

ADVICE TO THE OFFICE FOR ENVIRONMENTAL PROTECTION

# THE APPLICATION OF THE HABITATS DIRECTIVE TO DEROGATION DECISIONS UNDER THE NITRATES DIRECTIVE

**STATUS: FINAL VERSION**

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# Executive Summary

## *Background*

The purpose of the report is to explore the practical implications of DAERA's decision-making in the context of compliance with its duties under the Habitats Directive. In particular in respect of decision-making for 'derogation' applications under regulation 39 of the Nutrient Action Programme Regulations (Northern Ireland) 2019 as relevant to the application of nutrients onto land. At the time of writing, the Northern Ireland authorities are proposing to adopt a position whereby all nitrate derogation decisions fall within the scope of Article 6(3) and are subject to a full Habitats Regulations Assessment (HRA). The proposed approach to treat all derogation applications as 'new' projects is a precautionary one which was identified through the HRA of the NAP itself.

**DTA Ecology would advise caution in connection with the approach to the HRA of the NAP and does not accept the premise that subjecting each nitrate derogation to an assessment under Article 6(3), or HRA, at an individual farm level is necessary to enable the NAP to be adopted in compliance with the Habitats Regulations.**

## *The provision of Article 6 of the Habitats Directive*

It is the opinion of DTA Ecology that a correct approach to compliance with the Habitats Directive for derogation applications requires consideration of Article 6 as a whole, in light of the overall aims and objectives of the Habitats Directive. Article 2 of the Directive explains the overall aim of the Directive with reference to the maintenance and restoration of natural habitats and species to a favourable conservation status, and provides that measures taken to achieve this aim shall take account of economic, social and cultural requirements and regional and local characteristics.

Article 6 of the Habitats Directive provides the legal framework for the protection of designated sites. There is a distinction between Article 6(1) and (2) which define a regime of general *proactive* obligations with a focus on delivery of restoration duties, and Article 6(3) and (4) which define a step-wise *reactive* assessment procedure which applies when a new plan or project is being considered or proposed by a competent authority, with a focus on avoiding damage (or compensating for any damage where a public interest overrides a conservation interest). Taking the current situation as a baseline position, Articles 6(1) and (2) are inherently backward-looking, whilst 6(3) and (4) are forward-looking.

The proposed application of Article 6(3) to derogation applications in the absence of any commitment to the parallel delivery of duties under Articles 6(1) and (2) therefore requires careful consideration. A more coordinated approach to Article 6, which recognises the role of Article 6(2) for ongoing or recurring activities alongside the role of Article 6(3) has implications for how derogation applications are dealt with.

## *The question of continuity*

It is the advice of DTA Ecology that an application under regulation 39 can correctly be recognised as a project for the purpose of Article 6(3). Having said that, the Courts have established that some activities which might, in principle, be recognised as 'projects' may nevertheless be exempt from assessment obligations under Article 6(3) on the basis that they are ongoing or continuous in nature. Subjecting such activities to assessment under Article 6(3) may therefore be vulnerable to legal

challenge and caution is required. When considering the implications of the DTA interpretation of relevant case law for the determination of nitrate derogation applications under regulation 39, three scenarios which may reasonably be envisaged are identified:

Scenarios which may arise in respect of nitrate derogation applications and implications for scope of duties under a 'hybrid approach' to Article 6		
Scenario		Scope of duties under Article 6
A	A 'new' derogation application under regulation 39 from a farm which has not previously been subject to a derogation.	Article 6(3) applies to the whole application.
B	A 'renewal' application under regulation 39 from a farm which is currently subject to a derogation. There is continuity and the activity is classified as 'one and the same',	Exempt from Article 6(3) but Article 6(2) applies. Where the continuation may represent a risk to a European site, appropriate steps to avoid deterioration should be taken (refer section 4 below).
C	A 'renewal' application under regulation 39 from a farm which is currently subject to a derogation. Whilst the activity is recurring there is no continuity and it cannot be classified as 'one and the same'.	Both Articles 6(2) and 6(3) applies. The application is subject to Article 6(3) but the need for appropriate assessment is determined on the basis of the effects arising from the change which will occur (compared to the earlier recurring activity).  Residual effects associated with the continuation of the established recurring activity fall within the scope of Article 6(2). Where it may represent a risk to a European site, appropriate steps to avoid deterioration should be taken (refer section 4 below).

DTA Ecology advises that the alternative 'hybrid approach' warrants further scrutiny as a potential alternative to the current proposed approach of undertaking a full HRA for all derogation applications. **It is important to recognise that a recurring activity being exempt from Article 6(3) does not mean that it escapes scrutiny under Article 6.** Agricultural practice involves a range of recurring activities which were 'ongoing' prior to the Directive coming into force, or prior to any requirement for consent or permission which might trigger the application of the Directive. Any recurring continuous agricultural activities which represent a risk of deterioration to a European site falls within the scope of Article 6(2) along with other ongoing threats and pressures that may also give rise to a risk of deterioration. Ongoing agricultural activities may also be relevant to duties under Article 6(1).

How the concept of 'continuity' is approached is important when considering the practical implications of a hybrid approach. On balance, and placing primary importance on the ability of the Directive to achieve its objectives to maintain or restore habitats to a favourable conservation status, whilst avoiding legal formalism, **it is the view of DTA Ecology that a reasonable argument could be made that the question of continuity for derogation applications could be approached in light of the previous application baseline.** The broader scope of Article 6(2) means that such an approach is more likely to deliver meaningful progress in achieving the Directive's objectives

compared to an approach which focuses on Article 6(3). This approach is also preferred in view of practical feasibility for competent authorities and the realities of handling a large number of applications being submitted at the same time. Some case scenarios are provided in Appendix 3 to illustrate the practical implications of different approaches.

The benefits to decision-making under Article 6(3) from a hybrid approach to derogation decisions, and the need to proactively deliver on wider duties under 6(1) and (2), will extend beyond the agricultural sector and will be relevant to all plans and projects which represent a risk to a European site through increased nutrient loading. For example, housing development which connects to wastewater treatment works which discharge into an affected catchment.

By way of a summary, in the opinion of DTA Ecology:

- a hybrid approach which explicitly requires the delivery of wider duties better respects the underlying intention of the Habitats Directive, which assumes that duties under 6(1) and (2) will be triggered where a site requires restoration.
- A failure to comply with duties under 6(1) and (2) unfairly penalises the delivery of plans and projects under Article 6(3) in a manner which the Directive did not anticipate.
- The proposed hybrid approach also avoids risks from excessive costs associated with the delivery of environmental improvements which might arise from supply and demand market forces in a private market.
- A centrally coordinated approach, potentially involving the exercise of statutory powers will ensure improvements are delivered in a cost effective manner, creating opportunities for integrated mitigation options.

#### *How might a hybrid approach work*

A perception can arise that associated duties under the Habitats Directive are necessarily separate and distinct (i.e. additional) to other statutory duties. In other words engaging with 6(1)/(2) represents an additional burden over and above existing initiatives and obligations. Whilst this perception is perfectly understandable at face value, it is a misconception.

In understanding wider implications of Article 6(1)/2), it is the advice of DTA Ecology that it is first necessary to recognise that, whilst the scope of measures/steps under 6(1)/(2) can be broad, there is potential for overlap with measures already being taken in respect of other Directives or duties. It is therefore the case that measures currently being taken might legitimately be included within a list of 'measures/steps' under Articles 6(1) and (2) even if they were not originally 'labelled' as such. For example: measures in the Nutrient Action Programme to deliver reductions in overall nutrient loading; planned improvements in priority areas under UWWTD; a locally targeted Programme of Measures under a River Basin Management Plan; or actions identified in the Northern Ireland Ammonia Strategy. The ability to include existing measures within a list of measures under wider Article 6 duties has been recognised in EC guidance 'Farming for Natura 2000' which states that conservation measures under Article 6(1) '*may not necessarily be new, as existing measures can also contribute to achieving the conservation objectives*'.

An absence of formally defined 'measures/ steps' under 6(1) and/or (2) does not mean that proactively engaging with such duties will necessarily require new steps to be taken. A logical step-wise approach to Article 6(1)/(2) is proposed below:

- Step 1: identify what measures are already being taken which have the objective of reducing or controlling nutrient inputs.

- Step 2: Estimate the improvements which are anticipated to be achieved by the measures already being implemented or secured. This will be on the basis of the measures as currently implemented and recognising a degree of inherent uncertainty.
- Step 3: Evaluate the sufficiency of existing measures to achieve conservation objectives and/or avoid deterioration to habitats. NOTE that avoiding deterioration to habitats is different to a non-deterioration policy in respect of water quality under WFD .
- Step 4: If existing measures are insufficient, identify and implement further measures/steps, as appropriate.

A need to identify further measures/steps under step 4 may require entirely new initiatives, but further measures might also include changes in how existing measures are implemented. Appropriate steps under 6(2) may also involve enforcement and compliance with existing obligations and duties. In some cases adaptation of existing initiatives and/or enforcement of existing requirements may not be sufficient and necessary measures/steps may also involve entirely new initiatives.

When evaluating the confidence that deterioration will be avoided, arguments that the ‘no reasonable scientific doubt’ test (which applies under Article 6(3) in respect of new plans and projects) should apply lack coherence. This is due to the inherent differences between an ongoing activity and an aspirational one. Article 6(2) applies to ongoing activities which already represent a risk to a site and is an ongoing duty (rather than one which applies at a specific point in time as is the case with Article 6(3)). Where a site is subject to deterioration, in order to achieve the overall objective of the Directive to restore habitats and species to a favourable conservation status, the key duty is to be actively taking positive steps. The actual delivery of improvements can be approached in an adaptive manner, with steps being reviewed and refined in accordance with monitoring and available evidence until the desired outcome is achieved. An approach which seeks to apply the integrity test to ‘appropriate steps’ before they can be implemented, serves no useful purpose where adverse effects are already happening. Constraining the delivery of steps to deliver restoration until it can be demonstrated, beyond reasonable scientific doubt, that they will be sufficient will only frustrate the ability of the Directive to achieve its objectives.

When designing steps to be taken to avoid deterioration under Article 6(2), and/or restoration steps under Article 6(1), it is the advice of DTA Ecology that:

- A requirement to take appropriate steps to avoid deterioration or to implement restoration measures is triggered on the basis of a risk of deterioration / damage. A precautionary approach is taken to the need to implement measures which provides equivalent protection to that afforded under Article 6(3).
- Once the need for steps/measures has been identified the regime to be followed should be specific, coherent and complete, based on best available information. Uncertainty should be addressed by applying precautionary rates to variables.
- The proactive duties under Article 6(1) and (2) are ongoing in nature; steps to avoid deterioration and deliver restoration should be subject to regular review and adapted or refined as necessary until the required outcomes are achieved.

#### *Decision-making for derogation applications under a hybrid approach*

Where a nitrate derogation application is submitted it is a project for the purpose of Article 6(3). The first question for a decision-maker concerns the matter of continuity (refer section 3). The question of continuity will inform which Article 6 duties are then engaged. Where a derogation application

falls entirely within Article 6(2), it is exempt from the 6(3) assessment obligations. Further detail will need to be agreed by the relevant authorities but, in principle, an application can be granted where a decision-maker is satisfied as to the sufficiency of the approach to Article 6(2) duties. This might reasonably involve the identification and implementation of necessary steps to avoid deterioration against pre-agreed criteria. It can reasonably be anticipated that an approach might also involve clear delivery milestones.

Where a derogation application falls wholly, or partially, within the scope of Article 6(3), these tests are applied as normal. However, where a suite of measures are identified under Article 6(1) and (2), and associated with agreed delivery milestones, decisions in respect of plans and projects under Article 6(3) can then be made in light of an improving baseline condition. The key question under the integrity test becomes whether a new plan or project will undermine or otherwise hinder the achievement of the conservation objectives through the parallel wider duties. As such, where parallel measures and steps are being implemented under wider 6(1) and (2) duties the potential for an integrated approach to the delivery of necessary mitigation can be explored. With this in mind a potential approach to the assessment of new plans and projects (including non-derogation farm consents or permission) might be linked to the delivery of duties under Article 6(1) and (2).

It is important to recognise that the Directive did not anticipate Article 6(3) being an absolute barrier to growth where a site is not in a favourable conservation status. If the application of the integrity test to new development proposals has regard to measures under 6(1) and (2), which the Directive clearly anticipates should be progressing in parallel, it is reasonable to argue that the benefits of a more flexible approach to decision-making would act as an incentive to authorities to identify and deliver sufficient measures under Article 6(1) and (2). A similar approach in respect of managing phosphates in SAC rivers in Wales has recently been published by the Welsh Government<sup>1</sup> and provides a helpful reference point.

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<sup>1</sup> Welsh Government Guidance <https://www.gov.wales/development-special-areas-conservation-sac-rivers-planning-guidance> and associated interim policy statement <https://www.gov.wales/development-special-areas-conservation-sac-rivers-interim-planning-policy-statement>

# 1 Introduction

## 1.1 Background

- 1.1.1 The purpose of the report is to explore the practical implications of DAERA’s decision-making in the context of compliance with its duties under the Habitats Directive. In particular in respect of decision-making for ‘derogation’ applications under regulation 39 of the Nutrient Action Programme Regulations (Northern Ireland) 2019 (hereafter referred to as the NAP Regulations) as relevant to the application of nutrients onto land.
- 1.1.2 Regulation 9 of the NAP regulations imposes a general limit on the application of total nitrogen in livestock manure and anaerobic digestate to a land holding of 170kg/ha/yr. An exception is allowed to this general limit where regulation 39 applies. Regulation 39 allows an application to be submitted to DAERA to apply up to 250kg/ha/yr on a grassland holding according to controls provided for in regulation 40 and schedule 8. An application under regulation 39 is commonly referred to as a ‘nitrates derogation’, and is made at the level of an individual farm.
- 1.1.3 The public consultation on the NAP (2026-2029)<sup>2</sup> identifies potential risks of contravention with the Habitats Regulations from nitrate derogations decisions (referred to as DER 4). DER 4 proposes to include (in the updated NAP Regulations) a cross reference to the Habitat Regulations to enable additional conditions to be included in a derogation where required following completion of a Habitats Regulations Assessment (HRA). The rationale for DER 4 is set out in box 1.1.1 below:

**Box 1.1.1: Rationale for proposed DER 4 amendment to NAP Regulations (emphasis added)**

The Department is at risk of contravention of the Habitat Regulations in the application of NAP without giving due consideration to the impact on habitats through the land application of manures.

As the Derogation permits a higher amount of manure to be spread on land, it is essential that as part of the application process that due consideration is given to the potential impacts of this on habitats and species within Designated sites.

In order to ensure that a derogation application is not having a significant impact, the Department is proposing to include in the regulations provisions to ensure that the application may be subject to an appropriate assessment under the Habitats Regulations. This may result in some additional restrictions to the land application of manures and derogation requirements in certain areas.

**This will mean that all Derogation applications will be screened for likely significant effects on designated habitats across Northern Ireland. Those applications which have the potential to have significant effects on a designated site will require further assessment under the Habitats Regulations.**

<sup>2</sup> <https://www.daera-ni.gov.uk/consultations/public-consultation-proposed-nutrients-action-programme-2026-2029>

- 1.1.4 It is therefore the case that, at the time of writing, the Northern Ireland authorities are proposing to adopt a position whereby all nitrate derogation decisions fall within the scope of Article 6(3).
- 1.1.5 The purpose of this separate report is to provide further specific advice to the OEP in respect of the requirements under the Habitats Regulations where nitrate derogation applications are determined by DAERA under regulation 39.
- 1.1.6 For purpose of clarification, and to avoid misunderstanding, in the advice provided by DTA Ecology to the Office for Environmental Protection (OEP), any reference to ‘derogation’ is a reference to an individual derogation decision taken at a farm level following an application by an individual farmer to a relevant authority (DAERA in Northern Ireland). In terms of compliance with the Habitats Directive a single decision relating to the continuation of derogation-based approach across Northern Ireland as a whole, is a different proposition to numerous decisions relating to individual derogations at a farm level.

### *The proposed approach*

- 1.1.7 The current proposed approach as set out in DER 4 involves the application of the Article 6(3) tests to all nitrate derogation applications. There are over 400 farms operating under a nitrates derogation in Northern Ireland, and derogations are applied for on an annual basis.
- 1.1.8 The proposed approach to treat all derogation applications as ‘new’ projects is a precautionary one which was identified through the HRA of the NAP. It is precautionary as new activities are subject to stricter assessment requirements compared to existing activities. The view that a precautionary approach of applying Article 6(3) to derogation applications will limit the risks of legal challenge is understandable; the case law in this area requires careful consideration and has been widely interpreted in a precautionary manner.
- 1.1.9 **DTA Ecology would advise caution in connection with the approach to the HRA of the NAP and does not accept the premise that subjecting each nitrate derogation to an assessment under Article 6(3), or HRA, at an individual farm level is necessary to enable the NAP to be adopted in compliance with the Habitats Regulations.**
- 1.1.10 The situation is also compounded by the fact that previous derogation decisions were taken without reference to duties under the Habitats Regulations, and case law concerning the rectification of flawed assessment decisions is also not straightforward.
- 1.1.11 The structure of the remainder of this advice is summarised below.
- Section 2 of the report provides further detail in respect of wider duties under Article 6 of the Habitats Directive and the extent to which the achievement of objectives of the Habitats Directive, and the achievement of conservation objectives, may rely upon wider appropriate steps being taken on other sources of nutrient loading (e.g. wastewater treatment works and non-derogation farms).
  - The question of continuity is addressed in section 3. The approach effectively treats each derogation application as a new ‘project’ for the purpose of the Habitats Directive, such that the HRA tests set out in regulation 43 apply in full as a matter of law to each application. With reference to case law decisions concerning the relevance of Article 6(3) to *ongoing* activities, it is the opinion of DTA Ecology that a degree of caution is advised in this assumption. Some case scenarios are provided by way of illustration in appendix 3 of how the question of continuity and wider Article 6 duties might influence outcomes.

- Section 4 proposes an alternative approach which involves a hybrid approach to Articles 6(1), (2) and (3).
- This advice is drafted from a practitioner perspective. It has been subject to review by the legal firm Freeths and a high level summary is provided in section 5.

## 1.2 Limitations

- 1.2.1 The application of the Habitats Directive to the permitting of ongoing activities is the subject to case law and understanding has evolved over time. The questions to be addressed fall between the cracks of different court decisions (in that no court has ever directly dealt with the issue meaning the provision of advice involves careful interpretation of a number of related decisions). Any approach to be taken by statutory agencies will therefore be a matter of interpretation applying professional judgement and common sense.
- 1.2.2 This advice represents the professional opinion of DTA Ecology, following a review of relevant case law decisions in view of practitioner experience, with reference to the overarching aims and objectives of the Habitats Directive. It is to be read and interpreted accordingly. Ultimately it will be for competent authorities to decide on an approach to take and this advice is provided by way of informing associated deliberations. A DTA preferred approach is put forward but any final decision rests with a relevant competent authority, who may prefer a different approach.

## 2 Implications of wider duties under 6(1) and (2) to decision-making for nitrate derogations under Article 6(3).

### 2.1 Introduction

2.1.1 It is the opinion of DTA Ecology that a correct approach to compliance with the Habitats Directive for derogation applications requires consideration of Article 6 as a whole, in light of the overall aims and objectives of the Habitats Directive.

2.1.2 Article 2 of the Directive explains the overall aim of the Directive with reference to the maintenance and restoration of natural habitats and species to a favourable conservation status, and provides that measures taken to achieve this aim shall take account of economic, social and cultural requirements and regional and local characteristics. It reads as follows:

*1. The aim of this Directive shall be to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.*

*2. Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.*

*3. Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics.*

2.1.3 Article 3 explains that, in order to achieve its aims, a coherent network of sites referred to as the Natura 2000 shall be set up and that sites classified under the Birds Directive should be included within that network. Articles 4 and 5 provide for the designation of Special Areas of Conservation. The ongoing protection of sites within the network, comprising both Special Areas of Conservation and Special Protection Areas, and commonly referred to as European Sites, is provided for in Articles 6 and 7. The remaining Articles 8-23 cover financing, reporting, protection of species, research and general supplementary provisions.

2.1.4 Compliance with the Habitats Directive is linked to the duties upon Member States to reach environmental targets. The difficulties facing an independent party when considering matters of compliance in such requirements have been recognised by the Advocate General of the European Court in *EC v Ireland*<sup>3</sup>. This case concerned an alleged failure to fulfil obligations under the Habitats Directive and paragraph 7 reads as follows:

*'the present case demonstrates several difficulties with which the Court is faced in infringement proceedings alleging the failure of Member States to reach environmental targets. What are precisely the obligations that a Member State must fulfil if it is to be considered that it has properly implemented the Habitats Directive? How is the Commission to prove such a failure, and what can a Member State raise in defence? Additionally, and quite importantly, how is the Court to assess those arguments?'*

2.1.5 Having acknowledged these difficulties the Advocate General emphasised the importance of concentrating on the main objectives of the Directive. She continues at paragraph 8:

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<sup>3</sup> EC v Ireland Case [C-444/21](#)

*‘As I will show, it is essential, more than in many other areas of EU law, that, in answering these questions, a substantive approach is adopted, avoiding legal formalism and concentrating on the main objective of the Habitats Directive. That objective is to safeguard biodiversity. Within the framework of that directive, this is to be achieved by measures taken by Member States aim at maintaining or restoring selected natural habitats and their wild flora and fauna at a favourable conservation status’.*

- 2.1.6 It therefore follows that demonstrating compliance with the Habitats Directive is nuanced and a purposive approach may need to be taken (whereby a decision-maker is guided by the underlying purpose and intention of a Directive, rather than a strict application of case law principles from indirectly related decisions without regard to real-world implications). Caution is required to avoid legal formalism, ensuring that the main objectives of the Habitats Directive are kept firmly in mind.

## 2.2 The provisions of Article 6 of the Habitats Directive as a whole

- 2.2.1 European sites were selected on the basis of specific habitat types or species considered to be most in need of conservation at a European level. The designation of a site recognised the presence of the habitat or species concerned and sites were selected to ensure a sufficient geographic ranges and distribution within the overall network of sites. Many habitat and species were not at a favourable conservation status when the Directive came into force meaning, at the time of designation, some sites within the network represented the best of what was left of the habitats and species concerned. Designated sites were frequently affected by a range of existing threats and pressures and their designation afforded specific legal protection under the UK Habitats Regulations<sup>4</sup>.
- 2.2.2 The Habitats Regulations transpose the requirements of the Birds and Habitats Directive into UK law. In accordance with regulation 2(A) of the NI Habitats Regulations, following EU Exit, the Habitats Directive is to be construed as if any reference to ‘Member State’ included a reference to the UK meaning the Directives remain relevant within a UK context. There are four ‘pillars’ of protection provided under Article 6 of the Habitats Directive which are summarised in table 2.2.1 below. In the table ‘Member States’ is replaced with ‘the UK’.

<b>Table 2.2.1 – overview of Article 6 provisions</b>	
Article 6(1)	The UK shall establish necessary conservation measures corresponding to the ecological requirements of the habitats and species for which the site has been designated.
Article 6(2)	The UK shall take appropriate steps to avoid deterioration of natural habitats and significant disturbance of species.
Article 6(3)	The UK shall undertake an appropriate assessment for new plans and projects which are likely to have a significant effect on a designated site; plans and projects should only be permitted where they will have no adverse effect on the integrity of the site concerned.
Article 6(4)	Potentially damaging proposals can, nevertheless, be permitted in the absence of alternative solutions for imperative reasons of overriding public interest. Compensatory measures must be secured.

<sup>4</sup> The [Conservation \(Natural Habitats etc.\) Regulations \(Northern Ireland\) 1995](#) (for Northern Ireland)

- 2.2.3 Article 6 of the Habitats Directive is central to matters of compliance in respect of potential risks to the national site network; it provides the legal framework for the protection of designated sites. Article 6 includes both proactive and reactive measures. Article 6(1) is concerned with *proactive* measures concerned with the *management* of designated sites; it deals with the establishment of the necessary conservation measures, and focuses on *positive* measures to maintain or restore the natural habitats and the populations of species of wild fauna and flora at a favourable status. Article 6(2) also makes provision for *proactive* measures which are *preventative* in nature; they involve the taking of appropriate steps to avoid habitat deterioration and significant species disturbance. Articles 6(1) and (2) are primarily concerned with addressing existing threats and pressures through positive management and preventative steps; they generally apply to effects from existing ongoing activities. Where a restoration objective applies the Directive therefore assumes that measures and steps under 6(1) and (2) will be being taken.
- 2.2.4 Article 6(3) and (4) are *reactive* preventative measures to avoid significant effects from proposed plans and projects. They set out a series of procedural and substantive safeguards governing plans and projects which have a 'likely significant effect' on a European site, either alone or in combination with other plans and projects. The assessment process applies to 'plans and projects' but plans and projects which are 'directly connected with or necessary to the management of European sites' are exempt. The tests under Article 6(3) apply strictly to plans and projects subject to assessment and preclude consideration of social and economic considerations or wider matters of public interest. These are taken into account in accordance with Article 6(4) where certain criteria have been met. Article 6(3) is primarily concerned with avoiding damage from specific plans and projects and has very limited powers in terms of delivering restoration.
- 2.2.5 Within this structure, it can be seen that there is a distinction between Article 6(1) and (2) which define a regime of general *proactive* obligations with a focus on delivery of restoration duties, and Article 6(3) and (4) which define a step-wise *reactive* assessment procedure which applies when a new plan or project is being considered or proposed by a competent authority, with a focus on avoiding damage (or compensating for any damage where a public interest overrides a conservation interest). Taking the current situation as a baseline position, Articles 6(1) and (2) are inherently backward-looking, whilst 6(3) and (4) are forward-looking.
- 2.2.6 It is relevant to note that the Habitats Directive does not impose a deadline in respect of the delivery of duties under Article 6(1) and (2) and the achievement of conservation objectives. There is a legal duty to be delivering conservation measures to achieve the conservation objectives and relevant authorities must be taking appropriate steps to avoid deterioration or significant disturbance, but the Habitats Directive recognises that there may be a delay between the measures/steps being taken and the objectives being achieved. Having said this, other statutory deadlines, such as those under the Water Framework Directive still apply which may, indirectly, impose deadlines in practice in terms of the delivery of water quality improvements.

## 2.3 Understanding Article 6 in view of Article 2

- 2.3.1 Going back to first principles, the preamble to the Directive describes the ‘main aim of the Directive being to promote the maintenance of biodiversity taking account of economic, social, cultural and regional requirements’ and continues ‘this Directive makes a contribution to the general objective of sustainable development’. It is therefore clear that the Directive, when understood as a whole, seeks to deliver biodiversity outcomes in a manner which takes account of economic, social, cultural and regional requirements, with reference to the general objective of sustainable development.
- 2.3.2 Article 2 is clear that measures taken pursuant to the Directive shall be designed to maintain or restore natural habitats and species to a favourable conservation status, but is also clear and explicit that such measures *shall* take account of economic, social and cultural requirements and regional and local characteristics.
- 2.3.3 The need to take account of social, economic and cultural considerations and regional and local characteristics is of particular important when engaging with decisions concerning the management of European sites following designation, and the taking of appropriate steps to avoid deterioration (usually from ongoing activities). This is because such measures and steps might have consequences for the lives and livelihoods of citizens. Many European sites extend over privately owned land and ongoing activities in and around designated sites might be closely tied to economic activities providing jobs within rural communities or cultural activities which are part of the fabric of a local community.
- 2.3.4 The designation of European sites was often viewed with caution by local communities due to a fear that constraints imposed by the designation will threaten livelihoods and constrain the use of the land. Article 2 is therefore highly significant to how the Directive should be interpreted and applied; it is an overarching provision which applies to all measures taken pursuant to the Directive and it therefore should be forefront and central, unless the Directive itself explicitly provides for an exception to this overarching provision.
- 2.3.5 It is therefore unhelpful to read Article 6 in isolation, as it needs to be correctly understood within the context of Article 2. Article 6 should be interpreted in a manner which provides protection to designated site network whilst respecting Article 2 and taking account of social, economic and cultural requirements. It is necessary to recognise that Article 6(1) provides a degree of flexibility in how conservation measures to address ongoing threats and pressures are delivered. EC guidance explains that 6(1) provides a choice of administrative, contractual and statutory measures allowing Member States to ‘*take into account other socio-economic activities in the sites*’. The CJEU explained in case 404/09 ([Alto Sil](#)) how ‘*the term “appropriate steps” contained in Article 6(2) of the Habitats Directive implies that Member States enjoy discretion when applying that provision*’. It is therefore to be anticipated that the taking of conservation measures and appropriate steps to avoid deterioration should be progressed in a manner which aligns with Article 2.
- 2.3.6 In this regard, and in the interests of avoiding confusion, it is important to recognise the limits of Article 2(3) in this context. The overarching duty under 6(1) and (2) is to deliver conservation measures and take appropriate steps to avoid deterioration. Article 2(3) applies to *how* this is achieved and may exert an influence over when measures and steps are implemented and how different options are evaluated. For example, measures and steps to achieve the conservation objectives may have social and economic consequences; with reference to Article 2(3) these might be delivered in a phased manner allowing time for

stakeholder engagement, rather than a ‘cliff-edge’ approach whereby a comprehensive and sufficient suite of measures and steps are all implemented simultaneously. In practice, it may not be possible to accurately predict the actual ecological improvements that certain measures or steps might provide. It may therefore be necessary to adopt an adaptive approach to duties under 6(1) and (2) whereby the delivery of an initial suite of ‘phase 1’ measures are monitored over time. The need for further measures, being identified and delivered as part of ‘phase 2’, will be informed by the monitoring outcomes. **The key requirement is to be actually taking measures and steps to ensure an improving baseline and meaningful progress towards achieving the conservation objectives.**

- 2.3.7 The scope of 2(3) is however limited in that it cannot extend to non-compliance with Article 6(1) and (2) duties. In other words, where a need to take of steps to avoid deterioration or significant disturbance from an ongoing activity arises, the selection of steps which are ‘appropriate’ and the timescales for their delivery can take account of social and economic considerations but **social and economic considerations cannot extend to a decision by a Member State not to take any measures or steps, or to take wholly insufficient measures/steps.** To look at it from another perspective, the Directive requires conservation measures to be implemented under 6(1) and appropriate steps to avoid deterioration/disturbance to be taken under 6(2). The sufficiency of these measures is evaluated against Article 6 but there is no defined timeframe for when the conservation objectives must be achieved. In reality there will be a number of options as to what measures might involve and how and when they are implemented. Article 2(3) provides a degree of flexibility whereby the selection of measures/steps and the timescales for delivery can take account of social and economic consequences allowing a degree of discretion.
- 2.3.8 Article 6(3) is different; the ability to take account of social and economic considerations is constrained to plans and projects which satisfy specific provisions set out within Article 6(4). Importantly in this regard, the Article 6(4) provision extends beyond Article 2(3) in that it allows for public interest to override conservation interests. **Article 6(3) therefore intentionally constrains the ability of a decision-maker to take social and economic factors into account when screening for a likely significant effect and applying the integrity test, but provides greater scope to take such matters into account under Article 6(4), explicitly allowing for a scenario whereby public interest can override the conservation interest at risk.** Only when seen within the wider context of Article 6(1), (2) and (4) can the overall approach to Article 6 be aligned with Article 2.
- 2.3.9 This raises the question as to whether the public interest being served by an *ongoing* activity, which falls within the scope of Article 6(2), can *override* conservation interests (in the way that a *new* activity subject to assessment under 6(3) can through the provisions of Article 6(4)). In this regard the Courts have recognised that an ‘appropriate step’ under 6(2) can include a review of an ongoing activity in accordance with Article 6(3)<sup>5</sup>. In this way the wider discretion afforded by 6(4), allowing reasons of public interest to override conservation interests, can be applied retrospectively to ongoing activities. Indeed the Court has ruled that where an existing activity might satisfy the derogation provisions, a review in accordance with Article 6(3) will be required as an appropriate steps under Article 6(2) as a pre-requisite to applying Article 6(4)<sup>6</sup>.

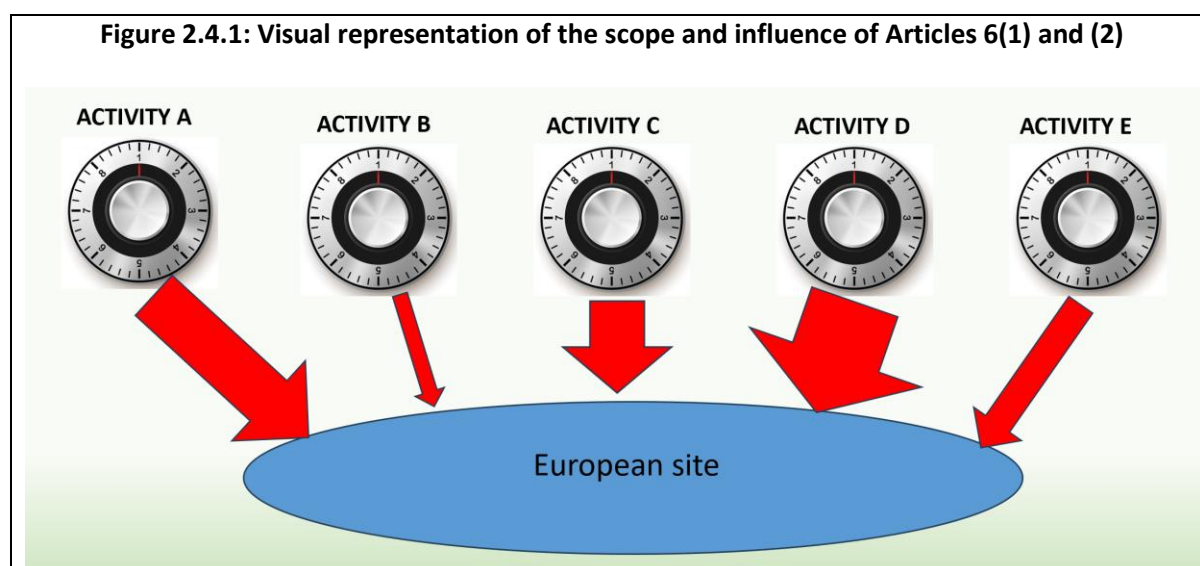
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<sup>5</sup> Case [C-399/14](#) Grüne Liga Saschen – refer paragraph 38

<sup>6</sup> Case [C-399/14](#) Grüne Liga Saschen – refer paragraph 56

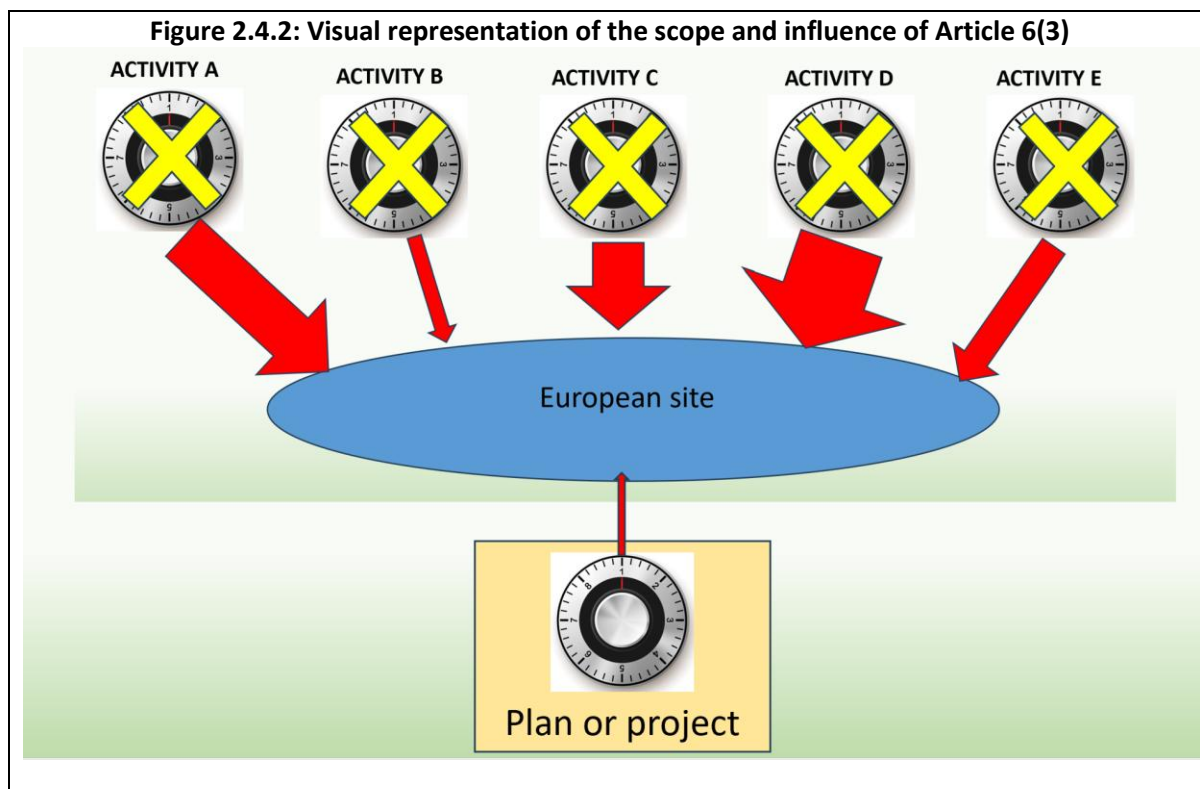
## 2.4 Implications for derogation applications

- 2.4.1 The overall objective of the Habitats Directive is to maintain or restore habitats and species to a favourable conservation status. Within the Natura 2000 network this is primarily achieved through the provisions of Article 6. Where a site is not achieving its conservation objectives the Directive anticipates that conservation measures will be put in place under Article 6(1) and, where necessary, appropriate steps will be taken to avoid deterioration under Article 6(2).
- 2.4.2 The scope of Article 6(1) and (2) is broad and the 'dials' which might be turned include all existing threats and pressures as illustrated in figure 2.4.1 below. In the context of water quality impacts to European sites, powers under Article 6(1) and (2) can be exercised in respect of all nutrient sources (including non-derogation farms and domestic wastewater such as treatment works, non-mains drainage and combined sewer overflows). Duties are ongoing allowing for simultaneous measures/steps to be taken, or for measures/steps to be phased. This is important as, in reality the pressure upon a site from different sources will rarely be uniform. The achievement of conservation objectives may require measures to be targeted to the sources which represent the greatest risk to the site, which may or may not be subject to a permitting regime (i.e. beyond the scope of Article 6(3)). Some sources may require a suite of measures involving national initiatives alongside more locally targeted measures involving stakeholder engagement. Other sources might be more appropriately addressed through statutory or legislative tools. Articles 6(1) and (2) allow relevant authorities to consider steps which might be taken, in view of *all* potential options, and to identify those which are considered to be most appropriate, whilst taking account of '*economic, social, cultural and regional requirements*' as required under Article 2(3).



- 2.4.3 The scope of Article 6(3) is different, as illustrated in figure 2.4.2 below. Under Article 6(3) there is generally only 1 dial which can be turned, that dial controls the effects from a plan or project for which some form of consent, permission or other authorisation is required. Where a site is subject to a restore objective as a consequence of the effects from wider ongoing activities, Article 6(3) can rarely influence the delivery of restoration. Legally

speaking Article 6(3) can prevent further deterioration, but the powers to deliver proactive restoration rest primarily with Articles 6(1) and (2).



2.4.4 Articles 6(1) and (2) do not impose timescales by which conservation objectives must be achieved; threats and pressures must be addressed, but the Directive allows flexibility in how this is done, potentially allowing for impacts to be addressed in a phased or sequential manner. In addition, these proactive duties are to be implemented in accordance with Article 2(3) meaning and the identification and delivery of ‘necessary conservation measures’ and ‘appropriate steps’ should take account of *economic, social and cultural requirements and regional and local characteristics*. This may influence how improvements are delivered and the timescales over which restoration is achieved. **The key requirement is for improving baseline conditions and meaningful progress in the delivery of restoration (in other words, a requirement to deliver constant improvement rather than merely avoid further decline).**

2.4.5 Effective implementation of Articles 6(1) and (2) is therefore of central importance to the achievement of conservation objectives in respect of water quality in Northern Ireland. Applying Article 6(3) to all derogation farms without reference to parallel wider duties might create disproportionate constraints on derogation farmers, without sufficient regard to:

- a) the actual risk to the site concerned from the farm concerned
- b) the extent to which action upon other sources might more appropriately deliver meaningful improvements (in view of Article 6(2) duty to take ‘appropriate steps’).
- c) the social and economic consequences of decisions where ongoing commercial activities are negatively affected by a 6(3) approach without due regard to (a) and (b).

- 2.4.6 Where the conservation objectives for the site concerned are not currently being met, the taking of measures and steps under Article 6(1) and(2) of the Directive influences the application of Article 6(3) in practice. **Where a site requires restoration, the Directive assumes that proactive measures are being taken in order to achieve the conservation objectives.** When applying the integrity test under such a scenario the question to be asked then needs to engage with the extent to which the plan or project (either alone or in combination with other plans and projects) might compromise or undermine the ability of necessary steps or measures to secure the improvements required to achieve the conservation objectives.

#### *Summary*

- 2.4.7 The proposed application of Article 6(3) to derogation applications in the absence of any commitment to the parallel delivery of duties under Articles 6(1) and (2) therefore requires careful consideration. The Directive anticipates that Article 6 is applied as a whole. Risks from ongoing day-to-day activities and existing threats and pressures fall within the scope of Articles 6(1) and (2), in light of Article 2(3) and the need to take account of social, economic, cultural and regional requirements when deciding how such duties are delivered. Risks from new plans and projects are considered under Article 6(3); the purpose of an assessment being to ensure that they do not compromise the achievement of the conservation objectives. Article 6(4) set out specific provisions whereby, in the absence of alternative solutions, potentially damaging proposals can be allowed where they deliver a public interest which ‘overrides’ the conservation interest potentially at risk. Compensatory measures being secured to protect the overall coherence of the national site network where this is the case.
- 2.4.8 A more coordinated ‘hybrid approach’ to Article 6, which recognises the role of Article 6(2) for ongoing or recurring activities alongside the role of Article 6(3) has implications for how derogation applications are dealt with. Some case scenarios are provided in appendix 3 and further detail concerning how an alternative ‘hybrid approach’ might work in practice is set out in section 4.

### 3 The question of continuity

#### 3.1 What is the question and why does it matter?

- 3.1.1 As a matter of law, the scope of HRA is limited to ‘plans and projects’. The extent to which a nitrate derogation application falls within the scope of a ‘project’ is therefore of central importance to a correct understanding of legal duties when advising on matters of compliance. It is the advice of DTA Ecology that an application under regulation 39 can correctly be recognised as a project for the purpose of Article 6(3).
- 3.1.2 Having said that, the Courts have established that some activities which might, in principle, be recognised as ‘projects’ may nevertheless be exempt from assessment obligations under Article 6(3) on the basis that they are ongoing or continuous in nature. Such activities fall instead within the scope of Article 6(2). Subjecting such activities to assessment under Article 6(3) may therefore be vulnerable to legal challenge and caution is required.

#### 3.2 Summary of relevant case law

- 3.2.1 A detailed review of relevant case law decisions is provided in Appendix 1. A summary of key principles is provided in table 3.2.1 below.

<b>Table 3.2.1 – Summary of principles from relevant court cases</b>	
<b>Court decision</b>	<b>Key principles</b>
The <i>Stadt Papenburg</i> <sup>7</sup> Case C-266/03	<p>Introduced the concept of a ‘one and the same project’ which might be identified on the basis of the ‘regularity or nature of the works or the conditions under which they are carried out’.</p> <p>A recurring activity which is ‘one and the same’ is not subject to the assessment obligations under Article 6(3) (paragraph 48) but may fall instead within the scope of Article 6(2)</p>
The Dutch Nitrogen Ruling Case C-293/17 <sup>8</sup>	<p>Reiterates that a single operation which is ‘one and the same project’ is ‘exempt’ from 6(3), providing criteria against which ‘one and the same’ should be understood for fertiliser application with reference to the location and spreading techniques. In doing so, case C-293/17 effectively creates a distinction in practice between ‘recurring’ activities and ‘continuity’.</p> <p>A recurring activity which is unchanged is exempt from Article 6(3). Where changes to a recurring activity are introduced, the legal tests under 6(3) are triggered, but the requirement for appropriate assessment is determined on the basis of the risk to a European site from any such changes, rather than being triggered merely by the notion of change in and of itself. The recurring element of any changed activities would be out with the scope of Article 6(3) but would remain within the remit of Article 6(2).</p>

<sup>7</sup> Case [C-226/08](#) The Stadt Papenburg ruling.

<sup>8</sup> The Dutch Nitrogen Ruling [Case C-293/17](#)

<p>The <i>Aqua Pri</i> case Case C-278/21<sup>9</sup></p>	<p>Reiterating the view of earlier Court decisions, the continuation, under unchanged conditions, of the activity of an operation which has already been authorised at the planning stage must not, in principle, be subject to the assessment obligation laid down in Article 6(3)</p> <p>An exception to that general rule applies where two criteria are met. If, a prior assessment under Article 6(3) was undertaken and was legally flawed, AND the activity is subject to a condition which makes continuation subject to seeking and obtaining a new permission, a new assessment under 6(3) must be undertaken.</p>
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- 3.2.2 It follows that the application of the ‘one and the same’ principle is not consistent and the Court appears to take account of specific circumstances when reaching a decision as to how it applies in any given case. In *Stadt Papenberg*, a recurring activity is exempt from 6(3) on the basis of the nature of the work and the regularity being such that it can be recognised as ‘one and the same’ project. In the *Dutch Nitrogen Ruling* the potential for the location and equipment to exert significant influence over the magnitude of risk (in term of air pollution impacts) lead to a more specific definition of ‘one and the same’ for fertiliser application, effectively creates a distinction in practice between ‘recurring’ activities and ‘continuity’. In this context a ‘recurring’ activity is one which is ongoing in nature i.e. it happens on a regular basis. The concept of ‘continuity’ refers to *how* the recurring activity is carried out, which may change, and the changes may have ecological consequences.
- 3.2.3 The specifics of the case before the Court led to clarify that, in the case of the application of fertiliser to land from a recurring activity, an appropriate assessment under Article 6(3) is triggered only on the basis of effects associated with any change in an otherwise recurring activity. In *Aqua Pri*, the environmental permitting process was different and, in certain circumstances, a recurring activity is subject to Article 6(3) even where there is continuity. How continuity is applied in respect of the current situation requires careful consideration due to the nature of the activity subject to which a consent relates and timescales over which a breach in assessment duties has persisted.
- 3.2.4 DTA recognises that paragraph 83 of the *Dutch Nitrogen Ruling* is open to interpretation but, when read in context of paragraphs 82 and 84, and the implications of different interpretations are reflected upon (refer case scenarios in appendix 3), on balance an interpretation which limits the application of 6(3) to the changes in what is otherwise a recurring application of fertiliser, whilst the recurring activity remains within the scope of Article 6(2) is considered to most closely align with the underlying aims and objectives of the Habitats Directive.
- 3.2.5 When considering the implications of the DTA interpretation of relevant case law for the determination of nitrate derogation applications under regulation 39, **an alternative ‘hybrid approach’ emerges whereby three scenarios may reasonably be envisaged** as set out in table 3.2.2:

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<sup>9</sup> Aqua Pri Case [C-278/21](#)

Table 3.2.2: Scenarios which may arise in respect of nitrate derogation applications and implications for scope of duties under an alternative 'hybrid approach' to Article 6		
Scenario	Scope of duties under Article 6	
A	A 'new' derogation application under regulation 39 from a farm which has not previously been subject to a derogation.	Article 6(3) applies to the whole application.
B	A 'renewal' application under regulation 39 from a farm which is currently subject to a derogation. There is continuity and the activity is classified as 'one and the same',	Exempt from Article 6(3) but Article 6(2) applies. Where the continuation may represent a risk to a European site, appropriate steps to avoid deterioration should be taken (refer section 4 below).
C	A 'renewal' application under regulation 39 from a farm which is currently subject to a derogation. Whilst the activity is recurring there is no continuity and it cannot be classified as 'one and the same'.	Both Articles 6(2) and 6(3) applies. The application is subject to Article 6(3) but the need for appropriate assessment is determined on the basis of the effects arising from the change which will occur (compared to the earlier recurring activity).  Residual effects associated with the continuation of the established recurring activity fall within the scope of Article 6(2). Where it may represent a risk to a European site, appropriate steps to avoid deterioration should be taken (refer section 4 below).

3.2.6 It is important to recognise that **a recurring activity being exempt from Article 6(3) does not mean that it escapes scrutiny under Article 6**. Agricultural practice involves a range of recurring activities which were 'ongoing' prior to the Directive coming into force, or prior to any requirement for consent or permission which might trigger the application of the Directive. Any recurring continuous agricultural activities which represent a risk of deterioration to a European site falls within the scope of Article 6(2) along with other ongoing threats and pressures that may also give rise to a risk of deterioration. Ongoing agricultural activities may also be relevant to duties under Article 6(1).

3.2.7 A hybrid approach to Article 6, when considering a 'new' application for what is an existing activity therefore brings in the requirement to clearly define the concept of 'continuity', and how it might be applied in practice.

### 3.3 When the question of continuity arises

3.3.1 The question of continuity has been considered above as a matter of principle. It is the professional view of DTA Ecology that, in principle, when an application for a 'project' is subject to HRA, and the project relates to an ongoing activity, it is necessary to consider whether the 'project' should be classified as 'one and the same' for the purpose of Article 6(3). Where this is the case a valid argument can be envisaged that it is exempt from the assessment requirements, even though it would nevertheless remain within the scope of Article 6(2).

3.3.2 The approach to continuity will be of central importance if an alternative hybrid approach is to be feasible. **The relevant authorities will ultimately need to take a decision as to what point in time the question of continuity is to be applied, in view of the need to erase the unlawful consequences of breaches in respect of earlier derogation decisions.** With this in mind DTA Ecology would refer relevant authorities to the view of the Advocate General of the European Court in *EC v Ireland*<sup>10</sup>. This case concerned an alleged failure to fulfil obligations under the Habitats Directive and, having acknowledged the difficulties in matters of compliance concerning the achievement of ecological outcomes, the Advocate General emphasised the importance of concentrating on the main objectives of the Directive. Paragraph 8 reads as follows:

*‘As I will show, it is essential, more than in many other areas of EU law, that, in answering these questions, a substantive approach is adopted, avoiding legal formalism and concentrating on the main objective of the Habitats Directive. That objective is to safeguard biodiversity. Within the framework of that directive, this is to be achieved by measures taken by Member States aim at maintaining or restoring selected natural habitats and their wild flora and fauna at a favourable conservation status’.*

3.3.3 In deciding a baseline against which ‘continuity’ might be assessed it therefore seems sensible to avoid legal formalism and to consider how differing approaches to continuity baselines will influence the outcomes that will be achieved and how those outcomes relate to the main objective of the Habitats Directive; to maintain or restore habitats and species to a favourable conservation status. It is also relevant to keep firmly in mind that, from a given ‘baseline’ situation Articles 6(1) and (2) are the proactive backward-looking parts of Article 6, whilst Article 6(3) and (4) are reactive and forward-looking.

3.3.4 The need to avoid legal formalism is highly relevant when coming to any decision over how continuity is approached. **In evaluating options, it is the view of DTA Ecology that it is important to recognise that any decision regarding continuity does not allow a derogation application to escape scrutiny under Article 6; it merely determines which part of Article 6 applies.** The ecological consequences of one approach over another therefore need to be taken into account and weighed against the administrative consequences. The overarching provision of Article 2 is relevant to such a weighing exercise, being mindful that:

*2. Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.*

*3. Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics*

3.3.5 Three different approaches to a continuity baseline are summarised in table 3.3.1 below, with commentary as to how they relate to Article 2(2) and 2(3).

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<sup>10</sup> EC v Ireland Case [C-444/21](#)

<b>Table 3.3.1: comparison of different approaches to continuity</b>			
<b>Baseline</b>	<b>Implications</b>	<b>Article 2(2)</b>	<b>Article 2(3)</b>
Coming into force of the Directive (1992)	<p>Very challenging in practice for a decision-maker to have any confidence about farming practices in 1992.</p> <p>High workload for authority. Most applications would fall under Article 6(3) due to uncertainty.</p>	<p>Article 6(3) can prevent further deterioration. Refusal of applications for ongoing activities <b>may deliver some restoration</b>, but scope of 6(3) limited to derogation farms</p> <p>Contributions from other sources are not addressed. <b>Restoration outcomes limited.</b></p>	<p><b>Negative economic and social consequences for derogation farmers</b> from mitigation requirements or refusals and ‘cliff-edge’ scenario.</p> <p><b>Potential cultural and regional consequences</b> given the significance of farming to rural communities.</p>
Coming into force of NAP (2007)	<p>Still challenging for a decision-maker to have confidence about farming practices in 2007.</p> <p>High workload for authority. Most applications would fall under Article 6(3), although some may fall within scope of 6(2)</p>	<p>Article 6(3) can prevent further deterioration. Refusal of applications for ongoing activities <b>may deliver some restoration</b>, but scope of 6(3) limited to derogation farms.</p> <p>Contributions from other sources are only addressed in limited cases where 6(2) applies. <b>Restoration outcomes limited.</b></p>	<p><b>Negative economic and social consequences</b> for derogation farmers from mitigation requirements or refusals and ‘cliff-edge’ scenario.</p> <p><b>Potential cultural and regional consequences</b> given the significance of farming to rural communities.</p>
Previous application	<p>Practically feasible for decision-maker.</p> <p>Most farms anticipated to already be subject to a derogation. Meaning most farms will fall under scope of 6(2) as continuity is likely.</p> <p>Article 6(3) limited to new applications and those with changes compared to previous year that represent a likely significant effect.</p>	<p>Article 6(2) allows steps on derogation farms to be considered alongside other steps that might be taken affecting other sources. <b>Wider scope of 6(2) and options appraisal to identify the most appropriate steps increases restoration outcomes.</b></p> <p>Article 6(3) applies to <b>prevent further deterioration</b> from any changes to otherwise recurring activities.</p>	<p>The identification and delivery of appropriate steps <b>must take account of social, economic, cultural and regional requirements.</b></p> <p>The delivery of steps can be phased allowing for an improving baseline.</p> <p>Greater flexibility in decision-making under Article 6(3) provides <b>economic benefits in terms of the delivery of growth.</b></p>

3.3.6 On balance, and placing primary importance on the ability of the Directive to achieve its objectives to maintain or restore habitats to a favourable conservation status, whilst

avoiding legal formalism, **it is the view of DTA Ecology that a reasonable argument could be made that the question of continuity for derogation applications could be approached in light of the previous application.** The broader scope of Article 6(2) means that such an approach is more likely to deliver meaningful progress in achieving the Directive's objectives compared to an approach which focuses on Article 6(3). This approach is also preferred in view of practical feasibility for competent authorities and the realities of handling a large number of applications being submitted at the same time.

- 3.3.7 Some case scenarios are provided in Appendix 3 to illustrate the practical implications of different approaches; some further reflections on the case scenarios are set out at 3.4.
- 3.3.8 Before considering the case scenarios further, in the absence of a clear position by the Courts it is helpful to briefly consider the arguments which might be relied upon to support a different approach to continuity to that recommended by DTA Ecology; whereby the continuity baseline should instead reflect a 2007 scenario or a 1992 one. In this regard a summary of how case law might have applied in a historic sense, and how the understanding of continuity has changed over time is provided in Appendix 2.
- 3.3.9 In the absence of any prior breach the continuity question would reasonably be applied in respect of the previous application. Hence if there is no change from the previous year, the project can be classified as one and the same project, and falls within the scope of Article 6(2). The potential difficulty with this approach is that, in the current situation, the previous year(s) represented a breach of duties as derogation decisions have been granted since 2007 in the absence of any prior assessment under the Habitats Directive. A question therefore remains as to whether the continuity question should, instead, be addressed against an earlier timeframe. Should reference be made back to 2007, when the first derogation application was considered, or even 1992 when the Directive first came into force as the spreading of manure was an ongoing practice at that time.
- 3.3.10 The *Dutch Nitrogen Ruling* is an important decision when addressing the question of continuity. In this case the courts were considering consents relating to agricultural activities and how 'existing practices' were taken into account. The question referred to the Court adopted the following phrasing regarding such a practice '*it was carried out lawfully before Article 6(3) became applicable*'. In providing a response, the Court ruling reflects the wording of the question posed. At paragraph 86 the Court refers to a recurring activity... '*authorised under national law before the entry into force of that Directive*'. When interpreting this ruling, and implications for an approach to continuity, it could therefore be argued that the question of continuity must, as a matter of law, be addressed with reference to the entry into force of the Habitats Directive, in other words 1992.
- 3.3.11 In the opinion of DTA Ecology, the phrasing of the question which was referred, arguably provides a degree of flexibility in respect of a continuity 'baseline'. It is not inevitable that the Court intended *all* matters relating to continuity to be addressed with reference to 1992 (as a matter of law). They might simply have used that phrasing to reflect the wording of the question as it had been put to them? To argue that all questions of continuity *must* date to 1992 would not always be feasible. For example, where a new permitting regime is introduced in respect of ongoing activities, an approach whereby Article 6(2) only applies if the activity (now subject to permitting) was ongoing in 1992 would a) be very challenging to implement in practice by competent authorities; and b) distort the distinction in practice between Article 6(2), which applies primarily to ongoing activities, and Article 6(3) which is primarily concerned with new activities.

- 3.3.12 In the *Dutch Nitrogen Ruling* the question of continuity was posed with reference to 1992, but it is equally reasonable to anticipate the question of continuity emerging in respect of an ongoing activity that commenced after 1992, perhaps without any requirement for consent or permission such that it escaped scrutiny under Article 6(3). If such an activity later became subject to some form of consent, the continuity question would be relevant to how 6(3) was applied but would necessarily need to be considered against a later date.
- 3.3.13 An alternative approach to continuity for derogation applications could perhaps refer instead to the coming into force of the NAP in 2007. This could be argued on the basis that this was the first time any consent or permission was required meaning this represents the first occasion when the matter of continuity for derogation farms would have become relevant as a matter of law.
- 3.3.14 Having said that, derogation farms have been operating since 2007 subject to annual permitting requirements. Recognising that the Habitats Directive should have been applied, but wasn't, and accepting that the matter of continuity therefore only arises in practice at the current time, lends weight to the DTA preferred approach that continuity is best approached from a previous decision baseline. The Aqua Pri ruling which required a full 6(3) assessment in spite of continuity related to a scenario where an earlier assessment was taken under 6(3) but was legally flawed. That is different to a scenario where no earlier assessment under 6(3) was undertaken at all.

#### 3.4 Reflections on case scenarios to explore different approaches to the Dutch Nitrogen Ruling in view of wider duties under Article 6.

- 3.4.1 Three case scenarios are produced in Appendix 3 by way of illustration to explore consequences of different approaches to derogation applications in light of wider consequences.
- 3.4.2 With reference to the case scenarios, and by way of a summary, in the absence of wider measures under Article 6(1) and (2), the blanket application of Article 6(3) is likely to lead to an emerging nature market in respect of the delivery of mitigation measures to avoid adverse effects to site integrity. This can reasonably be expected to increase costs of compliance for project proposers and will also, over time, deplete the pool of measures which might otherwise have been delivered under Article 6(1) and (2) to deliver overall restoration. **The implications of Article 6(3) in the absence of wider measures and steps under 6(1) and (2) therefore results in increased costs for project proposers with the capacity for growth being constrained for the foreseeable future.**
- 3.4.3 A blanket application of 6(3) to derogation farms in the absence of wider measures and steps under 6(1) and (2) also creates an unlevel playing field. Farmers caught by 6(3) are subject to more stringent controls, irrespective of their relative contribution to nutrient loading compared to non-derogation farms and non-agricultural sources or other proactive steps they may have taken to reduce their environmental impacts. The wider duties under 6(1) and (2) anticipate that all sources of pollution are considered in a fair and reasonable manner, to identify appropriate steps taking account of social, economic, cultural and regional requirements. The absence of such measures constrains the application of Article 6(3); positive effects from *aspirational* future benefits cannot be taken into account when applying the integrity test.

- 3.4.4 A hybrid approach which constrains the application of 6(3) to new applications and changes to otherwise recurring activities which represent a ‘likely significant effect’, whilst recurring activities fall within the scope of 6(2) has different consequences. The need for relevant authorities to actively engage with duties under Articles 6(1) and (2) will have resource requirements, but the flexibility that can then be adopted under 6(3) and the potential for mitigation to be integrated with the delivery of management and restoration (as per the [Welsh government approach to nutrient impacts in SAC rivers](#)) will have significant implications for the delivery of plans and projects in the meantime, with associated economic and political benefits. **The benefits to decision-making under Article 6(3) from a hybrid approach to derogation decisions, and the need to proactively deliver on wider duties under 6(1) and (2), will extend beyond the agricultural sector and will be relevant to all plans and projects which represent a risk to a European site through increased nutrient loading.** For example, housing development which connects to wastewater treatment works which discharge into an affected catchment. An approach, whereby derogation farms are subject to 6(3), risks unintended consequences as it may flag issues of consistency if other plans and projects contributing nutrients are not also subject to Article 6(3).
- 3.4.5 DTA Ecology would respectfully advise caution in assumptions regarding resource implications of proactively engaging with Articles 6(1) and (2) as considered further in section 4.2. In many cases compliance with Article 6(2) may be achieved from existing initiatives, or through changes to the implementation of existing initiatives to increase uptake of measures and/or enforcement of existing statutory requirements.
- 3.4.6 A hybrid approach, whereby reliance on duties under Article 6(2) for the purpose of decisions under 6(3) is made conditional on the sufficiency of such measures, has the potential to drive meaningful progress in the delivery of restoration in a cost-effective manner without creating a barrier to growth. Further detail is provided in section 4 but DTA Ecology is of the opinion that such an approach is viable in principle.
- 3.4.7 By way of a summary, in the opinion of DTA Ecology:
- a hybrid approach which explicitly requires the delivery of wider duties better respects the underlying intention of the Habitats Directive, which assumes that duties under 6(1) and (2) will be triggered where a site requires restoration.
  - A failure to comply with duties under 6(1) and (2) unfairly penalises the delivery of plans and projects under Article 6(3) in a manner which the Directive did not anticipate.
  - The proposed hybrid approach also avoids risks from excessive costs associated with the delivery of environmental improvements which might arise from supply and demand market forces in a private market.
  - A centrally coordinated approach, potentially involving the exercise of statutory powers will ensure improvements are delivered in a cost effective manner, creating opportunities for integrated mitigation options.
- 3.4.8 Up-front input and staff resource in developing a hybrid approach will be anticipated for statutory agencies but, once implemented, DTA Ecology is of the opinion that the long-term benefits to the delivery of restoration (a statutory duty) alongside the delivery of growth (an economic priority), and efficiency savings in staff time associated with determining individual applications are considered to justify such an approach as being preferable.

## 4 How might a hybrid approach to Article 6 for nitrate derogation applications work in practice?

### 4.1 Introduction

- 4.1.1 The advice provided in earlier sections raises questions concerning the proposed approach being taken by the authorities in Northern Ireland. This section 4 sets out what an alternative approach might look like. **This section 4 provides a high level overview of an alternative approach to inform discussions; it is not comprehensive guidance. Further specific detail concerning each step is beyond the scope of this advice and is premature until relevant authorities decide there is merit in exploring the approach further.** The approach below represents the professional opinion of DTA Ecology. It is based upon an interpretation of paragraph 83 of the Dutch Nitrogen Ruling as set out in section 2, whereby Article 6(3) only applies to the ecological effect that may arise from a *change* in an otherwise recurring activity. The recurring element of such an activity remaining within the scope of Article 6(2), alongside other sources of nutrient loading such as non-derogation farms, wastewater treatment works and other permitted and diffuse sources of pollution.
- 4.1.2 In the situation before the Northern Ireland authorities it is the advice of DTA Ecology that it is necessary to recognise duties arising under 6(1) and (2) as well as those under 6(3). The extent to which the application of fertiliser falls within the scope of different elements of Article 6 is thus of central importance.
- 4.1.3 Article 6(2) has not been widely applied meaning there is a shortage of practical experience / understanding of what a 6(2) approach to nutrient management might involve. A decision that sources of nutrient loading fall within the scope of Article 6(2) therefore brings the wider requirements under 6(2) into sharp focus. A hybrid approach might also involve duties under Article 6(1) which are also considered below.
- 4.1.4 The scope of this advice is limited to the implementation of 6(1) and (2) in respect of avoiding deterioration from nutrient input to sensitive aquatic European sites and delivering restoration where a site is already negatively impacted.

### 4.2 What an hybrid approach involving 6(1) and (2) duties might involve

- 4.2.1 More detailed information on Article 6(1) and (2) of the Habitats Directive, and relevant case law concerning associated duties is provided in Appendix 4. The scope of Articles 6(1) and (2) is broad; any such approach to address deterioration to aquatic sites from excess nutrients is relevant to *all* nutrients sources which might include derogation farms, non-derogation farms, and domestic effluent via wastewater treatment works, non-mains discharges (septic tanks) and combined sewer overflow (CSO). The requirements under Articles 6(1) and (2) to take 'conservation measures' to achieve conservation objectives alongside 'appropriate steps' to avoid deterioration therefore apply in a comprehensive manner. Whilst it can reasonably be anticipated that the approach to nitrate derogation applications will be relevant, wider steps targeted to the control of other sources might also be identified as 'appropriate' if deterioration is to be avoided.

- 4.2.2 A perception can arise that associated duties are separate and distinct (i.e. additional) to other statutory duties. In other words engaging with 6(1)/(2) represents an additional burden over and above existing initiatives and obligations. Whilst this perception is perfectly understandable at face value, it is a misconception. In understanding wider implications of Article 6(1)/2), it is the advice of DTA Ecology that it is first necessary to recognise that, whilst the scope of measures/steps under 6(1)/(2) can be broad, there is potential for overlap with measures *already* being taken in respect of other Directives or duties. It is therefore the case that measures currently being taken might legitimately be included within a list of ‘measures/steps’ under Articles 6(1) and (2) even if they were not originally ‘labelled’ as such. For example: measures in the Nutrient Action Programme to deliver reductions in overall nutrient loading; planned improvements in priority areas under UWWTD; a locally targeted Programme of Measures under a River Basin Management Plan; or actions identified in the Northern Ireland Ammonia Strategy. The ability to include existing measures within a list of measures under wider Article 6 duties has been recognised in EC guidance ‘[Farming for Natura 2000](#)’ which states that conservation measures under Article 6(1) ‘*may not necessarily be new, as existing measures can also contribute to achieving the conservation objectives*’.
- 4.2.3 As a starting point therefore, an absence of formally defined ‘measures/ steps’ under 6(1) and/or (2) does not mean that proactively engaging with such duties will necessarily require *new* steps to be taken. A logical step-wise approach to Article 6(1)/(2) is proposed below:
- Step 1: identify what measures are already being taken which have the objective of reducing or controlling nutrient inputs.
  - Step 2: Estimate the improvements which are anticipated to be achieved by the measures already being implemented or secured. This will be on the basis of the measures as currently implemented and recognising a degree of inherent uncertainty.
  - Step 3: Evaluate the sufficiency of existing measures to achieve conservation objectives and/or avoid deterioration to habitats. **NOTE that avoiding deterioration to habitats is different to a non-deterioration policy in respect of water quality under WFD<sup>11</sup>.**
  - Step 4: If existing measures are insufficient, identify and implement further measures/steps, as appropriate.
- 4.2.4 A need to identify further measures/steps under step 4 may require entirely new initiatives, but further measures might also include changes in how existing measures are implemented. For example, a programme of measures (PoM) under a River Basin Management Plan may involve voluntary initiatives where uptake within a sensitive catchment is currently low. Measures to incentivise or, where necessary, impose a more targeted uptake of measures through the vehicle of the PoM could be identified as a

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<sup>11</sup> Non-deterioration under WFD is assessed against existing water quality classes, meaning actual deterioration against existing water quality is allowed so long as water quality nevertheless remains within a pre-defined class boundary. By way of comparison, habitat deterioration in the context of Article 6(2) of the habitats Directive can reasonably be expected to occur when water quality exceeds a given environmental standard. Where such a standard is exceeded ‘appropriate steps’ to avoid associated deterioration may require active improvement until the standard is achieved. An approach which maintains the status quo in terms of water quality will simply maintain the habitat in a deteriorated state (even though water quality has not deteriorated); an approach which delivers some improvement will contribute to avoiding deterioration, but deterioration of the habitat is not avoided until water quality falls within the relevant environmental standard, after which the deteriorated habitat can reasonably be expected to recover.

conservation measure under 6(1) or a 'necessary step' under 6(2). The four yearly NAP review also provides opportunities for new measures to be identified and delivered through an existing initiative. In some catchments actions already in place through the NAP regulations may be sufficient whereas another catchment may require enhanced more targeted measures. It is relevant to note that 'enhanced' measures might involve spatial targeting rather than stricter measures applying in a blanket manner.

- 4.2.5 Necessary steps under 6(2) may also involve enforcement and compliance with existing obligations and duties. In other words, requirements concerning the control of nutrients may already be in place within existing legislative or statutory frameworks, but deterioration arises as a result of a poor compliance with such duties. Where this is the case enforcement action to address non-compliance would be an appropriate step to avoid deterioration.
- 4.2.6 In some cases adaptation of existing initiatives and/or enforcement of existing requirements may not be sufficient and necessary measures/steps may also involve entirely new initiatives.
- 4.2.7 It is important to recognise that a relevant authority may decide that an appropriate step to avoid deterioration under Article 6(2) would be to undertake a review of a prior decision in accordance with the requirements under 6(3). The key difference here being that the assessment under 6(3) is taken to satisfy duties under 6(2) rather than being a legal requirement under 6(3). In this regard the CJEU has ruled that, whilst an obligation to carry out a review of an existing activity may be based upon Article 6(2), it contains no provision *obliging* a Member State to do so<sup>12</sup>.

*35 With regard to whether Article 6(2) of the Habitats Directive imposes an obligation to review the implications of a plan or project, such as that at issue in the main proceedings, which was approved before the site in question was placed on the list of SCIs, on the basis of a preliminary risk assessment not consistent with the requirements of Article 6(3) of that directive, it must be held that such an obligation cannot be inferred unequivocally from the wording of Article 6(2).*

- 4.2.8 Further clarification recognising the discretion afforded to a relevant authority when considering whether a review of an existing activity in accordance with Article 6(3) might be an 'appropriate step'(or not) under Article 6(2) is provided in later paragraphs where the Court explained:...

*38 With regard to projects which do not meet the requirements under Article 6(3) of the Habitats Directive, the Court has already held that an obligation to carry out a subsequent review of the implications of existing plans or projects for the site in question may be based on Article 6(2) of that directive (see, to that effect, judgment in Commission v United Kingdom, C 6/04, EU:C:2005:626, paragraphs 57 and 58).*

*39 Nevertheless, as the Advocate General stated in points 48 and 49 of her Opinion, the obligation to carry out such a subsequent review cannot be absolute.*

*40 The term 'appropriate steps' contained in Article 6(2) of the Habitats Directive implies that Member States enjoy discretion when applying that provision.*

- 4.2.9 Given the discretion available it is helpful to reflect upon why a decision-maker might choose to progress a review in accordance with 6(3) as an appropriate step under 6(2). A

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<sup>12</sup> Case [C-6/04 EC v UK](#) (paragraph 58)

scenario where this might be preferable is where a decision-maker takes a view that an ongoing activity should nevertheless continue, in spite of deterioration, on the basis of imperative reasons of overriding public interest. Where a public interest is served by an ongoing activity Article 6(2) **does not allow the public interest to override the conservation interest potentially at risk**. Whilst the taking of appropriate steps under 6(2) is subject to Article 2(3), the scope of 2(3) cannot extend to a decision not to take steps, or to take steps which are insufficient. Appropriate steps must be taken to avoid deterioration in all cases which provides a stricter approach than that available to *new* plans and projects under Articles 6(3) and (4). In case C-399/14 the Court recognised at paragraph 56 that *'a review meeting the requirements of Article 6(3) of the Habitats Directive is necessary in every case where, by analogy with Article 6(4) of that directive, a project incompatible with the conservation objectives of the site concerned must be implemented for imperative reasons of overriding public interest.'*

- 4.2.10 In other words, should a decision-maker take the view that a potentially damaging ongoing activity should be allowed to continue due to a public interest being served, in spite of it contributing to deterioration, the public interest can only be weighed against the conservation interest at risk following an assessment under Article 6(3). A review of an ongoing activity in accordance with Article 6(3) therefore becomes a necessary 'appropriate step' under Article 6(2) where the consequences of the delivery Article 6(2) duties risk being disproportionate. Such an approach thus allows an ongoing activity to benefit from the broader scope of Article 6(4) whereby the need to avoid adverse effects can be weighed against the public interest which is delivered.
- 4.2.11 In the context of derogation applications, a decision to apply a 6(3) approach under 6(2), on the basis of an intention to rely upon Article 6(4), should be approached with caution. Article 6(4) requires the absence of alternative solutions and such an approach would only be relevant where a decision-maker can demonstrate the absence of *other* appropriate steps under Article 6(2) to avoid deterioration.

#### *A timeline and delivery milestones*

- 4.2.12 A timeline for the achievement of the conservation objectives targets, and delivery progress milestone should be defined on the basis of best available information and professional judgement concerning the steps to be taken. Duties under Article 6(1) and (2) are ongoing in nature; any list of steps/measures will be subject to regular review and can be amended in response to monitoring outcomes. Estimates of the improvements to be achieved from a suite of measures will necessarily include uncertainties (see further below).
- 4.2.13 **Delivery progress milestones** relate to when identified steps/measures will be taken. Parties involved in delivery should specify milestones for delivery which could helpfully align with any parallel work under other initiatives. For examples timescales in a River Basin Management Plan programme of measures or against wider Water Framework Directive duties.
- 4.2.14 **A delivery date for achieving the conservation objective targets** is more challenging. A degree of uncertainty is unavoidable given the complexity of addressing nutrients within natural riverine catchments and the variables which will influence the effectiveness of the measures or steps to be taken. A delivery date for achieving the conservation objectives will necessarily be an estimate informed by local knowledge and best available information. **Delivery dates for achieving the conservation objective targets should therefore be**

**estimated by a relevant lead authority, potentially having regard to restoration timelines under the Water Framework Directive and other initiatives. They will be subject to regular review and updated as necessary on the basis of monitoring and local knowledge.**

#### *Handling uncertainty*

- 4.2.15 The need for a suite of steps/measures to be identified and associated with delivery milestones is important, but must be approached in a pragmatic and proportionate manner. Public bodies are expected to apply professional judgment and best available information to identify measures and estimate a timeline to achieve the conservation objective targets with accompanying delivery milestones, but the nature of the challenges posed by excess nutrients and the variables within the natural environment mean that a degree of uncertainty will be unavoidable.
- 4.2.16 Strictly speaking, the implementation of conservation measures under Article 6(1) and the delivery of appropriate steps to avoid deterioration under Article 6(2) are not subject to the case law which applies in respect of Article 6(3). Having said that, the Courts have ruled that Article 6 must be construed as a coherent whole and emphasised that Articles 6(2) and (3) are designed to ensure the same level of protection, so a precautionary approach is required.
- 4.2.17 This need to take appropriate steps under Article 6(2) is triggered on the basis of a *risk* of deterioration. In the *Grüna Liga Saschen* case<sup>13</sup> the Court reiterated an established principle that *'the very existence of a probability or a risk... is capable of constituting an infringement of Article 6(2) of the Habitats Directive, without a cause and effect relationship... having been proved'*. This risk-based approach is comparable to the approach to avoiding adverse effects to site integrity under Article 6(3).
- 4.2.18 Caution is required however in extending all case law relevant to Article 6(3) to Article 6(2). Which would be inappropriate. The *Grüna Liga Saschen* case continued to observe that *'the wording of Article 6(2) does not define any particular criterion for implementing the measures to be taken'*.
- 4.2.19 When evaluating the confidence that deterioration will be avoided, arguments that the 'no reasonable scientific doubt' test<sup>14</sup> (which applies under Article 6(3) in respect of new plans and projects) should apply lack coherence. This is due to the inherent differences between an ongoing activity and an aspirational one. Article 6(2) applies to ongoing activities which already represent a risk to a site and is an ongoing duty (rather than one which applies at a specific point in time as is the case with Article 6(3)). Where a site is subject to deterioration, in order to achieve the overall objective of the Directive to restore habitats and species to a favourable conservation status, the key duty is to be actively taking positive steps. The actual delivery of improvements can be approached in an adaptive manner, with steps being reviewed and refined in accordance with monitoring and available evidence until the desired outcome is achieved. An approach which seeks to apply the integrity test to 'appropriate steps' before they can be implemented, serves no useful purpose where adverse effects are already happening. Constraining the delivery of steps to deliver restoration until it can be demonstrated, beyond reasonable scientific doubt, that they will be sufficient will only frustrate the ability of the Directive to achieve its objectives.

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<sup>13</sup> [Case C-399/14](#) Grüne Liga Saschen Reference for a preliminary ruling

<sup>14</sup> Refer the Waddenzee Ruling [Case C-127/02](#).

4.2.20 By way of comparison, Article 6(3) is a reactive provision, which applies at a defined point in time when a decision is being taken as to whether to allow a potentially damaging project to proceed or not. The requirements to remove reasonable scientific doubt as to the absence of adverse effects to site integrity as part of a decision-making process is entirely appropriate given the reactive nature of Article 6(3) and the fact that the activity is not yet exerting any influence over the site concerned and opportunities to address adverse effects which might subsequently arise are limited.

4.2.21 When designing steps to be taken to avoid deterioration under Article 6(2), and/or restoration steps under Article 6(1), it is the advice of DTA Ecology that:

- A requirement to take appropriate steps to avoid deterioration or to implement restoration measures is triggered on the basis of a risk of deterioration / damage. A precautionary approach is taken to the *need* to implement measures which provides equivalent protection to that afforded under Article 6(3).
- Once the need for steps/measures has been identified the regime to be followed should be specific, coherent and complete, based on best available information. Uncertainty should be addressed by applying precautionary rates to variables.
- The proactive duties under Article 6(1) and (2) are ongoing in nature; steps to avoid deterioration and deliver restoration should be subject to regular review and adapted or refined as necessary until the required outcomes are achieved.

4.2.22 Where a derogation application falls within the scope of Article 6(2) it will be subject to any necessary steps identified as relevant to the ongoing activities at the farm concerned.

### 4.3 How identified measures and steps under 6(1) and (2) influence the application of 6(3) in a hybrid approach

4.3.1 Where a nitrate derogation application is submitted it is a project for the purpose of Article 6(3). The first question for a decision-maker concerns the matter of continuity (refer section 3). The question of continuity will inform which Article 6 duties are then engaged. **Where a derogation application falls entirely within Article 6(2) (i.e. scenario 2 in table 3.2.2) it is exempt from the 6(3) assessment obligations.** Further detail will need to be agreed by the relevant authorities but, in principle, an application can be granted where a decision-maker is satisfied as to the sufficiency of the approach to Article 6(2) duties. This might reasonably involve the identification and implementation of necessary steps to avoid deterioration against pre-agreed criteria. It can reasonably be anticipated that an approach might also involve clear delivery milestones (as set out in section 4.2).

4.3.2 In order to provide necessary confidence, it is also anticipated that the ability of current (and future) derogation decisions to rely on 6(2) duties might be made conditional upon Article 6(2) delivery milestones being achieved. In that way, if insufficient progress is made in delivery of Article 6(2) obligations, derogation applications will become subject to Article 6(3) until sufficient progress is made (with associated consequences for decision-makers and applicants). Such conditionality might provide an important incentive for the agricultural sector to engage with the delivery of Article 6(2) measures. The wider benefits of the delivery of 6(1) and (2) duties are relevant to all plans and projects (not just derogation farmers) so the incentive will not only be relevant to derogation farmers.

4.3.3 Where a derogation application falls wholly, or partially, within the scope of Article 6(3), these tests are applied as normal. **However, where a suite of measures are identified under Article 6(1) and (2), and associated with agreed delivery milestones, decisions in respect of plans and projects under Article 6(3) can then be made in light of an improving baseline condition.** The key question under the integrity test becomes whether a new plan or project will undermine or otherwise hinder the achievement of the conservation objectives through the parallel wider duties. As such, where parallel measures and steps are being implemented under wider 6(1) and (2) duties the potential for an integrated approach to the delivery of necessary mitigation can be explored. With this in mind a potential approach to the assessment of new plans and projects (including non-derogation farm consents or permission) might be linked to the delivery of duties under Article 6(1) and (2) as follows:

- When applying the integrity test to new plans and projects which contribute additional nutrients to European sites which exceed nutrient standards, the question to be asked is whether the plan or project undermines the achievement of the conservation objectives.
- Where a new plan or project contributes additional nutrients to a European site which currently exceeds nutrient standards, in addressing that question, a decision-maker must therefore have regard to any measures being taken under 6(1) and (2). For purpose of clarification, measures being taken under 6(1) and (2) cannot be relied upon as mitigation for the effects of a ‘new’ or non-continuous activity, in order to grant authorisation for a plan or project. This would be contrary to the CJEU Dutch Nitrogen Ruling which explains that the positive effects of measures under 6(1) and (2) cannot be invoked in order to grant authorisation under Article 6(3). This applies to aspirational measures before they have been implemented (refer paragraph 123) and also to measures after they have been implemented (paragraph 124).
- Having said that, an assessment of predicted effects under Article 6(3) can recognise measures being delivered under Articles 6(1) and (2) to the extent that they might influence the baseline conditions against which the Article 6(3) tests are being applied. The confidence in respect of the expected benefits from 6(1) and (2) measures will exert an influence over the extent to which they might be taken into account. In some cases measures being taken under 6(1) and (2) might be recognised as ‘other plans and projects’ within the scope of an in-combination assessment; in other cases they might simply be acknowledged as relevant to a decisions as to the extent to which the plan or project might undermine the achievement of the conservation objectives.
- The appropriateness of 6(1) and (2) measures for the site concerned can be evaluated against pre-defined criteria and the delivery of measures should be aligned to clearly defined delivery milestones.
- Where ‘appropriate’ measures and steps are being taken, and delivery milestones are on track, decision makers can have regard to those measures (and an improving baseline trend) when applying the integrity test providing greater flexibility in decision-making and potentially allowing for an integrated approach to the delivery of management, restoration and mitigation. An integrated approach to the delivery of management restoration and mitigation explicitly recognises that separate mitigation is still required under 6(3) even where positive measures are being taken under Article 6(1) and (2), but the delivery of measures under 6(1) and (2) allows the potential for an integrated approach to mitigation (whereby mitigation is evaluated against the extent to which it

will avoid any delay in the delivery of improvements compared to progress if the plan or project was not authorised).

- 4.3.4 It is important to recognise that **the Habitats Directive did not anticipate Article 6(3) being an absolute barrier to growth where a site is not in a favourable conservation status**. If the application of the integrity test to new development proposals has regard to measures under 6(1) and (2), which the Directive clearly anticipates should be progressing in parallel, it is reasonable to argue that the benefits of a more flexible approach to decision-making would act as an incentive to authorities to identify *and* deliver sufficient measures under Article 6(1) and (2). A similar approach in respect of managing phosphates in SAC rivers in Wales has recently been published by the Welsh Government<sup>15</sup> and provides a helpful reference point.
- 4.3.5 A broader more integrated approach referred to above will have added benefits of being linked to the delivery of wider duties under other obligations such as the Water Framework Directive.

#### 4.4 Summary

- 4.4.1 This paper has set out some advice concerning the determination of derogation applications under regulation 39. Having raised concerns over a blanket application of Article 6(3) to ongoing activities, in view of the overall aims and objectives of the Habitats Directive and the scope of different powers under Article 6. An alternative ‘hybrid’ approach has been put forward which, in the professional opinion of DTA Ecology is preferable.
- 4.4.2 Any final decision over a preferred approach rests with the relevant authorities concerned. The OEP (and others reading this advice) will need to seek and rely on their own legal advice. In this regard, a review of the advice contained herein has been undertaken by Freeths and is provided in section 5.

#### 4.5 Reflections on Advocate Generals’ Opinion in the An Taisce case

- 4.5.1 The Advocate General’s Opinion in cases C-531/21 and C-895/24 (*The An Taisce ruling*) was handed down after the advice provided in this report thus far was drafted, but before the report was published. For purpose of completion this section 4.5 was added retrospectively to provide reflections on the relevance of the Opinion to the advice.
- 4.5.2 The *An Taisce* case concerns the application of Article 6(3) to a Nitrates Action Programme by the Irish Government. It is primarily relevant to AA requirements for a ‘plan’ (as opposed to a ‘project’) as clearly recognised by the AG in paragraph 86.
- 4.5.3 The AG Opinion explains that, whilst the NAP is a ‘plan’ for the purpose of Article 6(3), it does not follow that all measures within the plan must necessarily be subject to assessment of implications for European sites (paragraph 92). This arises as a consequence of an assessment under 6(3) being constrained by the level of precision within the plan

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<sup>15</sup> Welsh Government Guidance <https://www.gov.wales/development-special-areas-conservation-sac-rivers-planning-guidance> and associated interim policy statement <https://www.gov.wales/development-special-areas-conservation-sac-rivers-interim-planning-policy-statement>

(paragraphs 95-96) and the need to be ‘appropriate’ recognising the burden associated with an assessment where precision is lacking (paragraph 98).

- 4.5.4 The AG concluded that there was no need to carry out an assessment of a derogation provision within a NAP if it is ensured that the utilisation of that possibility by individual farmers is assessed pursuant to Article 6(3) (paragraph 113).
- 4.5.5 The AG ruling does not appear to undermine the approach proposed within this advice. It is explicitly recognised at paragraph 3.1.1 that *‘It is the advice of DTA Ecology that an application under regulation 39 can correctly be recognised as a project for the purpose of Article 6(3).’*
- 4.5.6 The advice contained herein is relevant to how that assessment under Article 6(3) might be approached. Whilst the AG Opinion clearly anticipates the utilisation of a derogation potential being assessed pursuant to Article 6(3) there is nothing to imply that established case law relevant to 6(3) would not apply to any such assessment.
- 4.5.7 The approach put forward within this advice is developed in light of case law relevant to the application of Article 6(3) where the ‘project’ relates to an ongoing activity. The approach put forward by DTA Ecology recognises the provisions of both Article 6(3) and Article 6(2) and how the Directive might best achieve its objectives. The key aim being to ensure that the application of fertiliser does not undermine the achievement of the conservation objectives (refer para 3.4.3). This focus on the conservation objectives aligns with the AG opinion at paragraph 112. Given many derogation farmers are already applying fertiliser, and a derogation application allows the continuation of that activity (often without material change) the overlap between Article 6(2) and 6(3) is relevant to this question.
- 4.5.8 The AG Opinion does not therefore, in the opinion of DTA Ecology, render the advice contained herein unsound. DTA Ecology recognises that it might be assumed that the AG anticipates a full assessment under Article 6(3) which treats each application as a new project without regard to any ongoing activity at the farm concerned. DTA Ecology recognises the potential validity of that argument but it is reasonable to anticipate that the Advocate General’s thinking can reasonably be expected to align with her opinion on the *Dutch Nitrogen Ruling* where she considered the concept of a single project and changes in fertilisation practice in some detail in paragraphs 128-139 which are provided in box 4.5.1 below.

**Box 4.5.1 – Extract from AG Kokott Opinion in the Dutch Nitrogen Ruling**

128. By Question 2 in Case C 293/17 it is intended to clarify how regularly recurring fertilising is to be assessed in the event that it was initiated lawfully before Article 6(3) of the Habitats Directive became applicable to a protected site and that it is still being carried out. The Raad van State (Council of State) would like to know in particular whether fertilising can form part of a single overall project, namely a farm, and could thus be covered by the permit for that farm.

**(a) The concept of single project**

129. Just as the Habitats Directive defines the concept of project, it regulates which measures may be subsumed in a single project. However, this question has no practical relevance to the application of Article 6(3) of the Habitats Directive to given projects, as irrespective of which individual measures have been subsumed in a project, all specific effects of the package of

measures must be examined in view of the conservation objectives of the protected sites concerned.

130. The background to this question is instead the temporal applicability of Article 6(3) of the Habitats Directive. If a project was authorised before that provision became applicable, its further execution cannot be assessed on the basis of that provision, but is subject to Article 6(2), (62) which requires an assessment of compatibility with the conservation objectives of protected sites only in certain circumstances. (63) If, however, any fertilising of agricultural land or even merely fertilising carried out over the course of a certain year is an individual project, it must in principle also be reassessed in each case.

131. In *Stadt Papenburg* the Court recognised the possibility of a single operation in a similar situation. That case concerned recurrent dredging of a waterway which was necessary to maintain the navigable channel at a certain depth. Those works can, having regard to their nature or the conditions under which they are carried out, and in particular their common purpose, be regarded as a single operation and as one and the same project. (64) A further indication that it should be classified as a single project, which the Court did not highlight, however, is the fact that the regular works were approved in a single authorisation before Article 6(3) of the Habitats Directive became applicable. (65)

132. The regular fertilising of agricultural land likewise has a single common purpose, namely crop cultivation on a farm. It must also be assumed that fertilising has been permitted at least since the farm in question commenced its activity.

133. Such a farm is thus to be regarded as a single operation and includes the fertilisation of the land associated with it.

134. This conclusion is also supported when fertilising is viewed from the perspective of the temporal application of Article 6(3) of the Habitats Directive. If an assessment under Article 6(3) of the Habitats Directive had to be carried out for each individual fertilisation of agricultural land or even merely for each year, the expenditure would, in all likelihood, be disproportionate to the possible benefits to site protection. In general, it should be sufficient for fertilising of certain land which recurs in a similar form to be assessed appropriately once in view of the conservation objectives of the sites concerned.

#### **(b) Changes in fertilisation practice**

135. Difficulties can arise, however, where fertilising changes. The Raad van State (Council of State) therefore asks whether a single operation should still be taken to exist if the fertilising did not always take place on the same tracts of land, in the same quantities and using the same techniques. It also asks whether it is relevant to this question that the nitrogen deposition caused by the application of fertilisers on the surface of land or below its surface did not increase after Article 6(3) of the Habitats Directive became applicable.

136. As the concept of project in the context of the application of Article 6(3) of the Habitats Directive is at issue, these questions should be answered with reference to the aim of that provision. It integrates the precautionary principle and makes it possible to prevent in an effective manner adverse effects on the integrity of protected sites as a result of the plans or projects envisaged. (66) The crucial factor must therefore be whether an additional risk of a significant effect on protected sites is created by the changes in fertilisation practice.

137. If the risk of adverse effects from fertilising remains within the previously existing bounds, it must be considered that the project, the farm, has not changed. If, however, the risk of adverse effects increases, for example because additional nitrogen deposition in protected habitats are to be expected as a result of more intensive fertilisation, different fertilisers, different fertilisation methods or a change in the location of the fertilisation, fertilising cannot be recognised as being part of the originally authorised project.

138. It is therefore important whether nitrogen deposition caused by the application of fertilisers on the surface of land or below its surface did not increase only if it is clear that nitrogen deposition has not increased in the protected habitats concerned. A general development to the effect that fertilising has not resulted in higher nitrogen deposition overall does not, however, rule out the possibility of a higher load on certain protected habitats.

139. It should further be noted that similar considerations apply to grazing as to fertilising of agricultural land.

**(c) Interim conclusion**

140. The answer to Question 2 in Case C 293/17 is therefore that regularly recurring fertilising which was carried out lawfully before Article 6(3) of the Habitats Directive became applicable to a protected site and is still being carried out can form a single project with a farm. On the other hand, changes in fertilisation practice are to be regarded as a new project if they create an additional risk of significant effects on protected sites.

- 4.5.9 The opinion in the Dutch Nitrogen Ruling is relied upon to support the interpretation by DTA Ecology of paragraph 83 of the final ruling of the Court, which underpins the proposed hybrid approach whereby the recurring unchanged application of fertiliser falls within the scope of Article 6(2).
- 4.5.10 DTA Ecology recognises however that no authoritative ruling has yet been made in this regard and that the AG opinion in the Dutch Nitrogen Ruling can be interpreted in other ways, especially where the practice of fertiliser is subject to an annual permitting process and the date against which continuity is understood is unclear.
- 4.5.11 Ultimately, as recognised by Freeths in section 5, the proposed hybrid approach has not definitely been ruled upon by any Court and will inevitably invite scrutiny.

## 5 A legal review of the DTA Ecology advice by Freeths

### LEGAL REVIEW OF THE DTA ECOLOGY REPORT

1. Freeths LLP (“**Freeths**”) has worked with DTA Ecology on this Report. In doing this Freeths has discussed the contents of the Report with DTA Ecology and has read the arguments as presented above.
2. The arguments made in the Report in favour of a “hybrid approach”, which integrates the provisions of Articles 6(1), 6(2), and 6(3) in more coherent and purposive way, are compelling. This is because the “hybrid approach” recognises the recurring nature of many derogation activities and the broader legal duties under Articles 6(1) and 6(2). The approach therefore allows for a more holistic and nuanced approach to the provisions of Article 6 compared to the Department of Agriculture, Environment and Rural Affairs’ (“**DAERA**”) blanket application of Article 6(3) to all derogation applications.
3. It is our view that administratively the proposed “hybrid approach” would lead to better outcomes, as the assessment provisions under Article 6(3) would only apply to new derogation applications or changes to existing recurring activities that may have a significant effect on European sites. Taking this approach does not mean that those ongoing, unchanged recurring activities would then be ignored. Rather, they would (more appropriately) be managed in accordance with DAERA’s wider duties under Articles 6(1) and 6(2). Those wider duties ought (even now) to be proactively delivered by DAERA and in doing so should be targeting all sources of nutrient pollution (not just derogation farms) to achieve the conservation objectives of European sites. The “hybrid approach” would therefore allow for more proportionate, risk-based regulation on this issue, which avoids unnecessary burdens being placed on farmers, and which is better aligned with the Habitats Directive’s aims of safeguarding biodiversity while considering wider economic and social realities. It is our view that doing this would represent a positive step towards more flexible, integrated decision-making on the application of nutrients in Northern Ireland, supporting both environmental and economic outcomes.
4. Conceptually the “hybrid approach” is also appealing because, as stated in paragraph 2.2.5 of the Report, the proactive obligations under Articles 6(1) and 6(2) are intended to deal with the “baseline” or status quo position. They therefore look back at what activities have taken place to date which are undermining the conservation objectives of European sites. Articles 6(3) and 6(4) however, impose a “...*step-wise reactive assessment procedure which applies when a new plan or project is being considered or proposed by a competent authority*”. Articles 6(3) and 6(4) therefore look forward at what pathways of effect new plans or projects may have on European sites either alone or in combination with other plans and projects, taking the current situation as the baseline position.
5. In contrast, DAERA’s approach does not properly make that distinction between the proactive (but backward looking) parts of Article 6 and the reactive (but forward looking) parts of Article 6. It also risks straying into the use of Article 6(3) as a mechanism intended to deliver the maintenance or restoration of European sites. Categorically, the maintenance and restoration of European sites should instead come about through actions of the Member State under Article 6(1) and 6(2) of the Habitats Directive.

6. However, it should be recognised that the “hybrid approach” promoted by DTA Ecology has not been definitively ruled upon by either the Court of Justice of the European Union (“CJEU”) or our domestic courts. Presumably DAERA have taken legal advice on its proposed approach and is pursuing it anyway, which suggests that persuasive arguments could be made either way as to the correct approach. Decision-makers may also prefer to take the more precautionary approach of assessing all derogations, given that the precautionary principle is inherent within Article 6 of the Habitats Directive.
  
7. Potential counter arguments to the “hybrid approach” include:
  - 7.1. That it relies heavily on a particular interpretation of paragraphs 82 to 84 of the CJEU judgment in *Cooperatie Mobilisatie for the Environment UA v College van Gedeputeerde* (C-293/17). Whilst this interpretation is consistent with the underlying aims and objectives of the Habitats Directive, our domestic courts may take a different interpretation should the argument be scrutinised by the courts. Legal uncertainty over the application of the “hybrid approach” in this context will therefore continue until our domestic courts provide a definitive ruling on it, taking into account all of the relevant facts.
  - 7.2. Arguments could be made over whether farming methods generally or in particular instances can be characterised as ongoing or recurring activities. This introduces a degree of fact specificity, which means that legal arguments may be inherently vulnerable to new information as it comes to light.
  - 7.3. Matters are complicated by the fact that, as noted in the Report, previous derogations since 2007 were not assessed by DAERA under Article 6(3) despite the Habitats Directive, despite it being in force since 1992. This presents challenges over the legal history of this issue, and therefore the potential for further arguments being made which undermine reliance on “hybrid approach” in these circumstances.
  
8. Therefore, whilst Freeths LLP is supportive of the proposed “hybrid approach”, it must be noted that certain aspects of the argument are untested in the courts. Until further judicial clarification is obtained, it would be prudent to characterise these points as persuasive but not yet legally watertight.

**FREETHS LLP**  
**12 January 2026**

# Appendix 1: Review of case law relevant to continuity

## *Stadt Papenburg*

A review of relevant case law is provided in appendix 1. By way of a summary,

The *Stadt Papenburg*<sup>16</sup> case involved the recurring activity of dredging. Having recognised that dredging is a 'project' for the purpose of Article 6(3), the Court introduced the concept of a 'one and the same project' which might be identified on the basis of the 'regularity or nature of the works or the conditions under which they are carried out'. A recurring activity which is 'one and the same' is not subject to the assessment obligations under Article 6(3) (paragraph 48) but may fall instead within the scope of Article 6(2) (Refer paragraph 49). Understanding when a project may be classified as 'one and the same' is therefore important when considering assessment obligations under the Habitats Directive. Further clarification on this was provided by the *Dutch Nitrogen Ruling*.

## *Dutch Nitrogen Ruling*

The Dutch Nitrogen Ruling Case C-293/17<sup>17</sup> involved the application of fertiliser to land and was concerned with associated impacts from air quality, in particular emissions from ammonia. When interpreting this ruling, it is relevant to recognise that impacts associated with ammonia emissions are very localised (highest contributions generally within 1km of an emission point) and are significantly influenced by the spreading location and equipment used. For instance, spreading via a shallow injection technique will lead to a 70% reduction in emissions to air compared to a splash plate spreader.

With reference back to *Stadt Papenburg*, paragraph 80 reiterates that a single operation which is 'one and the same project' is 'exempt' from 6(3). The Court then provides criteria against which 'one and the same' should be understood for fertiliser application with reference to the location and spreading techniques.

In doing so, case C-293/17 effectively creates a distinction in practice between recurring activities and continuity. Whilst the application of fertiliser on many existing farms might be a recurring activity, it does not necessarily follow that a recurring activity represents continuity such that an exemption from 6(3) would follow. In other words, whilst the application of fertiliser might be recurring (in that it has been taking place for many years and predates the coming into force of the Habitats Directive), the location and application methods may have changed over time such that it is not 'one and the same' activity for the purpose of 6(3). From an air quality perspective the potential influence over ecological risks arising from such changes were recognised by the Court.

The first sentence of paragraph 83 of Case C-293/17 explains that where there is no continuity, a recurring activity cannot be classified as 'one and the same project' for the purpose of Article 6(3) (and cannot therefore be exempted from the assessment obligations). Had paragraph 83 stopped there, the position of the Courts would be clear and beyond any significant debate; a recurring activity which is not continuous is not 'one and the same project' rendering the whole activity

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<sup>16</sup> Case [C-226/08](#) The Stadt Papenburg ruling.

<sup>17</sup> The Dutch Nitrogen Ruling [Case C-293/17](#)

subject to a full assessment under Article 6(3). Paragraphs 83 continues however to provide important clarification as to the scope of the likely significant effect test in the case of a recurring application of fertiliser where there is no continuity, the second sentence of paragraph 83 has implications for how such activities are dealt with in practice.

It states that the decision, in each case, as to whether there is a likely significant effect from a recurring activity in the absence of continuity (and thus a requirement for appropriate assessment) will depend upon criteria relating to the risk that arises to the protected site on account of the **changes** thus brought about by such an activity. It can therefore be argued that the 'likely significant effect' test for a recurring non-continuous application of fertiliser involves a comparison between the effects associated with the previous situation (prior to any change in location or method of application) with the effects that are predicted following the change in location/method. **In other words, the test for significance is constrained to the effects that arise from the change rather than the effects from the overall activity itself.**

This interpretation aligns with paragraphs 135-137 of the supporting AG Opinion. It is also supported when paragraph 83 is read in the context of the preceding paragraph 82. Paragraph 82 explains the *normal* 6(3) approach where the decisive criterion for triggering an AA relates to the possibility that the **project** will have a significant effect. The criterion in paragraph 83 then notably refers, instead, to a criterion relating to risks from the **changes** brought about (which is different).

Caution is always required in any speculation as to underlying thinking within the Courts, but it can reasonably be proposed that the starting point for the Court might have been a recognition that Article 6 treats existing/ongoing activities differently to 'new' activities, and that this distinction is important. Generally speaking, the Directive anticipates that an existing or ongoing activity would fall within the scope of Articles 6(1) and (2), whilst new or proposed activities would be subject to specific assessment requirements under Articles 6(3) and (4). If *any* change in a recurring activity triggered the *normal* 6(3) assessment process, the underlying discretion afforded to ongoing activities would be lost in its entirety; a changed recurring activity would be treated in the same way as a 'new' activity irrespective of the actual risk to a site from the change and the real-world consequences for parties currently undertaking the activity. The clarification by the Court in the case of *EC v Austria* (2006) is relevant in this context as the principle that projects are subject to an assessment does not apply prior to the Directive coming into force, and it would not therefore be appropriate for situations which are already established to be affected by the assessment obligations<sup>18</sup>.

On the other hand, if changes to recurring activities are included within a blanket exemption from Article 6(3) by default, new risks to European sites might escape proper scrutiny. An incentive could arise for plan and project proposers to artificially disguise new activities as mere changes to recurring activities in order to evade proper scrutiny under 6(3). The Courts were handling a sensitive yet important matter.

The DTA interpretation of paragraph 83 provides a safety net which protects sites from damaging impacts which might rise from *changes* to otherwise recurring activities, whilst protecting recurring activities from being tripped up on the basis of a legal technicality. A recurring activity which is unchanged is exempt from Article 6(3). Where changes to a recurring activity are introduced, the legal tests under 6(3) are triggered, but the requirement for appropriate assessment is determined on the basis of the risk to a European site from any such changes, rather than being triggered merely

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<sup>18</sup> Case C-209/04 EC v Austria (refer paragraphs 56-57).

by the notion of change in and of itself. The recurring element of any changed activities would be out with the scope of Article 6(3) but would remain within the remit of Article 6(2).

Some scenarios are provided in the section 3.5 case studies by way of further illustration of how the DTA interpretation compares in practice to an interpretation whereby any change triggers a full assessment under 6(3) of the entire activity.

#### *Aqua Pri*

The final *Aqua Pri* case concerned a fish farm which is subject to an environmental permitting regime which envisaged regular review in light of the nature of activities subject to a permit. This case was handed down after the UK formally left the EU and is not legally binding on UK Courts. The ruling reiterated the underlying principles established by *Stadt Papenburg* and Case C-293/17 at paragraph 36 but concluded that, in the case before the Court, as a new authorisation was required and the prior assessment had been flawed, a new assessment of the entire activity under 6(3) is triggered upon renewal, even though there was continuity.

However this exception to the general rule established by *Stadt Papenburg* applies where two criteria are met. Firstly, a prior assessment under Article 6(3) was undertaken and was legally flawed, AND secondly, the activity is subject to a condition which makes continuation subject to seeking and obtaining a new permission, a new assessment under 6(3) must be undertaken.

## Appendix 2 – how our understanding of continuity has changed since 2007

The Habitats and Birds Directive were in force in 2007 when the first derogation applications were submitted. In accordance with corresponding duties under the Habitats Directive, consideration should have been given to the provisions of Article 6 at that time. The question of continuity would have been relevant to the correct application of Article 6 in 2007 but the *Stadt Papenburg* ruling was not handed down until 2010. Caution is required in any speculation on how any decision would have been approached had the first derogation applications been subject to assessment under the Habitats Directive, but it is reasonable to anticipate that a Court in 2007 might have given weight to the *Waddenzee* Ruling<sup>19</sup> (handed down in 2004) which established the legal principle that an ongoing activity can be recognised as a ‘project’ and concluded that the derogation applications in 2007 should have been treated as a ‘plan or project’ for the purpose of Article 6(3). The fact remains that they were not.

At that point, from 2007, a question in respect of an ongoing duty under Article 6(2) from a failure to recognise derogation applications as a project under 6(3) could also be argued to arise in light of the *Waddenzee* ruling. Paragraph 36-37 explains that, if a plan or project which was granted in accordance with Article 6(3) subsequently proves to give rise to deterioration or disturbance, duties under 6(2) could be relied upon to satisfy the essential objectives of the Habitats Directive. It logically follows that where a plan or project had been granted in breach of Article 6(3) the duties under 6(2) to take appropriate steps to avoid deterioration or disturbance could likewise be triggered and the question of continuity then becomes a moot point.

The fact remains that no attempt was made to erase the unlawful consequences of any breach during the period between 2007-2010. After 2010 the clarification provided by *Stadt Papenburg* ruling would have allowed a decision-maker to reasonably decide that a nitrate derogation application was exempt from 6(3) where it was classified as ‘one and the same’ project. Where this was the case the decision-maker would have needed to acknowledge that the continuation of the ‘one and the same’ project could however fall within the scope of Article 6(2). In practice therefore, after the *Stadt Papenburg* ruling, relevant authorities would have had discretion over how the unlawful consequences of the earlier breaches could be erased. They could identify appropriate steps to avoid deterioration under Article 6(2), and these steps might have involved the application of Article 6(3) to new applications but they could also have involved wider measures targeted to other sources of nutrient pollution (beyond derogation farms). In other words relevant authorities could have adopted a more flexible hybrid approach involving either 6(2) or 6(3) duties, or both.

Attempts to erase the unlawful consequences following the *Dutch Nitrogen Ruling* in 2018 would have benefitted from further clarification as to how ‘continuity’ should be approached in respect of recurring activities with reference to criteria set out therein. The scope of an assessment under Article 6(3) for a recurring non-continuous activity would be constrained in accordance with paragraph 83, in view of the effects of any change which may have arisen. Duties under Article 6(2) would be relevant to the identification of appropriate steps to avoid deterioration.

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<sup>19</sup> Case C-127/02 The Waddenzee Ruling

# Appendix 3 – case scenarios to illustrate the practical implications of different approaches

These scenarios are provided to illustrate and explore some potential practical implications of different approaches to derogation applications. Some consequences draw upon experience with ‘nutrient neutrality’ approaches to mitigation in England which have driven private nature markets for nutrient trading with significant costs for developers (primarily residential development). It is reasonable to anticipate that a similar approach might be adopted when considering mitigation options which might be relied upon to avoid adverse effects from derogation applications if they were subject to Article 6(3) tests. The important difference to be acknowledged when considering a nutrient neutrality type approach for farming lies in the disposable income available to farmers compared to housing developers who are more readily able to pass costs onto buyers. The scenarios are theoretical and any relevance to actual farms is entirely coincidental.

**The context:** Three neighbouring farms operate in close proximity to a terrestrial European site designated for heathland (which exceeds relevant air quality nutrient nitrogen standards) and are within the catchment of a sensitive riverine SAC (which exceeds relevant water quality nutrient standards) . All have been applying manure and chemical fertiliser in a recurring manner and a consenting process is introduced.

- Farmer A requires consent under the new regime. His recurring activities have changed and are not ‘one and the same’ and his application falls within the scope of 6(3).
- Farmer B requires consent under the new regime. His recurring activities have not changed and are ‘one in the same’ project falling within the scope of Article 6(2).
- Farmer C does not require a consent. Application of fertiliser by Farmer C is a recurring activity with continuity which falls within the scope of Article 6(2).

No action under Article 6(2) is currently being taken. Consider the following three scenarios for Farmer A...

## Scenario 1

The scenario: Farmer A originally applied his fertiliser over three of his four fields (A-C). More recently he has included field D meaning the spatial location of spreading has increased but the overall nutrient loading remains the same as his herd size is unchanged. Risks to air quality are unchanged as field D is not adjacent to the European site. Risks to water quality are unchanged.

### Full assessment under 6(3) on the basis that activities have changed (strict interpretation)...

The assessment must be made against the prevailing baseline conditions (refer paragraph 48 Case C-127/02 *Waddenzee*) which will necessarily include the impacts from the ongoing spreading by Farmers B and C (and other farms within the catchment). No action under Article 6(2) is currently planned and the *Dutch Nitrogen Ruling* is clear that the effects of measures under 6(1) and (2)

cannot be invoked to grant the consent for Farmer A before they are actually implemented (paragraph 123).

**Water Quality:** The effects from Farmers B and C (and other farms in the catchment) are the dominant contributor to an exceedance of the water quality nutrient targets within a European site and it is not possible to conclude that Farmer A will have no adverse effect to site integrity as the contribution from his farm (when it is considered as a 'new' activity) will add further nutrients and the site is subject to a restore objective. On-site mitigation options to reduce his overall emission are limited if the farm is to remain financially viable given the scale of the reduction to be achieved. The farmer considers off-site mitigation options including payments to farmer B to reduce his nutrient loading.

**Air Quality:** The effects from Farmer B and other farms are the dominant contributor to an exceedance of the air quality critical load within a European site and it is not possible to conclude that Farmer A will have no adverse effect to site integrity as the contribution from his farm will add further nutrients and the site is subject to a restore objective. Mitigation options to reduce his emissions further are limited if the farm is to remain financially viable given the scale of the reduction to be achieved. The farmer considers off-site mitigation options including payments to farmer C to reduce his ammonia emissions.

Other projects in the catchment are also seeking off-site mitigation and market forces allow farmers B and C to enter a bidding round with Farmer A and other interested parties, significantly increasing the costs to Farmer A.

**Outcome for agricultural sector:** The application for Farmer A is granted, and he is now committed to long-term financial contributions to neighbouring Farmers B and C. Other farms in the catchment will continue current operations until appropriate steps under Article 6(2) are identified by the relevant authorities and implemented, but no action under Article 6(2) is currently planned. Farmer A joins with other farms affected by derogation refusals and a legal challenge is mounted regarding the application of Article 6(3) given the recurring nature of their farming activities. Farmers B and C are now exploring other way to derive income from provision of mitigation for derogation farms and have identified opportunities from the delivery of mitigation associated with increased nutrient loading from the grant of planning permission for agricultural intensification and residential development leading to increased nutrient loading from wastewater treatment works. The nature market that emerges significantly increases offsite mitigation costs. In addition, steps which might otherwise have been centrally delivered under Article 6(2) to deliver restoration are increasingly being depleted as they are traded against new plans and projects as part of an emerging nature market. Farmer A (and other farms affected) are now operating at a commercial disadvantage to Farmers B and C who have a new income stream.

If duties under Article 6(1) and (2) are implemented at a future date, farmers B and C may be subject to 'appropriate steps' to avoid deterioration but their contribution to necessary reductions will take account of their relative contribution and 'measures/steps' directed to other nutrient sources. Implementation of necessary reductions will be delivered in a phased manner involving a fair share approach with stakeholder engagement, taking account of social and economic considerations. The Government are expected to announced a grant scheme for farmers who might be affected.

**Outcome for achievement of SAC conservation objectives:** Some minor improvements are secured where farmers B and C deliver mitigation for derogation farms that continue operating, but little progress is made on delivering meaningful restoration. The emerging nature market will

lead to a continuing depletion of what might have otherwise been ‘appropriate steps to avoid deterioration’ meaning the future delivery of duties under Article 6(2), and wider legislative duties such as Water Framework Directive, becomes increasingly challenging. The need for nutrient neutrality type bespoke mitigation is required for the foreseeable future placing burdens on the delivery of growth with no prospect of conservation objectives being achieved.

**DTA Interpretation of paragraph 83 whereby AA triggered on the basis of the effects from the actual change that has arisen**

On the DTA interpretation of paragraph 83, no AA would be triggered for Farmer A as there are no effects from the ‘change in continuity’ compared to his earlier recurring activity. His ongoing activity, does however falls within the scope of Article 6(2). In order to demonstrate compliance with the Habitats Directive, the assessment under Article 6(3) is dependent upon the decision-maker demonstrating that relevant authorities are proactively engaged with the identification and delivery of ‘appropriate steps to avoid deterioration’ such that reliance on 6(2) can be justified.

Once Article 6(2) is triggered, relevant authorities identify appropriate steps to be taken (refer section 4.2), taking account of potential changes to ongoing initiatives (such as the programme of measures under the River Basin Management Plan and the Lough Neagh Action Plan) as relevant to all sources of pollution. In view of Article 2(3) steps to be taken are implemented in a phased manner involving stakeholder engagement and, where appropriate, the exercise of statutory powers with the aim of delivering ongoing improvements until the conservation objectives are achieved. Farms A-C fall within the scope of Article 6(2), along with other sources of nutrients, and are subject to ‘appropriate steps’.

The delivery of steps under Article 6(2) creates greater flexibility in respect of decisions under Article 6(3) with opportunities for a centrally coordinated and integrated approach to the delivery of management, restoration and mitigation (refer Welsh Government approach to nutrients in SAC rivers<sup>20</sup>). Mitigation opportunities for projects subject to Article 6(3) ensure that the delivery of growth does not undermine the delivery of necessary restoration.

**Outcome for agricultural sector:** Appropriate steps to avoid deterioration are delivered by relevant authorities in a fair and reasonable manner targeted to sources which represent the greatest risk to European sites rather than being restricted only to activities that incidentally trigger Article 6(3) due to a need for some form of consent or permission, irrespective of the relative risk from the activity concerned. The provision of Article 2(3) mean that steps are taken in a manner which takes account of social, economic, cultural and regional requirements. The exercise of statutory powers is explored to ensure that costs in delivery of improvement are controlled. Financial compensation to affected farmers and government grant schemes are considered as part of options appraisal. Projects subject to assessment under 6(3) can contribute to the delivery of integrated mitigation as part of a centrally coordinated approach.

**Outcome for achievement of SAC conservation objectives:** Proactive engagement of duties under Article 6(2) drives meaningful progress in the delivery of restoration and the achievement of conservation objectives for European sites. Integrated approaches to mitigation ensure that the delivery of growth in the meantime will not undermine progress in achieving conservation objectives.

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<sup>20</sup> See Welsh Government [‘Development in SAC rivers planning guidance’](#)

## Scenario 2

The scenario: Farmer A originally applied his fertiliser over three of his four fields (A-C). He increased his herd size and now also spreads fertiliser on field D meaning the location of spreading has changed and the overall nutrient loading has increased. Risks to both air quality and water quality have increased as a consequence of the higher overall nutrient loading from the farm.

### **Full assessment under 6(3) on the basis that activities have changed (strict interpretation)...**

The assessment must be made against the prevailing baseline conditions (refer paragraph 48 Case C-127/02 *Waddenzee*) which will necessarily include the impacts from the ongoing spreading by Farmers B and C (and other farms within the catchment). No action under Article 6(2) is currently planned and Case C-293/17 is clear that the effects of measures under 6(1) and (2) cannot be invoked to grant the consent for Farmer A before they are actually implemented (paragraph 123).

**Water Quality:** The effects from Farmers B and C (and other farms) are the dominant contributor to an exceedance of the water quality nutrient targets within a European site and it is not possible to conclude that Farmer A will have no adverse effect to site integrity as the contribution from his farm will add further nutrients and the site is subject to a restore objective. On-site mitigation options to reduce his overall emission are limited if the farm is to remain financially viable given the scale of the reduction to be achieved. The farmer considers off-site mitigation options which are also not financially viable given emerging nature markets driving up costs.

**Air Quality:** The effects from Farmer B and other farms are the dominant contributor to an exceedance of the air quality critical load within a European site and it is not possible to conclude that Farmer A will have no adverse effect to site integrity as the contribution from his farm will add further nutrients and the site is subject to a restore objective. Mitigation options to reduce his emissions further are limited if the farm is to remain financially viable given the scale of the reduction to be achieved. The farmer considers off-site mitigation options which are also not financially viable given emerging nature markets driving up costs.

**Outcome for agricultural sector:** The application for Farmer A is refused, and he must now change his farming practices such that he doesn't require consent which undermines the financial viability of the farm, especially as he has an outstanding loan which supported the expansion in herd size which has not yet been paid off. Other farms in the catchment will continue current operations until appropriate steps under Article 6(2) are identified by the relevant authorities and implemented, but no action under Article 6(2) is currently planned. Farmer A joins with other farms affected by derogation refusals and a legal challenge is mounted regarding the application of Article 6(3) given the recurring nature of their farming activities and the legitimate expectation which led to the decision by Farmer A to take out a bank loan to fund the recent expansion. Other projects in the sector which are subject to 6(3) tests are constrained; the absence of wider measures under Article 6(1) and (2) meaning that it is not possible to conclude no adverse effect to site integrity unless nutrient contributions are de minimis or subject to bespoke mitigation to deliver nutrient neutrality. Nutrient trading markets emerge with associated costs for the sector (refer scenario 1). Costs associated with delivery of mitigation are anticipated to increase as mitigation options become depleted over time and competition for measures increases.

If duties under Article 6(1) and (2) are implemented at a future date, farmers B and C may be subject to 'appropriate steps' to avoid deterioration but their contribution to necessary reductions will take account of their relative contribution and 'measures/steps' directed to other

nutrient sources. Implementation of necessary reductions will be delivered in a phased manner involving a fair share approach with stakeholder engagement, taking account of social and economic considerations. The Government are expected to announce a grant scheme for farmers who might be affected.

**Outcome for achievement of SAC conservation objectives:** Some minor improvements are secured by Farmer A no longer operating under a derogation but little progress is made on delivering meaningful restoration. The emerging nature market prompted by wider application of Article 6(3) in the absence of proactive measures and steps to deliver restoration leads to a continuing depletion of what might have otherwise been 'conservation measures' or 'appropriate steps to avoid deterioration' under Articles 6(1) and (2). Such measures/steps are traded off against the delivery of projects which add further nutrient loading. The future delivery of duties under Article 6(2), and wider legislative duties such as Water Framework Directive becomes increasingly challenging to meet. The need for bespoke mitigation is required for the foreseeable future placing a burden on the delivery of growth with no prospect of conservation objectives being achieved.

#### **DTA Interpretation of paragraph 83 whereby AA triggered on the basis of the effects of the change that has arisen**

On the DTA interpretation of paragraph 83, an AA would be triggered for Farmer A but the scope of the assessment, and the mitigation that may be required, is constrained to effects associated with the spreading in field D only. His ongoing activity (spreading in fields A-C) falls within the scope of Article 6(2). In order to demonstrate compliance with the Habitats Directive, the assessment under Article 6(3) is dependent upon the decision-maker demonstrating sufficient progress in appropriate steps to avoid deterioration being taken such that reliance on 6(2) can be justified.

Once Article 6(2) is triggered, relevant authorities identify appropriate steps to be taken (refer section 4.5), taking account of potential changes to ongoing initiatives (such as the programme of measures under the River Basin Management Plan and the Lough Neagh Action Plan) as relevant to all sources of pollution. In view of Article 2(3) steps under Article 6(2) are implemented in a phased manner involving stakeholder engagement and the exercise of statutory powers with the aim of delivering ongoing improvements until the conservation objectives are achieved. Farms A-C fall within the scope of Article 6(2), along with other sources of nutrients, and are subject to 'appropriate steps'.

The delivery of steps under Article 6(2) creates greater flexibility in respect of decisions under Article 6(3) with opportunities for a centrally coordinated and integrated approach to the delivery of management, restoration and mitigation (similar to the Welsh Government approach to nutrients in rivers<sup>21</sup>). Mitigation opportunities for Farmer A to avoid adverse effects from the increased nutrient loading from field D (and other projects which add nutrient loading) include financial contributions to avoid delays in the delivery of anticipated improvements under Article 6(1) and (2) through a centrally coordinated approach managed by relevant authorities. Costs are controlled and the approach ensures that the 6(3) plans and projects do not undermine the delivery of necessary restoration.

**Outcome for agricultural sector:** Appropriate steps to avoid deterioration are delivered by relevant authorities in a fair and reasonable manner targeted to sources which represent the

<sup>21</sup> See Welsh Government '[Development in SAC rivers planning guidance](#)'

greatest risk to European sites, rather than being restricted only to activities that incidentally trigger Article 6(3) due to a need for some form of consent or permission, irrespective of the relative risk from the activity concerned. The provision of Article 2(3) mean that steps are taken in a manner which takes account of social , economic, cultural and regional requirements. The exercise of statutory powers is explored to ensure that costs associated with the delivery of improvement are controlled. Financial compensation to affected farmers and government grant schemes are considered as part of options appraisal. Projects subject to assessment under 6(3) can contribute to the delivery of integrated mitigation as part of a centrally coordinated approach to avoid delays in the delivery of improvements avoiding blanket restrictions on growth.

**Outcome for achievement of SAC conservation objectives:** Proactive engagement of duties under Article 6(2) drives meaningful progress in the delivery of restoration and the achievement of conservation objectives for European sites. Integrated approaches to mitigation ensure that the delivery of growth in the meantime will not undermine progress in achieving conservation objectives.

### Scenario 3

The scenario: Farmer A is environmentally minded and had previously availed of a Government grant to purchase new equipment to spread his manure via a shallow injection technique leading to a 70% reduction in emissions to air (whilst Farmer B continued to spread using a splash plate spreader). There was no change to his herd size, or the location of spreading. Risks to water quality were unchanged and the overall nutrient loading remained the same.

#### **Full assessment under 6(3) on the basis that activities have changed... (strict interpretation)**

The assessment must be made against the prevailing baseline conditions (refer paragraph 48 Case C-127/02 *Waddenzee*) which will necessarily include the impacts from the ongoing spreading by Farmer B and other farms within the catchment.

**Water Quality:** The effects from Farmer B and other farms are the dominant contributor to an exceedance of the water quality nutrient targets within a European site and it is not possible to conclude that Farmer A will have no adverse effect to site integrity as the contribution from his farm will add further nutrients and the site is subject to a restore objective. Mitigation options to reduce his emission further are limited if the farm is to remain financially viable given the scale of the reduction to be achieved.

**Air Quality:** The effects from Farmer B and other farms are the dominant contributor to an exceedance of the air quality critical load within a European site and it is not possible to conclude that Farmer A will have no adverse effect to site integrity as the contribution from his farm will add further nutrients and the site is subject to a restore objective. Mitigation options to reduce his emission further are limited as he already uses an injection spreading technique which is regarded as best practice.

**Implications for agricultural sector:** The application for Farmer A is refused, in spite of his past record of changing his farming practices to reduce ammonia emissions to a European site. His farming activities must be changed such that he can operate without a consent undermining the economic viability of the farm. Farmers B and C, and other farms in the catchment will continue to operate until appropriate steps under Article 6(2) are identified by the relevant authorities and implemented. Farmer A joins with other farms affected by derogation refusals and a legal

challenge is mounted regarding the application of Article 6(3) given the recurring nature of their farming activities. Other projects in the sector which are subject to 6(3) tests are constrained; the absence of wider measures under Article 6(1) and (2) mean that it is not possible to conclude no adverse effect to site integrity unless nutrient contributions are de minimis or subject to bespoke mitigation to deliver nutrient neutrality. Nutrient trading markets emerge with associated costs for the sector (refer scenario 1).

If duties under Article 6(1) and (2) are implemented at a future date, farmers B and C may be subject to 'appropriate steps' to avoid deterioration but their contribution to necessary reductions will take account of 'steps' directed to other nutrient sources and their relative contribution to overall nutrient loading. Implementation of necessary reductions will be delivered in a phased manner involving stakeholder engagement and the Government are expected to announce a compensation package or grant scheme for farmers who meet certain criteria. Farmer B qualifies for a generous grant as the reductions to be delivered from his farm had higher economic consequences as he was a primary contributor to exceedance for air quality.

**Implications for achievement of conservation objectives:** The refusal of consent brings minor improvements to air and water quality but improvements are minimal compared to the loading from other sources. The emerging nature market prompted by wider application of Article 6(3), in the absence of proactive measures and steps to deliver restoration, leads to a continuing depletion of what might have otherwise been 'conservation measures' or 'appropriate steps to avoid deterioration' under Articles 6(1) and (2), as such measures/steps are traded off against the delivery of projects which add further nutrient loading. The future delivery of duties under Article 6(2), and wider legislative duties such as Water Framework Directive becomes increasingly challenging to meet. The need for bespoke mitigation is required for the foreseeable future placing a burden on the delivery of growth with no prospect of conservation objectives being achieved.

#### **DTA Interpretation of paragraph 83 whereby AA triggered on the basis of the effects of the change that has arisen**

On the DTA interpretation of paragraph 83, no AA would be triggered for Farmer A as the effects from the 'change in continuity' represent an improvement compared to his earlier recurring activity. His ongoing activity, with lower emissions, does however fall within the scope of Article 6(2). Triggering a need to identify appropriate steps to avoid deterioration.

Once Article 6(2) is triggered, relevant authorities identify appropriate steps to be taken, taking account of all relevant sources of pollution (refer scenarios 1 and 2). Farms A-C farms fall within the scope of Article 6(2) and are subject to 'appropriate steps' but the steps identified for Farmer A are less onerous than those for Farmer B as he has already introduced injection spreading meaning the risks from his farm are less.

The delivery of steps under Article 6(2) creates greater flexibility in respect of decisions under Article 6(3) with opportunities for a centrally coordinated and integrated approach to the delivery of management, restoration and mitigation (refer Welsh Government approach to nutrients in rivers<sup>22</sup>). Mitigation opportunities ensure that the delivery of growth does not undermine the delivery of necessary restoration.

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<sup>22</sup> See Welsh Government '[Development in SAC rivers planning guidance](#)'

# Appendix 4 – Scope of Articles 6(1) and (2) of the Habitats Directive and case law concerning associated duties and responsibilities

## Article 6(1) of the Habitats Directive

It is widely recognised that achieving the conservation objectives for a number of European sites in Northern Ireland will require the delivery of measures to address agricultural sources of pollution. It logically follows that conservation measures to achieve the conservation objectives across European sites, as required in accordance with Article 6(1), will necessarily involve the control of pollution from agricultural sources.

The EC guidance on Article 6(1) is a helpful cross-reference in understanding the type of measures which might be anticipated in delivering duties under Article 6(1). Extracts from chapter 2 of the EC guidance on Article 6(1) are summarised in box A4.1 below:

**Box A4.1: Extracts from chapter 2 ‘Article 6(1)’ of EC guidance ‘Managing Natura 2000’ (emphasis added by underline)**

‘Article 6(1) provides for positive conservation measures, involving, if need be, management plans, and statutory, administrative or contractual measures, which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the site. In that regard, Article 6(1) is distinguished from the three other paragraphs of Article 6 which provide for preventive measures to avoid deterioration, disturbance and significant effects in the Natura 2000 sites’

‘Article 6(1)... relates to Article 2(3), which specifies that the measures must take account of economic, social and cultural requirements and regional and local characteristics’.

‘Once the conservation objectives have been defined for a Natura 2000 site, there is some flexibility in defining and establishing the conservation measures. Several options can be considered, (using a choice of administrative, contractual or statutory measures), which take into account other socio economic activities in the sites.’

‘The obligation is to establish the necessary conservation measures, irrespective of whether those measures are applied within individual sites, or even in some cases outside the boundaries of sites or across multiple sites. In some cases it may be that a significant component of a Member State’s compliance with Article 6(1) is through measures of a broader scope which nevertheless contribute to site-specific conservation objectives and are adapted to the ecological requirements of protected habitats and species in the SAC. This may be particularly relevant to marine sites where, for example, wider regulation of fisheries activities may be a significant element of Article 6(1) compliance.’

'The conservation measures can take the form of 'appropriate statutory, administrative or contractual measures...' and 'if need be', the form of 'appropriate management plans'. The choice is left to the Member States, in line with the principle of subsidiarity. The Directive sets out the results to be achieved and leaves it up to the Member States to decide how to do so in practice. Often, the different options referred to in Article 6(1) are used in combination for the management of Natura 2000 sites.'

'The necessary conservation measures may involve *'if need be, appropriate management plans specifically designed for the sites or integrated into other development plans'*. Such management plans should address all existing activities, including regular ongoing activities such as day-to-day agricultural activities, whereas new plans and projects are dealt with under Article 6(3).'

'Management plans are often used as a tool to guide managers and other interested parties in dealing with the conservation of Natura 2000 sites, and to involve the different socioeconomic stakeholders and authorities, including local communities, landowners, farmers, fishermen and other interest groups, in implementing the necessary conservation measures that have been identified.'

'The phrase 'if need be' refers only to the management plans and not to the statutory, administrative or contractual measures which are needed in all cases (case C-508/04 paragraph 71). Thus, even if a Member State considers a management plan unnecessary, it will still have to take such measures.'

- 'Statutory measures usually follow a pattern laid down in law and can set specific requirements in relation to activities that can be allowed, restricted or forbidden in the site.
- Administrative measures can set relevant provisions in relation to the implementation of conservation measures or the authorisation of other activities in the site.
- Contractual measures involve establishing contracts or agreements usually among managing authorities and land-owners or users on the site.'

'Agri-environmental or forestry-environmental measures serve as a good example of a contractual measure that takes socioeconomic requirements into account when establishing agreements which benefit Natura 2000 sites. They should be designed in line with the conservation measures established for the site and in view of reaching its conservation objectives.

- Agri-environmental agreements with farmers within the Rural Development Programmes can be used as a contractual measure aiming to maintain or improve the conservation condition of certain habitat types (e.g. meadows, pastures) and species across a range of sites.
- Forestry-environmental measures can also be used to establish contracts and agreements with forest owners on the management of the forest to favour the conservation of habitats and species.'

The central importance of Article 6(1) to the achievement of the aims and objectives of the Directive as a whole has been recognised by Advocate General Capeta in her Opinion in EC v Ireland<sup>23</sup>. She described Article 6(1) as follows:

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<sup>23</sup> Case [C-444/21](#) AG Opinion (paragraph 30)

*‘In my opinion, the most important provision and the raison d’être of the Habitats Directive is its Article 6(1), which essentially requires Member States to adopt active conservation measures to preserve the habitats and species that live in them.’*

When considering the relative importance of compliance with Article 6(1) in view of compliance with Article 6(3), the Court ruled in the corresponding judgment that *‘implementing regulations which are limited to providing for prior consent for the carrying on of an activity that may have a significant or adverse effects on or cause the deterioration of a site of Community importance, are not sufficient to satisfy the obligations of Article 6(1) of the Habitats Directive’*<sup>24</sup>. Thus an approach to compliance under the Habitats directive which focuses primarily on the application of Article 6(3) will be deficient; proactive measures under 6(1) must also be taken.

## Article 6(2) of the Habitats Directive

Article 6(2) of the Habitats Directive is preventative in nature. It imposes a direct duty on a Member State to take steps which are considered to be necessary in order to avoid deterioration of habitats and significant disturbance of species. Extracts from chapter 3 of the EC guidance on Article 6(2) are summarised in box A4.2 below:

**Box A4.2: Extracts from chapter 3 ‘Article 6(2)’ of EC guidance ‘Managing Natura 2000’ (emphasis added by underline)**

‘The scope of this article is broader than that of Articles 6(3) and 6(4) which apply only to plans and projects. It also applies to the performance of all ongoing activities, like agriculture, fishing or water management, that may not fall within the scope of Article 6(3), along with plans and projects which have already been authorised in the past and subsequently prove likely to give rise to deterioration or disturbances’<sup>25</sup>. It can also apply to the implementation of plans or projects which were authorized before Article 6(3) became applicable (C-399/14 para. 33).’

‘Article 6(2):

- applies permanently in SACs, SCIs and SPAs. It may concern past, present or future activities or events...
- is not limited to intentional acts but could also cover any chance events that might occur (fire, flood, etc.), as long as they are predictable...
- is not limited to human activities... For instance, in the case of natural succession or of climate change effects, measures would need to be taken to halt or counter this process if it is deemed to be negatively impacting on the species and habitat types for which the site has been designated’

‘Member States are required to take preventive measures to avoid deterioration and disturbances connected with a predictable event, activity or process. These measures apply to all species and habitats for which the sites have been designated, and should also be implemented, if necessary, outside the sites.’

<sup>24</sup> Case [C-444/21](#) CJEU Ruling (paragraph 151)

<sup>25</sup> Case C-127/02, paragraph 37. See also section 4.3 of this EC document on relationship between Article 6(2) and 6(3).

'The legal regime under Article 6(2) has to be specific, coherent and complete, capable of ensuring the effective protection of the sites concerned. Member States enjoy discretion when taking appropriate steps to implement Article 6(2), provided it is guaranteed that no deterioration and disturbance will occur. If a review of a plan or project is necessary to comply with the provisions of Article 6(2), it must be carried out in accordance with the requirements of Article 6(3).'

## Case law underpinning the need for measures and steps under 6(1) and (2)

A summary of case law decisions which have helped to clarify the requirements and obligations under Articles 6(1) and 6(2) is provided in box 4.4.1 below.

### **Box 4.4.1 Case law relevant to interpretation of Article 6(1) and 6 (2)**

The CJEU has considered a number of cases concerned with the interpretation of Article 6(1) and 6(2). Some key extracts from more recent decisions are listed in date order below.

- Case C 504/14 ([EC v Hellenic Republic](#)) the court established that whilst prior authorisation is required for Article 6(3) this is not a requirement for Article 6(2). Part of this case concerned wild camping, and whilst this was prohibited in law, the practice still goes on. The Court found that, by failing to take adequate measures to enforce the prohibition on wild camping close to the beaches at Kalo Nero and Elaia, the Greek authorities had failed to fulfil their obligations under Article 6(2)
- In the case C 441/17 ([EC v Poland](#)) the Commission submitted, and the Court agreed, that *“Article 6(1) of the Habitats Directive and Article 4(1) and (2) of the Birds Directive require, if those provisions are not to be rendered redundant, that the conservation measures necessary for maintaining a favourable conservation status of the protected habitats and species within the site concerned not only be adopted, but also, and above all, be actually implemented.”*
- In the case of C-278/21 ([AquaPri](#)) the Advocate General explained in paragraphs 28-29 of her opinion the role of 6(2) in addressing past errors in connection with the authorisation of a plan or project (where the original assessment was later found to be defective). Such a scenario did not inevitably trigger a re-assessment under 6(3) but, instead, the provisions of 6(2) should be engaged such that necessary steps can be taken to remedy the situation.
- In Case C-444/21 [EC v Ireland](#) *‘Article 6 of the Habitats Directive places the Member States under a series of obligations and provides for specific procedures designed, as it is clear from Article 2(2) of that Directive, to maintain, or as the case may be, restore, at a favourable conservation status, natural habitats and species... More specifically, pursuant to Article 6(1) of the Habitats Directive, for every special areas of conservation the Member States must establish the necessary conservation measures which correspond to the ecological requirements of the natural habitat types listed’.*
- In Case C-116/22 [EC v Germany](#) *‘... conservation objectives are, by nature, intended to be implemented by way of concrete conservation measures. In order effectively to ensure the protection of the environment and, more specifically, as set out in Article 2(2) of the Habitats Directive, in order to ensure the maintenance or, where appropriate, the restoration, at a favourable conservation status, of natural habitats and species of wild fauna and flora of interest to the European Union, those concrete conservation measures must be adopted by the Member States as legal instruments with binding force, if necessary in particular vis-à-vis third parties.*

- In Case C-47/23 [EC v Germany](#) the court considered allegations that a failure to adopt legally binding measures to protect SACs from over-fertilisation and early mowing was a breach of Article 6(2). Binding protective agreements which exclude legally binding prohibition of activities known to result in deterioration are insufficient in this regard. The Court ruled that *'by failing to adopt legally binding protective measures against the over-fertilisation and early mowing of sites hosting habitat types 6510 and 6520, the Federal Republic of Germany has infringed Article 6(2) of the Habitats Directive'*.

Articles 6(1) and (2) thus provide a legal expectation that proactive steps are being taken, on a regular basis by a Member State. Article 6(1) anticipates that proactive conservation measures necessary for maintaining a favourable conservation status of the protected habitats and species within the site concerned not only be adopted, but also, and above all, be actually implemented. Such conservation measures must be adopted as legal instruments with binding force, if necessary in particular vis-à-vis third parties.

The scope of Article 6(2) provisions extends to enforcement of regulatory requirements, especially where activities which are in breach of existing environmental protection are, nevertheless, carried out. It is therefore insufficient to merely have protective provisions in place, they must be complied with and necessary enforcement action taken where necessary. Protective agreements which exclude legally binding prohibition of activities that result in deterioration are insufficient in this regard.