Information Notice

The Rt Hon Steve Reed MP
Secretary of State for Environment, Food and Rural Affairs
Seacole Building
2 Marsham Street
London
SW1P 4DF

By email only to: Secretary.State@defra.gov.uk

CMS-498

28 November 2024

Dear Secretary of State,

Investigation of the Secretary of State for Environment, Food and Rural Affairs' (the Secretary of State's) compliance with the Plant Protection Products Regulation EC No.1107/2009, the Environment Act 2021, the Conservation of Habitats and Species Regulations 2017, and the Wildlife and Countryside Act 1981 – Information Notice

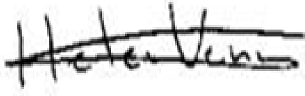
I write in respect of alleged failures to comply with environmental law by the Secretary of State. This concerns the 2023 and 2024 authorisations of the neonicotinoid, Cruiser SB, in light of the legal obligations set out in the Plant Protection Products Regulation EC No.1107/2009, the Environment Act 2021, the Conservation of Habitats and Species Regulations 2017, and the Wildlife and Countryside Act 1981. Following a decision of the OEP's Board, I enclose an Information Notice in connection with this which sets out the allegations, why these are considered to be serious and the information you are requested to provide.

Under section 35(3) of the Environment Act 2021 (the Act), you are required to respond in writing to this Information Notice and, so far as is reasonably practicable, provide the information requested in the notice. Under section 35(5) of the Act, your response should also respond to the alleged failures to comply with environmental law described in the notice and set out what, if any, steps you intend to take in relation to those allegations.

You must respond to this Information Notice by 28 January 2025, which is two months from the date of this notice, in accordance with section 35(4) of the Act.

I look forward to hearing from you.

Yours sincerely,



Helen Venn

Chief Regulatory Officer

For and on behalf of the Office for Environmental Protection

www.theoep.org.uk

Information Notice

Section 35, Environment Act 2021

Public Authority: Secretary of State for Environment, Food and Rural Affairs

Date of this Notice: 28 November 2024

Case name: Investigation of the Secretary of State for Environment, Food and Rural Affairs' compliance with the Plant Protection Products Regulation EC No.1107/2009, the Environment Act 2021, the Conservation of Habitats and Species Regulations 2017, and the Wildlife and Countryside Act 1981

Case reference: CMS-498

1. Background

1.1 The Office for Environmental Protection ('the OEP') may give an information notice to a public authority if the OEP has "*reasonable grounds*" for suspecting that the authority has failed to comply with environmental law and "*it considers that the failure, if it occurred, would be serious*" (section 35(1) Environment Act 2021). An information notice "*describes an alleged failure of a public authority to comply with environmental law*", "*explains why the OEP considers that the alleged failure, if it occurred, would be serious*" and requests information relating to the allegation (section 35(2) Environment Act 2021).

2. Description of alleged failures

2.1 This Information Notice relates to the following alleged failures by the Secretary of State for Environment, Food and Rural Affairs ('the Secretary of State'), acting through Defra / the Minister for Food, Farming and Fisheries ('the Minister'), to comply with environmental law:

2.1.1 unlawful failure to take into account the precautionary principle as a material consideration when granting the 2023 and/or 2024 authorisations of Cruiser SB ('the 2023 Authorisation' and 'the 2024 Authorisation') under article 53 Plant Protection Products Regulation EC No.1107/2009 ('the PPP Regulation'), in light of article 1(4) PPP Regulation;

2.1.2 unlawful failure to have due regard to the Environmental Principles Policy Statement ('EPPS') under section 19(1) Environment Act 2021 and interpret and proportionately apply the precautionary principle under the EPPS when granting the 2024 Authorisation in January 2024;

2.1.3 unlawful failure to carry out an appropriate assessment of the implications for European sites of the 2023 Authorisation and/or the 2024 Authorisation and consult Natural England and have regard to any representations it makes for the purposes of those assessments under regulation 63(1) and

(3) Conservation of Habitats and Species Regulations 2017 ('the Habitats Regulations');

2.1.4 when granting the 2023 Authorisation and/or the 2024 Authorisation, unlawfully failing to exercise its functions so as to secure compliance with the requirements of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (as amended) ('the Habitats Directive') and Directive 2009/147/EC of European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (as amended) ('the Birds Directive') and to have regard to the requirements of the Habitats and Birds Directives so far as they may be affected by the exercise of those functions, as required by regulation 9(1) and (3) Habitats Regulations;

2.1.5 when granting the 2023 Authorisation and/or the 2024 Authorisation, unlawfully failing to take reasonable steps to further the conservation and enhancement of Site of Special Scientific Interest ('SSSI') features when exercising functions that are likely to affect those features, as required by section 28G(1)-(2) Wildlife and Countryside Act 1981 ('WCA 1981'); and

2.1.6 unlawful failure to give notice to Natural England before granting the 2023 Authorisation and/or the 2024 Authorisation in view of likely damage to SSSIs and take any advice received into account, as required by section 28I(2) and (5) WCA 1981.

Failure to take into account the precautionary principle

2.2 The alleged failure at 2.1.1 above appears to have arisen due to a misunderstanding of the nature of the precautionary principle.

2.3 In relation to the 2024 Authorisation:

2.3.1 Defra's letter to the OEP dated 27 February 2024 noted that the Minister received advice on the precautionary principle and its application in Annex A '*Summary of key issues and expert advice on the application for emergency authorisation of 'Cruiser SB' for use on the 2024 sugar beet crop*' prior to making his decision (§6) and that "*it is apparent from Annex A that the Minister had due regard to the precautionary principle*" (§7).

2.3.2 The Minister's statement of reasons for the 2024 Authorisation noted that:

"*In carrying out this balancing exercise, the Minister considered whether to apply the precautionary principle, which underpins the Regulation. He concluded that <u>the precautionary principle did not need to be applied in the case of Cruiser because</u>, taking into account the assessment of HSE, the additional information from the CSA and the proposed mitigations/conditions, the <u>risks were sufficiently low and were outweighed by the benefits</u>.*" (emphasis added)

2.3.3 In Defra's letter of 27 February to the OEP, it was stated that "*proper account was taken of the precautionary principle*" and the Minister held that "*he was not required to exercise his discretion to apply the precautionary principle*" (§2).

2.4 In relation to the 2023 Authorisation:

2.4.1 While the Minister's statement of reasons for the 2023 Authorisation did not cite the precautionary principle, Defra stated in its letter to ClientEarth dated 10 January 2024 that his conclusion was "*consistent with*" and "*in accordance with*" the precautionary principle (§38e and §58d).

2.4.2 It has since been confirmed by Defra in a meeting with the OEP on 14 October 2024 that the same approach was taken to the precautionary principle for the 2023 Authorisation as for the 2024 Authorisation, by which we understand that the precautionary principle was not applied. This has not been confirmed in writing.

2.5 Except as indicated above, no further information has been provided by Defra on this issue since 14 June 2024 as it has not submitted a written response to the OEP's information request of that date.

2.6 There are two elements to the apparent misunderstanding of the nature of the precautionary principle, as follows:

2.6.1 First, the application of the precautionary principle under the PPP Regulation in these circumstances is mandatory, not discretionary.

2.6.1.1 Article 1(4) PPP Regulation provides:

> *"4. The provisions of this Regulation are underpinned by the precautionary principle in order to ensure that active substances or products placed on the market do not adversely affect human or animal health or the environment. In particular, Member States shall not be prevented from applying the precautionary principle where there is scientific uncertainty as to the risks with regard to human or animal health or the environment posed by the plant protection products to be authorised in their territory."*

2.6.1.2 Recital 8 PPP Regulation provides, so far as is relevant:

> "*(8) … The precautionary principle should be applied and this Regulation should ensure that industry demonstrates that substances or products produced or placed on the market do not have any harmful effect on human or animal health or any unacceptable effects on the environment.*"

2.6.1.3 Questions of the proper interpretation of the PPP Regulation must be taken in accordance with the assimilated case law under section 6 European Union (Withdrawal) Act 2018, which provides:

"*(3) Any question as to the validity, meaning or effect of any assimilated law is to be decided, so far as that law is unmodified on or after IP completion day and so far as they are relevant to it—*

(a) in accordance with any assimilated case law..."

2.6.1.4 In Case T-584/13 *BASF Agro and Others v European Commission*, the General Court rejected an argument that the precautionary principle should not be applied outside the emergency procedures provided for in articles 69-70 of the PPP Regulation. The General Court held that the precautionary principle was engaged in relation to all provisions of the PPP Regulation. Specifically, the judgment states at paragraphs [153] to [154]:

"153 It is apparent from recital 8 of Regulation No 1107/2009 and Article 1(4) thereof that all the provisions of that regulation are underpinned by the precautionary principle with a view to ensuring that active substances or products do not adversely affect, inter alia, the environment. It follows from this that any act adopted on the basis of Regulation No 1107/2009 is ipso jure founded on the precautionary principle.

154 Furthermore, the application of the precautionary principle is not limited to cases in which it is uncertain that there is a risk; the principle may also be applied where a risk has been proved to exist and where the Commission must assess whether that risk is acceptable or not (see paragraphs 71 to 73 above), or assess how it should be dealt with in a risk management context (see paragraph 74 above)."

The court also held at paragraph [60] that the precautionary principle is a process-based duty that requires a particular approach to be adopted to environmental risks but does not mandate a particular outcome.

2.6.1.5 In Case C-499/18 *Bayer CropScience AG v European Commission*, the court held that the precautionary principle entitles decision-makers to take protective measures where there is uncertainty whether a risk will materialise. The judgment states at paragraph [80]:

"*80 The precautionary principle means that where there is uncertainty as to the existence or extent of risks, including risks to the environment, protective measures may be taken without having to wait until the reality and seriousness of those risks become fully apparent…*"

2.6.1.6 In its letter to the OEP dated 27 February 2024 at §4, Defra relies on the second half of article 1(4) PPP Regulation to support its position that the precautionary principle is discretionary.

2.6.1.7 It is the OEP's view that the proper reading of article 1(4) PPP Regulation as a whole is that it is mandatory for decision-makers to apply the reasoning process required by the precautionary principle when making a decision under any provision of the PPP Regulation, but it is a question of discretion for the decision-maker whether to take more protective measures than it would otherwise have taken (where appropriate), justified by the precautionary principle.

2.6.2 Second, in his statement of reasons for the 2024 Authorisation, the Minister erroneously concluded that the precautionary principle did not need to be applied because the risks were "*sufficiently low*".

2.6.2.1 We note there is a discrepancy in Defra's letter dated 27 February 2024, which states the Minister determined the risks from authorisation were "*sufficiently certain and low*", in contrast to the wording of the actual decision, which referred to the risks being "*sufficiently low*".

2.6.2.2 The precautionary principle is concerned with whether potentially serious risks of environmental harm are certain or not, not whether they are high or low. Therefore, the Minister erred in concluding that the precautionary principle need not be applied because the risks were "*sufficiently low*".

2.6.3 The OEP therefore alleges that the Secretary of State unlawfully failed to take into account the precautionary principle as a material consideration when granting the 2023 Authorisation and/or the 2024 Authorisation.

Failure to have due regard to the Environmental Principles Policy Statement

2.7 The alleged failure at 2.1.2 above appears to have arisen due to a failure to properly understand the meaning of "policy" and the duty to have due regard to the EPPS in the Environment Act 2021 ("the EPPS duty").

2.8 Defra's letter dated 27 February 2024 stated that the EPPS duty did not apply to the 2024 Authorisation because it applies to the making of "policy" and not to operational decisions under existing policies (§9). No further information has been provided by Defra on this issue since 14 June 2024 as it has not submitted a written response to the OEP's information request of that date.

2.9 Section 19(1) Environment Act 2021 provides:

"*(1) A Minister of the Crown must, when making policy, have due regard to the policy statement on environmental principles currently in effect.*"

2.10 Section 17(2) Environment Act 2021 provides:

"*(2) A "policy statement on environmental principles" is a statement explaining how the environmental principles should be interpreted and proportionately applied by Ministers of the Crown when making policy.*"

2.11 Section 47(1) Environment Act 2021 provides, so far as is relevant:

"*(1) … 'policy' includes proposals for legislation, but does not include an administrative decision taken in relation to a particular person or case (for example, a decision on an application for planning permission, funding or a licence, or a decision about regulatory enforcement) …*"

2.12 The EPPS provides, so far as is relevant:

"*Policy can be broadly understood as an intended course of action adopted to achieve an objective. Examples of policy include: […] any other document that sets out a substantial change in approach to an established position*."

"Policy versus individual decisions

The duty is not designed to capture individual regulatory, planning or licensing decisions made by ministers or authorities acting on their behalf."

2.13 The view of the OEP is that the 2024 Authorisation is a decision that sets an "*intended course of action*" not specific to a particular person or case: the authorisation is wide-ranging, allowing the use of Cruiser SB across the country for 120 days. It also authorises the emergency use of a product that would otherwise be unauthorised, so the decision is a "*substantial change in approach to an established position*".

2.14 The decision of Lieven J in *R (Rights Community Action Ltd) v Secretary of State for Levelling Up, Housing and Communities* [2024] EWHC 1693 (Admin) at [43] is relevant, where the judge held the EPPS duty had to be met with "substance, rigour and an open mind". This turns both on the individual facts, and the broader purposes of the Environment Act 2021. The judge also appeared to accept the argument that circumstances may also impute a duty of inquiry (see [48]).

2.15 As such, it is the OEP's view that the decision to grant the 2024 Authorisation constitutes "policy" and the OEP alleges that the Minister failed to comply with the requirements to have due regard to the EPPS and interpret and proportionately apply the precautionary principle.

Failure to carry out an appropriate assessment

2.16 The alleged failure at 2.1.3 above appears to have arisen due to a failure to properly understand when an appropriate assessment must be carried out and when Natural England must be consulted in relation to that assessment.

2.17 Defra's letter of 10 January 2024 to ClientEarth states at §76 that the obligation to make an appropriate assessment is not triggered where the specific European sites on which there is likely to be a significant effect are not identifiable.

2.18 In contrast, prior to making his decision on the 2024 Authorisation, the Minister was provided with Annex A '*Summary of key issues and expert advice on the application for emergency authorisation of 'Cruiser SB' for use on the 2024 sugar beet crop*' which acknowledges that the requirement to make an appropriate assessment was triggered, but that such an assessment had not been carried out:

"*152. Any decision to give emergency authorisation for the use of Cruiser should include an assessment of impacts on sites designated as sites of special scientific interest ("SSSIs") under the Wildlife and Countryside Act 1981 ("WCA") and on sites designated as special protection areas ("SPA") and special areas of conservation ("SAC") under the Conservation of Habitats and Species Regulations 2017 ("the Habitats Regulations").*

153. We have considered for the current decision whether it would be possible to carry out a meaningful assessment of impacts on protected areas. Our conclusion is that this is not possible. It is not known where the treated seed will be used in relation to protected sites and SSSIs. There are many hundreds of protected areas in the part of England where sugar beet is grown.

154. However, it is worth noting that use of Cruiser (or any insecticide) within an SSSI is subject to consent from Natural England, if Natural England consider it relevant for the for that [sic] particular SSSI. Consent is unlikely to be given for Cruiser those [sic] SSSIs where the use of insecticides is a concern. So, the risks will be mitigated to a certain extent in areas where the risks to animals may be highest." (emphasis added)

2.19 No further information has been provided by Defra on this issue since 14 June 2024 as it has not submitted a written response to the OEP's information request of that date.

2.20 Section 63(1) Habitats Regulations provides:

"*(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—*

(a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and

(b) is not directly connected with or necessary to the management of that site,

must make an appropriate assessment of the implications of the plan or project for that site in view of that site's conservation objectives."

2.21 Section 63(3) Habitats Regulations provides:

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

2.22 Section 5(1)(b) Habitats Regulations provides, so far as is relevant:

"*(b) "the appropriate nature conservation body" means—*

(i) Natural England, in relation to England …"

2.23 In *R. (on the application of Mynydd y Gwynt Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2018] EWCA Civ 231, the Court of Appeal set out the following principles for appropriate assessments at paragraph [8]:

"*8. … (3) As to the appropriate assessment, "appropriate" indicates no more than that the assessment should be appropriate to the task in hand, that task being to satisfy the responsible authority that the project will not adversely affect the integrity of the site concerned. It requires a <u>high standard of investigation</u>, but the issue ultimately rests on the judgement of the authority…*

…

(5) Following assessment, the project in question may only be approved if the authority is convinced that it will not adversely affect the integrity of the site concerned. Where doubt remains, authorisation will have to be refused...

(6) Absolute certainty is not required. If no certainty can be established, having <u>exhausted all scientific means and sources</u> it will be necessary to work with <u>probabilities and estimates</u>, which must be identified and reasoned…

(9) The relevant standard of review by the court is the <u>Wednesbury rationality</u> standard, and not a more intensive standard of review." (emphasis added)

2.24 In Case C-461/17 *Holohan and others v An Bord Pleanála v National Parks and Wildlife Service* [2019] PTSR 1054, the Court of Justice of the European Union ("CJEU") held at paragraph [33]:

"*33. Under article 6(3) of the Habitats Directive, an appropriate assessment of the implications of a plan or project for the site concerned implies that, before the plan or project is approved, all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect the conservation objectives of that site must be identified, in the light of the best scientific knowledge in the field.*" (emphasis added)

2.25 It is the OEP's view that Defra cannot exempt itself from the requirement to make an appropriate assessment when there is an acknowledged risk of harm to the integrity of European sites simply because it is not known exactly where the treated seed will be used. It is known where it could be used, and the location of the European sites is known. It therefore appears there was a failure to comply with the requirements to carry out an appropriate assessment and to consult Natural England, and have regard to any representations Natural England makes, for the purposes of that assessment.

Failure to exercise functions so as to secure compliance with the Habitats and Birds Directives

2.26 The alleged failure at 2.1.4 above appears to have arisen due to a failure to properly understand the duty to secure compliance with and have regard to the requirements of the Habitats and Birds Directives when deciding whether to grant the 2023 Authorisation and/or the 2024 Authorisation.

2.27 Defra has not provided any information on this issue since 14 June 2024 as it has not submitted a written response to the OEP's information request of that date.

2.28 Regulation 9(1) and (3) Habitats Regulations provide:

"*(1) The appropriate authority, the nature conservation bodies and, in relation to the marine area, a competent authority must exercise their functions which are relevant to nature conservation, including marine conservation, so as to secure compliance with the requirements of the Directives.*"

"*(3) Without prejudice to the preceding provisions, a competent authority, in exercising any of its functions, must have regard to the requirements of the Directives so far as they may be affected by the exercise of those functions.*"

2.29 The correct interpretation of regulation 9(1) and (3) Habitations Regulations and the implications for relevant decision makers was set out in *Harris v Environment Agency* [2022] EWHC 2264 (Admin):

"*81. The duty to 'have regard' to X (where X is advice or guidance) is therefore different from a duty to act in accordance with X. In the present context, it is striking that the statutory language for the duties imposed by regulations 9(1) and 9(3) differ. Regulation 9(1) applies to the Secretary of State. It does not require the Secretary of State merely to have regard to the Habitats Directive.*

It requires the Secretary of State to secure compliance with the requirements of the Directive. Different statutory language is used in regulation 9(3). Instead of mandating compliance with the Directives it states only that regard must be had to their requirements. There is some force in Mr Dale-Harris' submission that this must impose a less onerous obligation than regulation 9(1).

…

85. … regulation 9(1) is concerned with the Secretary of State and the nature conservation bodies, who each have overarching responsibility for compliance with the Habitats Directive. That seems to me to explain the difference in language. This implies that the duty to 'have regard' here [in regulation 9(3)] *does not implicitly permit the Environment Agency to act in a way that is inconsistent with the Habitats Directive (in other words to have regard to the requirements of the Directive but then deliberately decide to act in a way that is inconsistent with those requirements). Rather, it recognises that the Environment Agency is one part of a complex regulatory structure and, depending on the issue, it may have a greater or lesser role to play. In the present context the Environment Agency is effectively the sole (and certainly the principal) public body that is responsible for determining whether abstraction licences should be granted, varied, or revoked. If it does not secure the requirements of article 6(2) in respect of those decisions, then no other public body is capable of filling the gap.*

…

87. For these reasons, in this context, the duty on the Environment Agency to have regard to the requirements of the Habitats Directive means that the Environment Agency must take those requirements into account, and, insofar as it is (in a particular context) the relevant public body with responsibility for fulfilling those requirements, then it must discharge those requirements. In other words, the scope for departure that is ordinarily inherent in the words 'have regard to' is considerably narrowed."

2.30 The OEP's view is that this "*considerably narrowed*" scope to depart from the requirements of the Habitats Directive applies to the emergency authorisation of Cruiser SB, given only the Secretary of State has control over the use of Cruiser SB (although the OEP recognises that there will be limited circumstances where other public bodies also have a controlling role, such as Natural England on the use on land within a SSSI).

2.31 Article 6(2) of the Habitats Directive, the provision implemented through the Habitats Regulations, provides:

"*2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been*

designated, in so far as such disturbance could be significant in relation to the objectives of this Directive."

2.32 This provision has been interpreted by the CJEU:

2.32.1 In Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* [2005] 2 CMLR 31, the CJEU confirmed that the Habitats Directive must be interpreted in accordance with the precautionary principle (paragraph [44]) and that Article 6(2) Habitats Directive establishes an obligation of general protection to avoid deterioration and disturbances which could have significant effects in the light of the Directive's objectives (paragraph [38]).

2.32.2 In Case C-418/04 *Commission v Ireland*, the CJEU confirmed at paragraphs [207]-[208] that article 6(2) Habitats Directive requires anticipatory measures to prevent deterioration before it occurs.

2.32.3 In Case C-399/14 *Grüne Liga Sachsen eV and Others v Freistaat Sachsen* [2016] PTSR 1240, the CJEU held at paragraphs [41]-[44] that where it appears there is a risk of deterioration of a protected habitat, article 6(2) Habitats Directive requires that "*appropriate steps*" are taken to avoid that deterioration.

2.32.4 In Case C-508/03 *Commission v United Kingdom* [2007] Env LR 1, the CJEU held at paragraph [104] that even if effects were not identifiable until a later stage in a multi-stage consenting process, the assessment should still be carried out at some stage in the course of that procedure.

2.33 As summarised in *Harris v Environment Agency* [2022] EWHC 2264 (Admin) at paragraphs [50], [98] and [100]:

"*50. This means that where it becomes apparent that there may be a risk to a protected habitat or species as a result of the licenced abstraction of water, article 6(2) imposes an obligation to review the applicable licences:* Grüne Liga *at [44]. The review must be sufficiently robust to guarantee that the abstraction of water will not cause significant damage to ecosystems that are protected under the Habitats Directive:* Grüne Liga *at [53].*

…

98. On the other hand, the authorities are clear that it is not sufficient to wait until damage to a site occurs before taking remedial action (see paragraphs 47-48 above). <u>If there is reason to believe that there is a risk of damage then it is necessary to take remedial steps</u>: Waddenzee *at [37], and* Grüne Liga *at [42]*

….

100. It would be contrary to the precautionary principle and the reasoning in Grüne Liga *if article 6(2) … could only be triggered once it becomes clear that a particular site is at risk by an identified mechanism from abstraction at a specific location. It is <u>sufficient that a generalised risk has been established</u> … to require 'appropriate steps' to be taken. What those steps might be depends on the particular circumstances … The <u>steps taken must, however, be sufficiently robust to guarantee</u> that abstraction of water <u>does not cause damage to ecosystems that are protected</u> under the Habitats Directive:* Grüne Liga *at [53].*" (emphasis added)

2.34 The OEP's view is that Defra accepts there is a risk of harm to the integrity of a European site (as set out in relation to the alleged failure at 2.1.3 above, given that the Annex A submission to the Minister prior to the 2024 Authorisation accepted the need for an appropriate assessment was triggered), and this triggers the Secretary of State's legal obligations under the Habitats Regulations to secure compliance with the Habitats and Birds Directives (and, as a matter of policy, the Ramsar Convention on Wetlands ('the Ramsar Convention')). This required the positive identification of appropriate action(s) and for steps to be taken to avoid, and/or mitigate the known risk of harm. As a first step, further information on the potential harm if the acknowledged risks eventuated was required.

2.35 The OEP therefore alleges that in granting the 2023 Authorisation and/or the 2024 Authorisation without taking appropriate steps to understand, and thereafter to avoid or mitigate the known risk of harm to European sites, the Secretary of State unlawfully failed to exercise his functions so as to secure compliance with the requirements of the Habitats and Birds Directives and to have regard to the requirements of those Directives.

Failure to further the conservation and enhancement of SSSI features

2.36 The alleged failure at 2.1.5 above appears to have arisen due to a failure to properly understand the duty to take reasonable steps to further the conservation and enhancement of SSSI features when deciding whether to grant the 2023 and/or the 2024 Authorisation.

2.37 In its letter of 10 January 2024 to ClientEarth, Defra stated that the duty to take reasonable steps to further the conservation and enhancement of SSSI features is only triggered on the exercise of the Secretary of State's functions affecting a specific SSSI or SSSIs, but that in the case of Cruiser SB, the effects on specific SSSIs could not be ascertained with the granularity required for the obligation to be triggered for the decision on the 2023 Authorisation and/ or the 2024 Authorisation:

"*68. The obligation to notify Natural England in s.28I(2) is qualified by the term "*operations likely to damage any of the flora, fauna [etc] by reason of which a site of special scientific interest is of scientific interest*". That term <u>assumes</u> that*

the s.28G authority will be in a position to assess the likelihood of particular damage to the very biodiversity for which a specific SSSI was designated as such. In other words, the assessment must be geographically specific.

69. Such a geographically specific assessment could not have been conducted prior to the Decision. The precise locations where treated seed might be used by ultimate land users was not sufficiently certain at that stage. Although broad regions in which sugar beet is grown were identified in the Application, the evidence before the Minister could not have identified the specific locations in which farmers would ultimately elect to drill seed treated with Cruiser SB. To the contrary, in Annex E it was recorded that there has been a reduction in the area grown of sugar beet over time (including because growers have decided no longer to grow the crop) and that the spatial distribution of virus levels is likely to be uneven meaning some growers experience greater than average losses and others less than average losses. Also some growers may choose to plant non-treated seed early rather than wait for the results of the prediction model (given that there can be benefits from early planting), which also makes it difficult to predict who will use treatedtr [sic] *seed (and where it will be used). The Minister was not in breach of s.28I(2) WCA.*

70. The structure of the statutory scheme under s.28I WCA is that, save for the situation in which Natural England allows the 28 day period following notification under s.28I(4) WCA to expire or otherwise curtails it, ss.28I(5) and (6) anticipate Natural England advising on the proposed grant of permission on an informed basis. Parliament cannot be taken to have imposed an obligation on s.28G authorities to notify Natural England if Natural England were not then to be able to discharge its advisory functions competently. The Complaint is wrong to suggest that, on the facts of the Application, Natural England would have been required to expend significant resources and time in the provision of advice in respect of any number of SSSIs that might hypothetically be affected by the grant of the emergency authorisation under art.53(1) of the Retained Regulation.

*71. Given that s.28G(1) WCA refers to the exercise of a s.28G authority's function being "*likely to affect the flora, fauna [etc] ... by reason of which a site of special scientific interest is of scientific interest*", the general obligation to take "*reasonable steps*" under s.28G(2) WCA is also triggered only upon the exercise of the s.28G's authority's functions affecting a specific SSSI/s. Indeed, the obligation in s.28G(2) WCA is described with reference to "*the site*". Paragraph 69 above is repeated: the effects on specific SSSIs could not be ascertained with the granularity required for the obligation in s.28G(2) WCA to be triggered when the Decision was made. The Minister was not in breach of s.28G(2) WCA.*" (emphasis added)

2.38 No further information has been provided by Defra on this issue since 14 June 2024 as it has not submitted a written response to the OEP's information request of that date.

2.39 Section 28G WCA 1981 provides, so far as relevant:

"(1) An authority to which this section applies (referred to in this section and in sections 28H and 28I as "a section 28G authority") shall have the duty set out in subsection (2) in exercising its functions so far as their exercise is likely to affect the flora, fauna or geological or physiographical features by reason of which a site of special scientific interest is of special interest.

(2) The duty is 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.

(3) The following are section 28G authorities—

(a) a Minister of the Crown (within the meaning of the Ministers of the M20 Crown Act 1975) or a Government department; …

(d) a person holding an office—

(i) under the Crown, …

(f) any other public body of any description."

2.40 In *R (Friends of the Earth England, Wales and Northern Ireland Limited) v The Welsh Ministers* [2015] EWHC 776 (Admin), the High Court held at paragraphs [131-133]:

"*131. As Mr Moffett submitted, that section 28G duty is more akin to the duty of an employer under what was section 6 of the Disability Discrimination Act 1995 …*

As Baroness Hale explained in Archibald v Fife Council [2004] UKHL 32 (at [57]), that entailed a measure of positive discrimination, in the sense that it imposed a positive duty on the employer to take steps that are in all the circumstances reasonable to help disabled people which they are not required to take for others.

132. Similarly here, the section 28G duty does not seek to protect SSSIs by weighting the desirability of their protection as against other factors, but by requiring relevant authorities to take reasonable steps 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". I gain some comfort that my view, based upon the wording of the relevant statutory provision, appears to be shared by the academic authors to whom I was referred (see Burnett Hall on Environmental Law, 3rd Edition (2012) at paragraph 9/087).

133. The question I have to consider is, therefore, not whether the Minister gave the desirability of conserving and enhancing these features particular enhanced weight, but whether she took reasonable steps to conserve and enhance those features. It is rightly common ground that "conserve and enhance" includes "not damage" the features." (emphasis added)

2.41 It is the OEP's view that Defra erroneously concluded that section 28G WCA 1981 was not engaged because it could not pinpoint which individual SSSIs potentially could be harmed. Where Defra knows the location of SSSIs, and the location of the potential risk (the location of farms that may grow sugar beet in the relevant growing season or in England), a lack of an ability to identify a specific impact on a specific site does not mean its obligations under section 28G WCA 1981 are discharged.

2.42 The OEP therefore alleges that the Secretary of State unlawfully failed to take reasonable steps to further the conservation and enhancement of SSSI features when approving the 2023 Authorisation and/or the 2024 Authorisation.

Failure to give notice to Natural England

2.43 The alleged failure at 2.1.6 above appears to have arisen due to a failure to properly understand the duty to give notice of proposed operations to Natural England 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 SSSI is of special scientific interest.

2.44 Having concluded that section 28G WCA 1981 was not engaged, as set out in relation to the alleged failure at 2.1.5 above, we understand that Defra did not give notice of the proposed approval of Cruiser SB to Natural England under section 28I(2) WCA 1981 before granting the 2023 Authorisation or the 2024 Authorisation. No further information has been provided by Defra on this issue since 14 June 2024 as it has not submitted a written response to the OEP's information request of that date.

2.45 Section 28I WCA 1981 provides, so far as relevant:

"*(1) This section applies where the permission of a section 28G authority is needed before operations may be carried out.*

(2) 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.

(3) Subsection (2) applies even if the operations would not take place on land included in a site of special scientific interest.

…

(5) 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.

…

(7) In this section "permission", in relation to any operations, includes authorisation, consent, and any other type of permission (and "permit" and "permitting" are to be construed accordingly)."

2.46 As set out in relation to the alleged failure at 2.1.5 above, it is the OEP's view that Defra erroneously concluded that section 28G WCA 1981 was not engaged. If it had not so erred, Defra should have given notice of the proposed authorisation of Cruiser SB for the 2023 and 2024 growing seasons to Natural England before it was granted, and the Minister should have taken into account any advice received from Natural England in deciding whether to grant each authorisation and what (if any) conditions should be attached to the permission.

2.47 The OEP therefore alleges that the Secretary of State unlawfully failed to give notice to Natural England and to take into account any advice received before granting the 2023 Authorisation and/or the 2024 Authorisation.

3. Seriousness

3.1 Our Enforcement Policy explains how we will assess the seriousness of an alleged failure to comply with environmental law and can be found in Annex A of our Strategy: here

3.2 We consider that the alleged failure at 2.1.1, if it occurred, would be serious for the following reasons:

3.2.1 Point of law – The alleged failure raises points of law of general public importance as Defra's understanding of the precautionary principle is of wider concern given it applies broadly across policymaking, as well as in the context of emergency authorisations under article 53 PPP Regulation.

3.2.2 Frequency of conduct – The conduct is frequent and ongoing as, despite the 2018 general ban of the use of Cruiser SB, Defra has granted emergency authorisations for Cruiser SB in four consecutive years (2021, 2022, 2023 and 2024, of which it was used in all years but 2021). There is a risk that this cycle continues.

3.2.3 Behaviour of public authority – In its correspondence with the complainant, ClientEarth, and with the OEP, Defra has made statements that give rise to

inconsistencies and a lack of clarity in its reasoning relating to the application of the precautionary principle.

3.2.4 Risk of harm – There is a potential risk of harm to the natural environment. The Health & Safety Executive and the Expert Committee on Pesticides considered that there was a potential harm to wildlife from granting the 2023 Authorisation and the 2024 Authorisation and that the potential adverse effects to bees could not be excluded to a satisfactory level. Natural England raised concerns about the impact on non-crop flowering plants and pollinators, and Defra's Chief Scientific Adviser advised that there was clear and abundant evidence that neonicotinoids are harmful to species other than those they are intended to control, particularly to pollinators, that the general ban on use was well justified scientifically and environmentally, but there was likely to be an acceptable level of risk to bees with regards to the 2023 and the 2024 Authorisation.

3.2.5 Other relevant factors – There is a risk that emergency authorisation will be granted on the same allegedly unlawful basis again in 2025 or beyond if the current approach is maintained. In the OEP's view, the likelihood of this risk is increased by the fact that Defra has not addressed the alleged failures to date or provided a written response to the OEP's information request dated 14 June 2024.

3.3 We consider that the alleged failure at 2.1.2, if it occurred, would be serious for the same reasons as outlined at 3.2 above. The failure to have due regard to the EPPS also raises a point of law of general public importance, because there is a need for clarity on the circumstances when the duty to have due regard to the EPPS when making policy is engaged and this is, in addition to what is said above, a reason why this alleged failure is serious.

3.4 We consider that the alleged failure at 2.1.3, if it occurred, would be serious for the same reasons as outlined at 3.2 above. The failure to carry out an appropriate assessment also raises a point of law of general public importance to clarify the extent of the duty to perform an appropriate assessment in the case of regional projects and plans, or where there is uncertainty about where the project or plans will take place. In relation to the behaviour of the public authority, from the currently available information, it does not appear that Defra took steps to determine where Cruiser SB would be used, the potential impacts on any European sites if it were used, or to find an alternative way to assess the potential impacts of its use across a region. The failure has wider implications given that Habitats Regulations assessments are used for a wide range of projects and plans. These, in addition to what is said above, are reasons why this alleged failure is serious.

3.5 We consider that the alleged failure at 2.1.4, if it occurred, would be serious for the same reasons as outlined at 3.2 above.

3.6 We consider that the alleged failure at 2.1.5, if it occurred, would be serious for the same reasons as outlined at 3.2 above.

3.7 We consider that the alleged failure at 2.1.6, if it occurred, would be serious for the same reasons as outlined at 3.2 above.

4. Our request for information

4.1 Please provide the following information in relation to the alleged failure:

4.1.1 The Secretary of State's response to each of the alleged failures to comply with environmental law set out at 2.1.1 to 2.1.6 above.

4.1.2 Any steps the Secretary of State intends to take in relation to each of the alleged failures to comply with environmental law set out at 2.1.1 to 2.1.6 above.

4.1.3 As previously requested in the OEP's information request dated 14 June 2024, in relation to the allegations at 2.1.1 and 2.1.2 please explain how the Minister considered that he had discretion as to whether to apply the precautionary principle, such that he reached the conclusion it did not need to be applied when making his decision on the 2023 Authorisation and/or the 2024 Authorisation.

4.1.4 The basis on which the conclusion was reached that the EPPS duty was not relevant to the 2024 Authorisation.

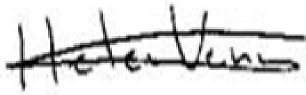
4.1.5 As previously requested in the OEP's information request dated 14 June 2024, in relation to the allegations at 2.1.3 to 2.1.6 please explain what analysis was carried out and how Defra came to the conclusion that it was not possible and therefore not necessary to carry out an appropriate assessment under the Habitats Regulations, and not necessary to give notice to Natural England before taking the decisions on the 2023 Authorisation and the 2024 Authorisation.

4.1.6 Confirmation of whether the Secretary of State conducted / commissioned correspondence and / or advice, internal or between Defra, Natural England, and/or any other body, on the potential impact of the 2023 Authorisation and/or the 2024 Authorisation to protected sites under the Habitats and/or Birds Directive and/or Ramsar Convention and WCA 1981. If so, please provide that information.

4.2 We draw your attention to your obligations under section 27 Environment Act 2021 regarding cooperation and the candid disclosure of information. You should also note section 43 Environment Act 2021, concerning the confidential handling of any information you provide to us.

5. Date for response

5.1 You must respond to this Information Notice within two months of the date it is given, which in this case is by 28 January 2025.



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