;
- training and empowering those responsible for implementing the regulatory controls and protective mechanisms;
- case law/ authoritative guidance which enhances the understanding of the interpretation and regularises the application of assessment process requirements and protective regimes.

Strong legislative / regulatory control, including

- mandatory compliance with the defined assessment process and protective regime;

- the appropriate application of the precautionary principle to protect the highest level of resources;
- the application of the sequential mitigation hierarchy (avoidance, prevention, cancellation, reduction, compensation and net benefit);
- regulatory control supported by strong policy protection, for example, through the land use planning system;
- meaningful and important consequences if assessment shows potentially significant adverse effects on the features to be protected, such as the refusal of planning permission where harm may outweigh the benefits, or the imposition of conditions which modify the proposal or the way it is to be carried out, to mitigate the potential harm;
- effective and adequately resourced enforcement with appropriate penalties for non-compliance including compulsory restoration;
- case law/ authoritative guidance which enhances the understanding of the interpretation and application of statutory controls;
- public support and understanding of the need for, and effect of, regulatory controls, for example, through stakeholder engagement and media coverage.

Importance of site monitoring and surveillance

- Site monitoring and Surveillance systems that transparently allow success of actions to be determined.
- Readily accessible information about designated areas, qualifying habitats and species and conservation objectives;
- Regular analysis of site, habitat or species condition and trends of change, including investigation of factors influencing changes;

Compliance procedures

Some treaties have compliance procedures to ensure outcomes are achieve in practice. It is necessary for strong governmental support through:

- Clearly defined ministerial and local government / statutory agency responsibilities;
- adequate levels of funding;

- clear expression of supportive policy relative to the designation and embedded into wider policies and strategies as necessary; and
- promotion (if necessary, by others) of high-quality conservation management and methodological guidance.

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