

# INVESTIGATION REPORT

addressed to the Secretary of State for Environment, Food and Rural Affairs in relation to their compliance with the Plant Protection Products Regulation EC No.1107/2009, the Environment Act 2021, the Conservation of Habitats and Species Regulations 2017 and the Wildlife and Countryside Act 1981

July 2026

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# **Executive summary**

## Executive summary

This report concludes the Office for Environmental Protection's ('OEP') investigation into the Secretary of State for Environment, Food and Rural Affairs' ('Secretary of State' or 'Defra') suspected failures to comply with the Plant Protection Products Regulation (EC) No.1107/2009 ('PPP Regulation'),<sup>1</sup> the Environment Act 2021, the Conservation of Habitats and Species Regulations 2017 ('Habitats Regulations'), and the Wildlife and Countryside Act 1981 ('WCA 1981'). This is in relation to the emergency authorisations for the use of the neonicotinoid pesticide, Cruiser SB, on sugar beet seeds granted under article 53 of the PPP Regulation in 2023 and 2024.

Cruiser SB contains thiamethoxam, a neonicotinoid pesticide, which breaks down into another neonicotinoid, clothianidin, which is particularly persistent in the environment.<sup>2</sup> Cruiser SB is applied to sugar beet seeds which are grown in the east of England. Since 2013, the use of neonicotinoids has been restricted, and in 2018 the European Union ('EU') banned thiamethoxam for outdoor use due to the risks to pollinators, such as bees, from treated seeds.<sup>3</sup>

Banned or restricted pesticides may be used in Great Britain through the granting of an emergency authorisation under article 53 of the PPP Regulation.

The Minister for Food, Farming and Fisheries ('Minister'), acting on behalf of the Secretary of State, granted emergency authorisations for the use of Cruiser SB in England in 2021 and 2022, and then again on 23 January 2023 for the 2023 growing season ('2023 Authorisation') and on 18 January 2024 for the 2024 growing season ('2024 Authorisation') (together, the '2023 and 2024 Authorisations').

The OEP received a complaint from ClientEarth on 26 October 2023 concerning the 2023 Authorisation. ClientEarth submitted an addendum to its complaint on 1 March 2024, extending its scope to include the 2024 Authorisation.

On 14 June 2024, we launched an investigation in relation to potential failures by the Secretary of State to comply with environmental law when granting the 2023 and 2024 Authorisations. These potential failures related to the application of the precautionary principle, the duty to have due regard to the Environmental Principles Policy Statement ('EPPS'), and nature conservation obligations set out in the Habitats Regulations and the WCA 1981.

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<sup>1</sup> Regulation (EC) 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC, as amended by the Plant Protection Products (Miscellaneous Amendments) (EU Exit) Regulations 2019 (SI 2019/556).

<sup>2</sup> Clothianidin is more persistent in soil than thiamethoxam, see: NFU Sugar and British Sugar, Emergency Registration Report of Cruiser SB (4 October 2023) <[https://assets.publishing.service.gov.uk/media/65a7e912ed27ca000d27b172/Cruiser\\_SB\\_HSE\\_emergency\\_registration\\_report\\_2024\\_-\\_redacted.pdf](https://assets.publishing.service.gov.uk/media/65a7e912ed27ca000d27b172/Cruiser_SB_HSE_emergency_registration_report_2024_-_redacted.pdf)>.

<sup>3</sup> Commission Implementing Regulation (EU) 2018/785 of 29 May 2018 amending Implementing Regulation (EU) No 540/2011 as regards the conditions of approval of the active substance thiamethoxam.

This report sets out our findings in relation to the six grounds of investigation. In relation to the first two grounds, we make no findings of failure to comply with environmental law by the Secretary of State:

- Ground 1: Failing to take into account the precautionary principle as a material consideration when granting the 2023 and 2024 Authorisations under article 53 of the PPP Regulation, in light of article 1(4) of the PPP Regulation; and
- Ground 2: Failing to have due regard to the EPPS for the 2024 Authorisation, under section 19(1) of the Environment Act 2021.

In relation to the remaining four grounds, we find that the Secretary of State failed to comply with environmental law as follows:

- Ground 3: Unlawfully failing to take proper account of regulation 63 of the Habitats Regulations when exercising their functions to grant the 2023 and 2024 Authorisations under article 53 of the PPP Regulation;
- Ground 4: Unlawfully failing to take appropriate steps to understand, and thereafter to avoid or mitigate, the known risk of harm to European sites in accordance with article 6(2) of the Habitats Directive<sup>4</sup> when granting the 2023 and 2024 Authorisations, as required by regulation 9(1) and (3) of the Habitats Regulations;
- Ground 5: Unlawfully failing to take reasonable steps to further the conservation and enhancement of designated SSSI features when approving the 2023 and 2024 Authorisations, as required by section 28G(1)-(2) of the WCA 1981; and
- Ground 6: As a result of the failure in Ground 5, unlawfully failing to turn their mind to the question of whether permitting the use of Cruiser SB by approving the 2023 and 2024 Authorisations was likely to damage designated SSSI features, as required by section 28I(2) of the WCA 1981.

During the investigation, the OEP analysed documents relevant to the 2023 and 2024 Authorisations and held a number of constructive meetings with Defra. As a result of discussions regarding the obligations under the Habitats Regulations and the WCA 1981, Defra has proposed to update the assessment process for granting emergency authorisations, so that it expressly recognises the relevance of potential impacts upon protected sites. This is very welcome.

We are therefore closing our investigation because we are satisfied that these planned updates, if applied correctly, are capable of preventing reoccurrence of the failures to comply with environmental law we have identified. We will monitor the implementation of the updated process, which is due to be in place by November 2026.

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<sup>4</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (as amended).

We make three recommendations to the Secretary of State in relation to our findings (noting that the first two recommendations concern matters which Defra has indicated it intends to implement):

**Recommendation 1:** Ensure that the updated article 53 assessment process expressly recognises the potential relevance of impacts upon protected sites, including by:

- a. Ensuring that the process applies to designated SSSI features as it does for other types of protected sites, so that it takes into account the requirements of s.28G of the WCA 1981;
- b. Ensuring that, within the scope of the risk assessment for emergency authorisations, suitable universal conditions are applied if the Health and Safety Executive ('HSE') risk assessment flags a significant effect on a European site against a specific conservation objective; and
- c. Where derogation is necessary under the updated assessment process, because it is not possible to exclude a risk to the relevant conservation objectives, Defra (or HSE in the first instance) checking at that stage which specific sites the affected conservation objective(s) relate to, in order to determine that (i) there are no alternative solutions, (ii) there are imperative reasons of overriding public interest and (iii) monitoring and compensation are provided for.

**Recommendation 2:** Ensure that the updated assessment process in recommendation 1 is formalised by the agreed deadline of November 2026. HSE should also update its internal guidance and assessment documentation accordingly.

**Recommendation 3:** Ensure that the precautionary principle reasoning process is referred to clearly and appropriately in future emergency authorisation decisions.



# Introduction

# 1. Introduction

- 1.1 This report concludes the OEP's investigation into the Secretary of State's suspected failures to comply with the PPP Regulation, the Environment Act 2021, the Habitats Regulations, and the WCA 1981. This is in relation to the emergency authorisations of Cruiser SB granted under article 53 of the PPP Regulation in 2023 and 2024.
- 1.2 On 26 October 2023, the OEP received a complaint from ClientEarth concerning the 2023 Authorisation. ClientEarth submitted an addendum to its complaint on 1 March 2024, extending its scope to include the 2024 Authorisation.
- 1.3 We made some initial enquiries with Defra from October 2023 to June 2024. On 14 June 2024, the OEP launched an investigation into the Secretary of State's interpretation and application of the precautionary principle and compliance with its nature conservation obligations when they granted the 2023 and 2024 Authorisations.
- 1.4 In accordance with section 33(5) of the Environment Act 2021, we set out our findings from the investigation in this report. We make no finding of failure by the Secretary of State to take into account the precautionary principle as a material consideration when granting the emergency authorisations in 2023 and 2024 or to have due regard to the EPPS when granting the 2024 Authorisation. We find that the Secretary of State did fail to comply with their nature conservation obligations when granting the 2023 and 2024 Authorisations.
- 1.5 We also set out our conclusion that Defra's planned updates for the emergency authorisation process, if applied correctly, are capable of preventing reoccurrence of the failures to comply with environmental law we have identified. We will monitor the implementation of this updated process.
- 1.6 Where we use terms with specific meanings within this report, explanations can be found in the glossary (Annex 1).



# Factual background

## 2. Factual background

### ***Cruiser SB and pollinators***

- 2.1 Cruiser SB is a coating for sugar beet seeds that contains the active substance thiamethoxam. The chemical, and its breakdown product clothianidin, are neonicotinoid pesticides.<sup>5</sup> Cruiser SB is used to protect sugar beet seedlings against ‘virus yellows’, which is spread by aphids and causes yield loss.<sup>6</sup> The seeds are coated in Cruiser SB and then drilled into the soil.
- 2.2 Sugar beet for sugar production is a large root crop grown only in a region dictated by proximity to the four processing factories in West Norfolk, East Norfolk, West Suffolk and East Nottinghamshire.<sup>7</sup> There are many sites with legal protection for their conservation value in this area, including Special Protection Areas (‘SPAs’) (designated for birds) and Special Areas of Conservation (‘SACs’) (designated for habitats and non-bird species).<sup>8</sup>
- 2.3 As set out in Defra’s December 2024 policy paper,<sup>9</sup> neonicotinoids can make their way from treated seeds and plants into the environment by a number of routes, including through their release to soil. They carry substantial risks to pollinator populations, including bees, as neonicotinoids are highly toxic in small quantities. They can be present in pollen and nectar of plants grown from treated seeds which makes them toxic to pollinators that feed on them. Bees exposed to sub-lethal levels of neonicotinoids can experience problems with flight and navigation, reduced taste sensitivity and slower learning of new tasks, all of which impact foraging ability and hive productivity. This can lead to reductions in food consumption, reproduction, worker foraging activity, worker survival rates and, ultimately, colony survival.

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<sup>5</sup> Defra, *Defra’s Chief Scientific Adviser’s advice on use of Cruiser SB for sugar beet in 2025* (updated 23 January 2025) <<https://www.gov.uk/government/publications/neonicotinoid-product-as-seed-treatment-for-sugar-beet-emergency-authorisation-application/defras-chief-scientific-advisers-advice-on-use-of-cruiser-sb-for-sugar-beet-in-2025>>.

<sup>6</sup> Defra, *Defra economic analysis report explaining the impacts of virus yellows on sugar beet production* (2025) <[https://assets.publishing.service.gov.uk/media/679237e1de39a2da43572d1f/Defra\\_economic\\_analysis\\_report\\_explaining\\_the\\_impacts\\_of\\_virus\\_yellows\\_on\\_sugar\\_beet\\_production\\_2025.pdf](https://assets.publishing.service.gov.uk/media/679237e1de39a2da43572d1f/Defra_economic_analysis_report_explaining_the_impacts_of_virus_yellows_on_sugar_beet_production_2025.pdf)>.

<sup>7</sup> Defra, *Statement of reasons for the decision on the application for emergency authorisation for the use of Cruiser SB on sugar beet crops in 2023* (updated 16 February 2023) <<https://webarchive.nationalarchives.gov.uk/ukgwa/20230220133103/https://www.gov.uk/government/publications/neonicotinoid-product-as-seed-treatment-for-sugar-beet-emergency-authorisation-application/statement-of-reasons-for-the-decision-on-the-application-for-emergency-authorisation-for-the-use-of-cruiser-sb-on-sugar-beet-crops-in-2023>>.

<sup>8</sup> See: Multi-Agency Geographic Information for the Countryside (MAGIC) <<https://magic.defra.gov.uk/>>.

<sup>9</sup> Defra, *A new approach to the use of certain neonicotinoids on crops grown in England* (21 December 2024) <<https://www.gov.uk/government/publications/a-new-approach-to-the-use-of-certain-neonicotinoids-on-crops-grown-in-england/a-new-approach-to-the-use-of-certain-neonicotinoids-on-crops-grown-in-england>>.

- 2.4 Pollinators are essential for biodiversity and the wider environment. They maintain the diversity of wild flowers and support healthy ecosystems, particularly by helping plants to produce fruits and seeds which birds and other animals rely on.<sup>10</sup>

### ***Emergency authorisations of neonicotinoid pesticides***

- 2.5 Neonicotinoid use in the EU has been restricted since 2013, and in 2018 the EU banned thiamethoxam for outdoor use due to the risks for bees from treated seeds.<sup>11</sup> Despite the restrictive nature of this regime, Member States continued to grant emergency authorisations for neonicotinoid seed treatments after 2018. In response, the European Court of Justice ruled on 19 January 2023<sup>12</sup> that article 53 of the PPP Regulation does not permit emergency authorisations for neonicotinoid seed treatments where those substances have already been banned under EU legislation.<sup>13</sup>
- 2.6 Although the EU legislation banning the use of thiamethoxam was revoked in the UK following EU Exit,<sup>14</sup> the prohibition on outdoor use remained in place and the remaining UK approvals for thiamethoxam lapsed by the end of 2020. Banned or restricted pesticides may be used in Great Britain only in limited circumstances, through the granting of an emergency authorisation under article 53 of the PPP Regulation. The PPP Regulation forms part of assimilated EU law and therefore continues to have effect in Great Britain,<sup>15</sup> subject to certain modifications following EU exit.<sup>16</sup>
- 2.7 Defra has granted emergency authorisations for the use of Cruiser SB in the 2021, 2022, 2023 and 2024 growing seasons. Each emergency authorisation imposed conditions restricting the use of Cruiser SB, including a requirement that it could only be used if the annual aphid forecast projected aphid pressure above a certain threshold.<sup>17</sup> Those thresholds were reached and Cruiser SB was used in all years except 2021.

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<sup>10</sup> Defra, *The National Pollinator Strategy: for bees and other pollinators in England* (4 November 2014, updated 10 April 2019) <<https://www.gov.uk/government/publications/national-pollinator-strategy-for-bees-and-other-pollinators-in-england>>.

<sup>11</sup> Commission Implementing Regulation (EU) 2018/785 of 29 May 2018 amending Implementing Regulation (EU) No 540/2011 as regards the conditions of approval of the active substance thiamethoxam.

<sup>12</sup> Case C-162/21 *Pesticide Action Network Europe and others v Belgium*.

<sup>13</sup> This EU case was decided after IP Completion Day (31 December 2020), so it is not assimilated EU case law under section 6 of the European Union (Withdrawal) Act 2018 and is therefore not binding on UK courts.

<sup>14</sup> Under powers conferred by section 8(1) of, and paragraph 21 of Schedule 7 to, the European Union (Withdrawal) Act 2018.

<sup>15</sup> Article 1(1) PPP Regulation.

<sup>16</sup> The Plant Protection Products (Miscellaneous Amendments) (EU Exit) Regulations 2019 (SI 2019/556) amended the Plant Protection Products Regulation (EC) No. 1107/2009.

<sup>17</sup> Defra, *Neonicotinoid product as seed treatment for sugar beet: emergency authorisation application* (updated 19 May 2021)

<<https://webarchive.nationalarchives.gov.uk/ukgwa/20210602084135/https://www.gov.uk/government/>

2.8 In reaching its decisions on the 2023 and 2024 Authorisations, the Secretary of State, acting through Defra / the Minister, considered the advice of the HSE, the Expert Committee on Pesticides ('ECP'), Natural England and Defra's Chief Scientific Advisor ('CSA'). HSE, ECP and Natural England advised that emergency authorisation should not be granted. Defra's CSA did not give an overall view on whether the authorisation should be granted, and his analysis differed in some respects from the HSE's, advising that certain risks to bees had been over-estimated. The Minister proceeded to grant authorisation.

### ***Decision to investigate***

2.9 On 26 October 2023, the OEP received a complaint from ClientEarth concerning the 2023 Authorisation. ClientEarth submitted an addendum to its complaint on 1 March 2024, extending its scope to include the 2024 Authorisation.

2.10 ClientEarth raised several allegations of failures to comply with environmental law in respect of both authorisations. Following our initial review, we closed some of those allegations as in our view they did not indicate any failure to comply with environmental law, and we further developed ClientEarth's remaining grounds in the course of our assessment. The assessment involved seeking information from Defra to understand its position and substantiate the allegations. We reviewed material provided by Defra in response to that request, as well as Defra's detailed responses to ClientEarth.

2.11 In June 2024, we concluded there were indications that the Secretary of State may have failed to comply with several environmental laws and we considered those potential failures to be serious.

### ***Investigation***

2.12 In line with our Enforcement Policy, we launched an investigation and requested information from Defra on 14 June 2024.<sup>18</sup>

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[publications/neonicotinoid-product-as-seed-treatment-for-sugar-beet-emergency-authorisation-application](https://www.gov.uk/government/publications/neonicotinoid-product-as-seed-treatment-for-sugar-beet-emergency-authorisation-application)>; Defra, *Neonicotinoid product as seed treatment for sugar beet: emergency authorisation application* (updated 2 March 2022) <<https://webarchive.nationalarchives.gov.uk/ukgwa/20220310064922/https://www.gov.uk/government/publications/neonicotinoid-product-as-seed-treatment-for-sugar-beet-emergency-authorisation-application>>; Defra, *Neonicotinoid product as seed treatment for sugar beet: emergency authorisation application 2023* (updated 16 February 2023) <<https://webarchive.nationalarchives.gov.uk/ukgwa/20230220120354/https://www.gov.uk/government/publications/neonicotinoid-product-as-seed-treatment-for-sugar-beet-emergency-authorisation-application>>; Defra, *Neonicotinoid product as seed treatment for sugar beet: emergency authorisation application 2024* (updated 18 January 2024) <<https://webarchive.nationalarchives.gov.uk/ukgwa/20240202212328/https://www.gov.uk/government/publications/neonicotinoid-product-as-seed-treatment-for-sugar-beet-emergency-authorisation-application>>.

<sup>18</sup> Under s.27 Environment Act 2021 in connection with our functions under s.33 Environment Act 2021.

- 2.13 The potential failures to comply with environmental law related to: (1) the obligation to apply the precautionary principle and, in relation to the 2024 Authorisation only, the duty to have due regard to the EPPS; and (2) several nature conservation obligations set out in the Habitats Regulations and WCA 1981.
- 2.14 Engagement with Defra proceeded at a slower pace than expected. While we exchanged correspondence and had discussions with Defra, by November 2024 we still had not received a response to our request for information.
- 2.15 In order to gain clarity on Defra's position in respect of the potential failures, the OEP gave an information notice to Defra on 28 November 2024 ('the Information Notice').
- 2.16 We can give an information notice where we have reasonable grounds for suspecting a public authority has failed to comply with environmental law and that failure, if it occurred, would be serious.<sup>19</sup> Public authorities must respond in writing to such notices and must provide the information requested so far as it is reasonably practicable to do so.<sup>20</sup>
- 2.17 The Information Notice set out the allegations of the suspected failures to comply with environmental law. We determined there were reasonable grounds for suspecting the following failures:
- 2.17.1 Ground 1: Unlawful failure to take into account the precautionary principle as a material consideration when granting the 2023 and/or 2024 Authorisation under article 53 of the PPP Regulation, in light of article 1(4) of the PPP Regulation.
- 2.17.2 Ground 2: Unlawful failure to have due regard to the EPPS under s.19(1) of the Environment Act 2021 and interpret and proportionately apply the precautionary principle under the EPPS when granting the 2024 Authorisation.
- 2.17.3 Ground 3: Unlawful failure to carry out an appropriate assessment of the implications for European sites of the 2023 and/or 2024 Authorisation, and consult Natural England and have regard to any representations it makes for the purposes of those assessments, under regulations 63(1) and (3) of the Habitats Regulations.
- 2.17.4 Ground 4: When granting the 2023 and/or 2024 Authorisation, unlawfully failing to exercise its functions so as to secure compliance with the requirements of the Habitats Directive and the Birds Directive<sup>21</sup> and to have regard to the requirements of those Directives so far as they may be

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<sup>19</sup> s.35(1) Environment Act 2021.

<sup>20</sup> s.35(3) Environment Act 2021.

<sup>21</sup> Directive 2009/147/EC of European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (as amended).

affected by the exercise of those functions, as required by regulations 9(1) and (3) of the Habitats Regulations.

- 2.17.5 Ground 5: When granting the 2023 and/or 2024 Authorisation, unlawfully failing to take reasonable steps to further the conservation and enhancement of SSSI features when exercising functions that are likely to affect those features, as required by sections 28G(1)-(2) WCA 1981
- 2.17.6 Ground 6: Unlawful failure to give notice to Natural England before granting the 2023 and/or 2024 Authorisations in view of likely damage to SSSIs and take any advice received into account, as required by sections 28I(2) and (5) WCA 1981.
- 2.18 The Information Notice explained the reasons why we considered these alleged failures to be serious. These related to raising points of law of general public importance, the risk of harm to the natural environment, the frequency of conduct over time and the behaviour of the public authority:
- 2.18.1 Defra's understanding of the precautionary principle was of wider concern given that it applies broadly across policymaking, as well as in the context of emergency authorisations under article 53 of the PPP Regulation. The failure to have due regard to the EPPS raised a need for clarity on the circumstances when the duty to have due regard to the EPPS when making policy is engaged. The failure to carry out an appropriate assessment raised a need to clarify the extent of the duty to perform an appropriate assessment in the case of regional projects and plans, or where there is uncertainty about where the project or plans will take place.
- 2.18.2 There was a potential risk of harm to the natural environment. The HSE and ECP considered that there was potential harm to wildlife from granting the 2023 and 2024 Authorisations and that the potential adverse effects to bees could not be excluded to a satisfactory level. Natural England raised concerns about the impact on non-crop flowering plants and pollinators. Defra's CSA advised that there was clear and abundant evidence that neonicotinoids are harmful to species other than those they are intended to control, particularly to pollinators. Defra's CSA also advised that the general ban on use was well justified scientifically and environmentally but that there was likely to be an acceptable level of risk to bees with regards to the 2023 and 2024 Authorisations.
- 2.18.3 The conduct had been frequent and ongoing as, despite the 2018 general ban on the use of Cruiser SB, Defra granted emergency authorisations for Cruiser SB in four consecutive years (2021, 2022, 2023 and 2024, of which it was used in all years but 2021). At the date of the Information Notice, there was a risk that an emergency authorisation would be

granted on the same allegedly unlawful basis again in 2025 or beyond if the current approach had been maintained.

2.18.4 In its correspondence with the complainant, ClientEarth, and with the OEP, Defra made inconsistent statements and lacked clarity in its reasoning relating to the application of the precautionary principle.

2.18.5 It did not appear that Defra took steps to determine where Cruiser SB would be used, the potential impacts on any European sites if it were used, or to find an alternative way to assess the potential impacts of its use across a region, which had wider implications given that Habitats Regulations assessments are used for a wide range of projects and plans.

2.19 On 21 December 2024, Defra published a policy paper on its plan to ban the use of certain neonicotinoids.<sup>22</sup> On 23 January 2025, for the first time in five years, the Minister for Water and Flooding, on behalf of the Secretary of State, refused the emergency authorisation application for the use of Cruiser SB for the 2025 growing season, citing the 'clear and abundant evidence' that this neonicotinoid was toxic to pollinators such as bees.<sup>23</sup> No application was made for the 2026 growing season.

2.20 Defra provided a substantial written response to the Information Notice on 28 January 2025.

2.21 Following analysis of the written response, we wrote to Defra setting out our respective positions in June 2025 and had further exchanges with Defra between July and September 2025.

2.22 In September 2025, the HSE published updated guidance to applicants for emergency authorisations that added emphasis on pollinators, additional reference to the precautionary principle, and a reference to consulting nature conservation bodies on impacts on protected areas.<sup>24</sup>

2.23 Defra wrote to the OEP on 14 November 2025 providing us with a clearer understanding of its legal position and proposals for updating the emergency authorisation process to prevent reoccurrence of the failures going forward.

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<sup>22</sup> Defra, *A new approach to the use of certain neonicotinoids on crops grown in England* (21 December 2024) <<https://www.gov.uk/government/publications/a-new-approach-to-the-use-of-certain-neonicotinoids-on-crops-grown-in-england/a-new-approach-to-the-use-of-certain-neonicotinoids-on-crops-grown-in-england>>.

<sup>23</sup> Defra, *Statement of reasons for the decision on the application for emergency authorisation of the use of Cruiser SB on sugar beet crops in England in 2025* (23 January 2025) <<https://www.gov.uk/government/publications/neonicotinoid-product-as-seed-treatment-for-sugar-beet-emergency-authorisation-application/statement-of-reasons-for-the-decision-on-the-application-for-emergency-authorisation-of-the-use-of-cruiser-sb-on-sugar-beet-crops-in-england-in-2025>>.

<sup>24</sup> HSE, *Guidance on Article 53 emergency authorisation applications* (updated January 2026) <<https://www.hse.gov.uk/pesticides/applicant-guide/emergency-authorisations.htm>>.

***Defra's planned updates for the emergency authorisation assessment process***

- 2.24 In its November 2025 response, Defra committed to work with the HSE to update its internal guidance and assessment documentation so that it expressly recognises the potential relevance of impacts upon protected sites. Further detail about these proposals is set out in section 4 below.
- 2.25 In February and March 2026 we had further engagement with Defra on the detail of these proposals and how they would achieve compliance with the Secretary of State's legal obligations.



# Analysis

## 3. Analysis

In this chapter we set out the legislative framework, our legal analysis of the relevant environmental laws and our findings on each ground of investigation.

### 3.1. Application of the precautionary principle

#### Alleged failure as set out in the Information Notice

3.1.1 Ground 1: Unlawful failure to take into account the precautionary principle as a material consideration when granting the 2023 Authorisation and/or the 2024 Authorisation of Cruiser SB under article 53 of the PPP Regulation, in light of article 1(4) PPP Regulation.

#### Relevant law

3.1.2 The PPP Regulation sets the rules for authorising pesticides, ensuring they are assessed for safety to human health, animal health, or the environment before they can be placed on the market. Emergency authorisation under article 53 provides the only legal route to temporarily permit otherwise non-approved products when it appears necessary to control a dangerous effect that cannot be controlled by any reasonable alternative.

3.1.3 The PPP Regulation originated as EU legislation and now applies in Great Britain as assimilated EU law, with amendments made in 2019 to reflect the UK's departure from the EU.<sup>25</sup>

3.1.4 Article 28(1) of the PPP Regulation provides:

*(1) A plant protection product shall not be placed on the market or used in a constituent territory unless it has been authorised by the relevant competent authority in accordance with this Regulation.*

3.1.5 Article 53(1) of the PPP Regulation provides:

*(1) By way of derogation from Article 28, in special circumstances a competent authority may authorise, for a period not exceeding 120 days, the placing on the market of plant protection products, for limited and controlled use in its constituent territory, where such a measure appears necessary because of a danger which cannot be contained by any other reasonable means.*

3.1.6 Article 3A(2) of the PPP Regulation provides:

*(2) The Secretary of State is the competent authority for the constituent territory of England.*

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<sup>25</sup> The Plant Protection Products (Miscellaneous Amendments) (EU Exit) Regulations 2019 (SI 2019/556) amended the Plant Protection Products Regulation (EC) No. 1107/2009.

3.1.7 Article 1(4) of the PPP Regulation provides:

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

3.1.8 Recital 8 of the PPP Regulation provides, so far as is relevant:

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

3.1.9 The PPP Regulation must be interpreted in accordance with any relevant assimilated case law.<sup>26</sup>

3.1.10 In assimilated case law Case T-584/13 *BASF Agro and Others v European Commission*, the General Court considered the precautionary principle and its application to the PPP Regulation. The court summarised the effect of the principle and the reasoning process for applying it at paragraphs [59]-[60]:

*59. Where there is scientific uncertainty as to the existence or extent of risks to human health or to the environment, the precautionary principle allows the institutions to take protective measures without having to wait until the reality and seriousness of those risks become fully apparent or until the adverse health effects materialise [...].*

*60. Within the process leading to the adoption by an institution of appropriate measures to prevent specific potential risks to public health, safety and the environment by reason of the precautionary principle, three successive stages can be identified: first, identification of the potentially adverse effects arising from a phenomenon; second, assessment of the risks to public health, safety and the environment which are related to that phenomenon; and, third, when the potential risks identified exceed the threshold of what is acceptable for society, risk management by the adoption of appropriate protective measures [...]*

3.1.11 This case concerned the EU Commission's review of a substance that had previously been approved, and the General Court rejected an argument that the precautionary principle should not be applied outside the emergency procedures provided for in articles 69-70 of the PPP Regulation. Instead, the court held that the precautionary principle was engaged in relation to all

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<sup>26</sup> Section 6(3) of the European Union (Withdrawal) Act 2018. Assimilated case law means decisions of the Court of Justice of the European Union, and principles laid down by them, as they had effect in EU law before IP completion day, being 11.00 p.m. on 31 December 2020 (as defined in section 39(1) of the European Union (Withdrawal Agreement) Act 2020).

provisions of the PPP Regulation. Specifically, the judgment states at paragraphs [155] to [156]:

*155. As regards the argument put forward by BASF that the application of the precautionary principle, in the context of Regulation No 1107/2009, is limited to emergency procedures, this is based on the proposition that the precautionary principle is already integrated in the provisions of that regulation and, in particular, in the emergency procedures provided for in Articles 69 and 70, which embody the essential elements of the application of that principle. It follows, according to BASF, that it is not possible to apply that principle in the context of the other provisions of Regulation No 1107/2009.*

*156. It is sufficient, for the purpose of rejecting that argument, to recall that, as is apparent from recital 8 of Regulation No 1107/2009 and Article 1(4) thereof, all the provisions of that regulation are underpinned by the precautionary principle with a view to ensuring that active substances or plant protection products do not adversely affect, inter alia, the environment. That basis is not limited to Articles 69 and 70 of Regulation No 1107/2009, relating to emergency procedures. As the Commission correctly notes, that statement is confirmed by settled case-law according to which the precautionary principle must be applied for the assessment of the approval criteria provided for in Article 4 of Regulation No 1107/2009 [...], to which Article 21(3) of that regulation refers. (emphasis added)*

## Analysis

- 3.1.12 In light of the judgment referred to above, the OEP's view is that the proper reading of article 1(4) of the PPP Regulation as a whole is that it is mandatory for decision-makers to apply the reasoning process required by the precautionary principle when making a decision under any provision of the PPP Regulation, where there is relevant scientific uncertainty. It is then a question of discretion for the decision-maker whether to take more protective measures than it would otherwise have taken (where appropriate), justified by the precautionary principle. The OEP's interest in respect of the precautionary principle in this investigation is in the correct decision-making process being followed, rather than the merits of whether Cruiser SB should have been authorised.
- 3.1.13 The Information Notice set out that the OEP had reasonable grounds for suspecting that there had been an unlawful failure to take into account the precautionary principle as a material consideration when granting the 2023 Authorisation and/or the 2024 Authorisation under article 53 of the PPP Regulation, in light of article 1(4) of the PPP Regulation. There were two elements of the precautionary principle that led us to this position.
- 3.1.14 First, as set out above, the application of the precautionary principle under the PPP Regulation where there is relevant scientific uncertainty is mandatory, not discretionary. The Minister's statement of reasons for the 2024 Authorisation on 18 January 2024 noted that 'the Minister [...] concluded that the precautionary principle did not need to be applied in the case of

Cruiser because [...] the risks were sufficiently low and were outweighed by the benefits.’ In Defra’s letter to the OEP in February 2024, it was stated that ‘proper account was taken of the precautionary principle’ and the Minister held that ‘he was not required to exercise his discretion to apply the precautionary principle’. This letter also noted that the Minister had received advice on the precautionary principle and its application in a document entitled Annex A: *Summary of key issues and expert advice on the application for emergency authorisation of ‘Cruiser SB’ for use on the 2024 sugar beet crop* (‘Annex A’) prior to making his decision and that ‘it is apparent from Annex A that the Minister had due regard to the precautionary principle.’

- 3.1.15 This led us to suspect that Defra may not have applied the precautionary principle at all when making a decision on the 2024 Authorisation. Our view on the 2023 Authorisation was similar; in that case the Minister’s statement of reasons did not mention the precautionary principle, although Defra stated in its letter to ClientEarth dated 10 January 2024 that the Minister’s conclusion was ‘consistent with’ and ‘in accordance with’ the precautionary principle. However, it was confirmed by Defra in a meeting on 14 October 2024 that the same approach to the precautionary principle was taken for the 2023 Authorisation as for the 2024 Authorisation.
- 3.1.16 Second, in his statement of reasons for the 2024 Authorisation, the Minister concluded that the precautionary principle did not need to be applied because the risks were ‘sufficiently low’. We note there was a discrepancy in Defra’s letter dated 27 February 2024, which stated the Minister determined the risks from authorisation were ‘sufficiently certain and low’, in contrast to the wording of the decision itself, which referred to the risks being ‘sufficiently low’. The approach to decision-making underpinned by the precautionary principle is instigated by the existence of risk of serious environmental harm, not whether that risk is high or low. Therefore, our understanding at this point was that the Minister erred in concluding that the precautionary principle need not be applied because the risks were ‘sufficiently low’.
- 3.1.17 In summary, the OEP’s position is that the identification of scientific uncertainty concerning the risk to bees required the express application of the precautionary principle, in accordance with article 1(4) of the PPP Regulation. The triggering event is the identification of uncertainty, not the level of risk, and the precautionary principle cannot be considered ‘applied’ until it is applied to the specific relevant factors under the article 53 decision by the Minister.

#### Defra’s position

- 3.1.18 During the course of the investigation, Defra articulated more clearly how the precautionary principle is embedded into decisions made under the PPP Regulation. Defra confirmed that the reasoning process associated with the precautionary principle was applied when considering both the 2023 and 2024 Authorisations, even if the earlier explanation created a different impression.

## OEP's analysis

- 3.1.19 It appears that the earlier difference in positions between Defra and the OEP was largely terminological, based on a lack of clarity in the wording used by Defra. Defra has now explained that its previous references to not 'applying' the precautionary principle should be understood as referring to the substantive decision not to adopt more protective measures as a matter of discretion, after having undertaken the fuller reasoning process mandated by the precautionary principle.
- 3.1.20 We considered what was presented in the published authorisation documentation. Other than the reference to the precautionary principle not having been 'applied' in 2024, which we now understand as having the meaning described in paragraph 3.1.19 above, there is nothing within that documentation which specifically suggests that the correct reasoning process was not in fact followed. Given the scope of this ground of the investigation, we have not conducted an in-depth analysis of the way in which the reasoning process was conducted in relation to each authorisation.

## Finding

- 3.1.21 We accept that references to the precautionary principle not being applied or not needing to be applied referred to not using the precautionary principle to justify the substantive decision, and that Defra has confirmed that the Minister, on behalf of the Secretary of State, did in fact apply the reasoning process required by the precautionary principle when coming to the decision. We therefore make no finding of failure by the Secretary of State to take into account the precautionary principle as a material consideration when granting the 2023 and 2024 Authorisations.

## 3.2. Duty to have due regard to the Environmental Principles Policy Statement

### Alleged failure as set out in the Information Notice

3.2.1 Ground 2: Unlawful failure to have due regard to the EPPS under section 19(1) of the Environment Act 2021 and interpret and proportionately apply the precautionary principle under the EPPS when granting the 2024 Authorisation.

### Relevant law

3.2.2 The Environment Act 2021 provides the legal foundation for the Minister's obligations in relation to the EPPS.

3.2.3 Section 19(1) of the Environment Act 2021 provides:

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

3.2.4 Section 17(2) of the Environment Act 2021 provides:

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

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

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

3.2.6 The EPPS was laid in Parliament at the beginning of 2023 and came into force on 1 November 2023.<sup>27</sup>

3.2.7 The EPPS provides, so far as is relevant:

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

*Policy versus individual decisions*

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

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<sup>27</sup> Defra, *Environmental principles policy statement* (updated 31 January 2023) <<https://www.gov.uk/government/publications/environmental-principles-policy-statement/environmental-principles-policy-statement>>.

## Analysis

- 3.2.8 This ground turns on the meaning of ‘policy’ for the purposes of the duty under section 19(1) of the Environment Act 2021 to have due regard to the EPPS when making policy (‘EPPS duty’).
- 3.2.9 The EPPS duty was in force when the decision to grant the 2024 Authorisation was made. The Information Notice set out our view that there were reasonable grounds for suspecting that the Minister failed to comply with the EPPS duty when determining the 2024 Authorisation, particularly in respect of the precautionary principle.
- 3.2.10 This analysis was based on the OEP’s view that the decision to grant the 2024 Authorisation constituted ‘policy’. This was on the basis that the 2024 Authorisation was a decision that set an ‘intended course of action’ not specific to a particular person or case: the authorisation was wide-ranging, allowing the use of Cruiser SB across the country for 120 days. It also authorised the emergency use of a product that would otherwise be legally unauthorised, so the decision was a ‘substantial change in approach to an established position’.
- 3.2.11 Defra had stated that it did not consider that the EPPS duty applied, and indicated that it regarded the decision as an operational decision under existing policies rather than the making of policy. The Information Notice asked for information setting out the basis for Defra’s conclusion that the EPPS duty did not apply to the 2024 Authorisation.
- 3.2.12 As indicated above, the EPPS duty is a relatively new requirement, so working through the definition of ‘policy’ and how it relates to a particular type of decision is important. Following the Information Notice, we had a number of helpful exchanges with Defra, and we appreciate Defra’s engagement on this issue.

### Defra’s position

- 3.2.13 Defra stated that the EPPS was not relevant to the 2024 Authorisation as it was an individual administrative decision taken in the context of a particular case, so is exempt from the definition of ‘policy’.
- 3.2.14 It also described the decision as an ‘operational’ one, made in respect of a specific application under the existing regulatory framework under article 53 of the PPP Regulation. It noted that an individual decision did not alter the existing policy or regulatory framework. By contrast, when the government made a statement in December 2024 on its new approach to the use of certain neonicotinoids on crops in England, and when the HSE guidance for applicants on emergency authorisations was updated, Defra considered that the EPPS duty was engaged.

### OEP’s analysis

- 3.2.15 We are satisfied with Defra’s explanation as to why it considered that the decision on the 2024 Authorisation did not fall within the definition of ‘policy’ in

s.47(1) of the Environment Act 2021 in this particular instance. We would note, however, that care needs to be taken not to refer too loosely to 'operational', 'administrative' or 'regulatory' decisions as being automatically excluded from the definition of 'policy', particularly given that the exclusion from the definition of 'policy' in s.47(1) only refers to administrative decisions 'taken in relation to a particular person or case', rather than to administrative decisions in other contexts, and also because making policy is itself an administrative act.

## Finding

3.2.16 We accept Defra's determination that the EPPS duty was not engaged by the decision on the 2024 Authorisation and so we make no finding of failure to comply with environmental law on this ground.

## 3.3. Duties under the Habitats Regulations

### Alleged failures as set out in the Information Notice

- 3.3.1 Ground 3: Unlawful failure to carry out an appropriate assessment of the implications for European sites of the 2023 Authorisation and/or the 2024 Authorisation, and consult Natural England and have regard to any representations it makes for the purposes of those assessments, under regulation 63(1) and (3) of the Habitats Regulations.
- 3.3.2 Ground 4: When granting the 2023 Authorisation and/or the 2024 Authorisation, unlawfully failing to exercise its functions so as to secure compliance with the requirements of the Habitats Directive and the Birds Directive and to have regard to the requirements of the Habitats and Birds Directives so far as they may be affected by the exercise of those functions, as required by regulation 9(1) and (3) of the Habitats Regulations.

### Relevant law

- 3.3.3 The Habitats Regulations provide for the designation and protection of areas important for the conservation of natural habitats and species. These areas, collectively, are referred to in the legislation as European sites because they derive from EU law, specifically the Birds Directive and the Habitats Directive, and include SPAs and SACs.

#### Ground 3

- 3.3.4 A key part of the protection is the requirement in certain circumstances to make an ‘appropriate assessment’ under regulation 63 of the Habitats Regulations, which implements article 6(3) of the Habitats Directive. Regulation 63(1) provides:

*(1) A competent authority,<sup>28</sup> before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—*

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

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

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

- 3.3.5 Regulation 63(3) of the Habitats Regulations provides:

*(3) The competent authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any*

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<sup>28</sup> The Secretary of State is a competent authority under regulation 7(1)(a) of the Habitats Regulations.

*representations made by that body within such reasonable time as the authority specifies.*

3.3.6 Regulation 5(1)(b) of the Habitats Regulations provides, so far as is relevant:

*(b) “the appropriate nature conservation body” means—*

*(i) Natural England, in relation to England [...]*

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

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

*[...]*

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

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

*(9) The relevant standard of review by the court is the Wednesbury rationality standard, and not a more intensive standard of review. (emphasis added)*

3.3.8 In *Joined Cases C-293/17 and C-294/17 Coöperatie Mobilisation for the Environment UA and Vereniging Leefmilieu v College van gedeputeerde staten van Limburg and College van gedeputeerde staten van Gelderland* the application of fertiliser was held to constitute a project:

*72. As regards the application of fertilisers, such an activity may alter the properties of the soil by enriching it with nutrients and thus constitute an intervention involving alterations to the physical aspect of the site within the meaning of Article 1(2)(a) of the EIA Directive and, with regard to the grazing of cattle, establishing grazing land could constitute ‘the execution of construction works or of other installations or schemes’ within the meaning of that provision, in particular if such execution involves, in the circumstances of the present case, an unavoidable or planned development of such grazing land, which it is for the referring court to verify.*

*73. [...] Article 6(3) of the Habitats Directive must be interpreted as meaning that the grazing of cattle and the application of fertilisers on the surface of land or below its surface in the vicinity of Natura 2000 sites may be classified as a ‘project’ within the meaning of that provision, even if those activities, in so*

*far as they are not a physical intervention in the natural surroundings, do not constitute a 'project' within the meaning of Article 1(2)(a) of the EIA Directive.*

- 3.3.9 Case C-323/17 *People Over Wind & Sweetman v Coillte Teoranta* established the principle that mitigation measures, such as conditions, cannot in any event be relied upon to avoid the need to carry out an appropriate assessment under the Habitats Directive:

*40. ... Article 6(3) of the Habitats Directive must be interpreted as meaning that, in order to determine whether it is necessary to carry out, subsequently, an appropriate assessment of the implications, for a site concerned, of a plan or project, it is not appropriate, at the screening stage, to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on that site.*

#### Ground 4

- 3.3.10 Regulations 9(1) and (3) of the Habitats Regulations provide:

*(1) The appropriate authority,<sup>29</sup> the nature conservation bodies and, in relation to the marine area, a competent authority must exercise their functions which are relevant to nature conservation, including marine conservation, so as to secure compliance with the requirements of the Directives.*

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

- 3.3.11 The interpretation of regulation 9(1) and (3) of the Habitats Regulations and the implications for relevant decision makers was set out in *Harris v Environment Agency* [2022] EWHC 2264 (Admin), a case concerning the Environment Agency's review of the impact that water abstraction licences were having on European sites:

*81. The duty to 'have regard' to X (where X is advice or guidance) is therefore different from a duty to act in accordance with X. In the present context, it is striking that the statutory language for the duties imposed by regulations 9(1) and 9(3) differ. Regulation 9(1) applies to the Secretary of State. It does not require the Secretary of State merely to have regard to the Habitats Directive. It requires the Secretary of State to secure compliance with the requirements of the Directive. Different statutory language is used in regulation 9(3). Instead of mandating compliance with the Directives it states only that regard must be had to their requirements. There is some force in Mr Dale-Harris' submission that this must impose a less onerous obligation than regulation 9(1).*

*[...]*

*85. [...] regulation 9(1) is concerned with the Secretary of State and the nature conservation bodies, who each have overarching responsibility for compliance with the Habitats Directive. That seems to me to explain the difference in language. This implies that the duty to 'have regard' here [in*

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<sup>29</sup> Meaning the Secretary of State under regulation 3(1) of the Habitats Regulations.

*regulation 9(3)] does not implicitly permit the Environment Agency to act in a way that is inconsistent with the Habitats Directive (in other words to have regard to the requirements of the Directive but then deliberately decide to act in a way that is inconsistent with those requirements). Rather, it recognises that the Environment Agency is one part of a complex regulatory structure and, depending on the issue, it may have a greater or lesser role to play. In the present context the Environment Agency is effectively the sole (and certainly the principal) public body that is responsible for determining whether abstraction licences should be granted, varied, or revoked. If it does not secure the requirements of article 6(2) in respect of those decisions, then no other public body is capable of filling the gap.*

[...]

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

3.3.12 Article 6(2) of the Habitats Directive is the relevant requirement for the purposes of regulation 9 of the Habitats Regulations in this ground. It provides, in relation to SACs:

*(2) Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.*

3.3.13 Article 7 of the Habitats Directive extends article 6(2) to SPAs:

*Obligations arising under Article 6 (2), (3) and (4) of this Directive shall replace any obligations arising under the first sentence of Article 4 (4) of Directive 79/409/EEC in respect of areas classified pursuant to Article 4 (1) or similarly recognized under Article 4 (2) thereof, [...]*

3.3.14 Article 6(2) of the Habitats Directive has been interpreted by the CJEU:

3.3.12.1 In Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* [2005] 2 CMLR 31 ('Waddenzee'), the CJEU confirmed that the Habitats Directive must be interpreted in accordance with the precautionary principle<sup>30</sup> and that article 6(2) of the Habitats Directive establishes an obligation of general

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<sup>30</sup> [44].

protection to avoid deterioration and disturbances which could have significant effects in light of the Directive's objectives.<sup>31</sup>

3.3.12.2 In Case C-418/04 *Commission v Ireland*, the CJEU confirmed that article 6(2) of the Habitats Directive requires anticipatory measures to prevent deterioration before it occurs.<sup>32</sup>

3.3.12.3 In Case C-399/14 *Grüne Liga Sachsen eV and Others v Freistaat Sachsen* [2016] PTSR 1240 ('Grüne Liga'), the CJEU held that where it appears there is a risk of deterioration of a protected habitat, article 6(2) of the Habitats Directive requires that 'appropriate steps' are taken to avoid that deterioration.<sup>33</sup>

3.3.15 As summarised in *Harris*<sup>34</sup> at paragraphs [98] and [100]:

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

*[...]*

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

## Analysis

### Ground 3

3.3.16 Ground 3 concerns the requirement on the Secretary of State under regulation 63(1) of the Habitats Regulations to carry out an appropriate assessment before authorising a project or plan which 'is likely to have a significant effect' on a European site and is not directly connected with or necessary to the management of that site.

3.3.17 Defra summarised the advice to the Minister in a document referred to as Annex A. For the 2024 Authorisation, Annex A included the following paragraphs:

#### *Risks to protected areas*

*152. Any decision to give emergency authorisation for the use of Cruiser should include an assessment of impacts on sites designated as sites of*

<sup>31</sup> [38].

<sup>32</sup> [207]-[208].

<sup>33</sup> [41]-[44].

<sup>34</sup> *Harris v Environment Agency* [2022] EWHC 2264 (Admin).

*special scientific interest (“SSSIs”) under the Wildlife and Countryside Act 1981 (“WCA”) and on sites designated as special protection areas (“SPA”) and special areas of conservation (“SAC”) under the Conservation of Habitats and Species Regulations 2017 (“the Habitats Regulations”).*

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

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

3.3.18 In relation to the 2023 Authorisation, Defra sent a letter in January 2024 to ClientEarth stating that the obligation to make an appropriate assessment is not triggered where the specific European sites on which there is likely to be a significant effect are not identifiable. Defra also confirmed to us that it had taken the same approach on both authorisations.

3.3.19 Taken together, this gave us reasonable grounds for suspecting that Defra had failed to comply with regulation 63 in relation to the 2023 and 2024 Authorisations. While Defra acknowledged in Annex A that the requirement to carry out an appropriate assessment had been triggered, it had not carried one out, because it was not considered possible, on the basis that it did not know exactly where the treated seed would be used.

3.3.20 We have had extended discussions with Defra since then to understand its position.

#### Defra’s position

3.3.21 Defra’s position is that the OEP has misconstrued paragraphs 152-154 of Annex A, quoted above. Defra considers that the decisions to grant the 2023 and 2024 Authorisations are not in scope of regulation 63 of the Habitats Regulations, and so the obligation to undertake an appropriate assessment did not arise.

3.3.22 Defra states that paragraph 152 of Annex A identified obligations which might arise in relation to other decisions. However, it said the circumstances of the 2023 and 2024 decisions cannot be reconciled with the necessary granularity and geographical specificity required for an assessment under regulation 63(1) and (3) of the Habitats Regulations, as paragraphs 153-154 make clear. Consequently, its position is that the words ‘as applicable’ ought to be implied into paragraph 152, so as to read ‘Any decision to give emergency authorisation for the use of Cruiser should [as applicable] include an assessment of impacts [...]’.

3.3.23 On the law, Defra's position is that regulation 63 of the Habitats Regulations is not normally applicable to decisions on emergency authorisations under article 53 of the PPP Regulation, and was not applicable to the 2023 and 2024 Authorisations, because they did not constitute 'a plan or project' for the purposes of regulation 63. This is based on several interconnected points, arising out of the authorisation not being limited to one or more specific and identified or identifiable locations where the treated sugar beet seeds would be used:

3.3.23.1 As a matter of statutory construction, regulation 63 applies to a 'plan or project' that relates to a specific, identifiable European site; for example, the appropriate assessment has to be carried out with respect to 'that site's conservation objectives', and both regulation 63 and regulation 64 refer repeatedly to 'the site';

3.3.23.2 Case law has established that a high standard of assessment is required for an appropriate assessment under regulation 63, but without knowing where the treated seeds would be used, any assessment would be hypothetical and would be incapable of meeting that standard; and

3.3.23.3 Where geographically specific SACs and SPAs are not identifiable before an authorisation is granted, it is not possible to make a rational assessment of the likelihood that the authorisation will have a significant effect on them or not, meaning the requirement for an appropriate assessment cannot be triggered.

3.3.24 Defra has also stated that if the obligation to carry out an appropriate assessment in fact arose, it was substantially discharged by the steps taken by the Minister under article 53 of the PPP Regulation and the conditions imposed in light of the scientific evidence received.

#### OEP's analysis

3.3.25 In our view, the Annex A section headed 'Risks to protected areas' is, on the face of it, evidence that Defra accepted there was a risk of harm to protected sites, and that provisions requiring the impacts on them to be assessed were engaged. For the purposes of ground 3, that means assessing the impact on European sites under regulation 63 of the Habitats Regulations. This is consistent with the context that this is a decision on the use of a substance that has been banned due to the risk it poses to the environment. Whilst paragraph 153 indicates that the assessment will not in fact be carried out, this is stated to be because Defra has concluded that it is not possible to do so in a meaningful way, not because the risks have been judged to fall below the threshold of 'likely to have a significant effect' on a European site.

3.3.26 We find it hard to see why Annex A would say that an assessment 'should' be carried out if this was not intended in some way to refer to the decision in question, and we are not persuaded that the 'as applicable' wording should be read in retrospectively: this is advice to the Minister on a specific application, so it is not clear why an assessment would be mentioned in this way if it was not considered applicable to this application.

- 3.3.27 We also note that Defra has not sought in the course of this investigation to suggest that a significant effect on European sites was not likely based on the scientific evidence, only that the test did not arise as a matter of law.
- 3.3.28 In our view, the authorisation to place on the market and use sugar beet seeds treated with Cruiser SB was an authorisation for a ‘plan or project’ for the purposes of regulation 63 of the Habitats Regulations. Specifically, we consider that both the 2023 and 2024 Authorisations were decisions which authorised ‘projects’ for these purposes, applying Joined Cases C-293/17 and C-294/17 *Coöperatie Mobilisation for the Environment UA and Vereniging Leefmilieu v College van gedeputeerde staten van Limburg and College van gedeputeerde staten van Gelderland* (‘Dutch case’) at paragraph [73], where the application of fertiliser was held to constitute a project. If ‘the application of fertilisers on the surface of land or below its surface in the vicinity of Natura 2000 sites may be classified as a “project” for the purposes of article 6(3) of the Habitats Directive, so too is the use or application of pesticides in the vicinity of SPAs and/or SACs for the purposes of regulation 63 of the Habitats Regulations, which transposes article 6(3).
- 3.3.29 We also note that the programme in the Dutch case was nationwide but still required an appropriate assessment to be carried out. Similarly, nationwide plans such as National Policy Statements and regionally based development plans are subject to appropriate assessment. In our view, the references to ‘the site’ in regulation 63 do not mean that an authorisation potentially affecting multiple sites cannot fall within scope. We agree that there is a need to establish which sites should be considered, not least so that their conservation objectives can be identified, but we do not accept that this is only possible if it is known with certainty where Cruiser SB will be used. It is known where Cruiser SB could be used, which is confined to one region of England, and the location of the European sites in that region is known.
- 3.3.30 Defra cannot exempt itself from the requirement to make an appropriate assessment when there is an acknowledged risk of harm to the integrity of European sites simply because it is not known exactly where the treated seed will be used. While the uncertainty over which specific fields within the sugar beet growing area will use Cruiser SB that year may make the application of regulation 63 more difficult, we do not consider that it makes it impossible or meaningless, nor that it takes emergency authorisation decisions outside the scope of regulation 63. The predicted impacts on protected sites could be important environmental information to factor into the authorisation decision.
- 3.3.31 We also do not accept that regulation 63 requires a specific degree of granularity of effects on protected sites to trigger the obligation to carry out an appropriate assessment. It depends on the circumstances. This also applies to the standard of assessment: as quoted above in *Mynydd*, “‘appropriate’ indicates no more than that the assessment should be appropriate to the task in hand’, and where certainty is not possible, ‘it will be necessary to work with probabilities and estimates’.

3.3.32 Additionally, we do not agree with Defra’s position that any obligation to carry out an appropriate assessment was substantially discharged by the steps taken by the Minister under article 53 of the PPP Regulation and the conditions imposed on the 2023 and 2024 Authorisations. As noted above, an appropriate assessment must be carried out with regard to the conservation objectives of the site or sites in question; that is where specificity is relevant. Since no assessment was carried out, the scientific advice sought as part of the article 53 process considered impacts on the environment generally, but did not give specific consideration to the relevant conservation objectives. Consequently, the same applied to the conditions placed on the 2023 and 2024 Authorisations. Mitigation measures, such as conditions, cannot in any event be relied upon to avoid the need to carry out an appropriate assessment.<sup>35</sup>

3.3.33 Our conclusion is that regulation 63 of the Habitats Regulations was engaged by the decisions on the 2023 and 2024 Authorisations and that it was possible to carry out a meaningful assessment of impacts on protected areas under regulation 63(1), but that the Secretary of State failed to do so because they wrongly thought that the difficulty of carrying out the assessment amounted to a lawful reason not to do so.

3.3.34 As a result of this error of law, and the resulting failure to carry out an appropriate assessment, the Secretary of State also failed to consult Natural England for the purposes of the assessment, and to have regard to any representations made by Natural England for that purpose, as required by regulation 63(3) of the Habitats Regulations.

#### Ground 4

3.3.35 The Secretary of State is the appropriate authority for the purposes of regulation 9(1) of the Habitats Regulations, and determining emergency applications under article 53 of the PPP Regulation is a function ‘relevant to nature conservation’. Accordingly, the duty to exercise that function ‘so as to secure compliance’ with the Habitats Directive and the Birds Directive is engaged.

3.3.36 Additionally, the Secretary of State is a competent authority for the purposes of regulation 9(3), so is subject to the duty to ‘have regard’ to the requirements of those directives, so far as they may be affected by the exercise of that function. Our view is that the ‘considerably narrowed’ scope to depart from the requirements of the Habitats Directive in *Harris* applies to the emergency authorisation of Cruiser SB, given that only the Secretary of State has control over the use of Cruiser SB (although we recognise that there will be limited circumstances where other public bodies also have a controlling role, such as Natural England on the use on land within a SSSI).

3.3.37 The relevant requirement for the purposes of this investigation is article 6(2) of the Habitats Directive. As noted above, article 7 of the Habitats Directive

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<sup>35</sup> Case C-323/17 *People Over Wind & Sweetman v Coillte Teoranta* [40].

provides that article 6(2) applies to SPAs protected under the Birds Directive, as well as to SACs. Articles 6(2) and 7 therefore require the taking of appropriate steps to avoid, in SACs and SPAs, the deterioration of natural habitats and the habitats of species, as well as the significant disturbance of species for which the areas have been designated.

3.3.38 As set out in *Harris*, above, '[i]t is sufficient that a generalised risk has been established [...] to require 'appropriate steps' to be taken'. For the reasons set out in relation to ground 3 above, we consider that such a 'generalised risk' had been established in relation to the 2023 and 2024 Authorisations, as acknowledged by Defra in the Annex A submission to the Minister. This triggered the Secretary of State's legal obligations under the Habitats Regulations to secure compliance with, and have regard to, the requirements of article 6(2) of the Habitats Directive. We consider that the first appropriate step would have been to carry out an assessment of the impact on European sites, as referred to in Annex A for the 2024 Authorisation. This would have enabled the risk of harm to European sites to be understood in more detail, and further steps to be taken to avoid and/or mitigate the risk.

#### Defra's position

3.3.39 Defra's starting point was that regulation 9 was not engaged. To the extent that the ground referred to obligations under article 6(3) of the Habitats Directive, Defra relied on the same points as for ground 3, since regulation 63 of the Habitats Regulations reflects the requirements under article 6(3). In relation to article 6(2), Defra's position was that the 2023 and 2024 Authorisations were distinguishable from *Harris* in relation to the existence of a 'generalised risk', including because the locations where treated seeds would be used, and hence the location of affected protected sites, were not known at the time when the authorisations were granted.

3.3.40 Defra made further points in relation to article 6(2) of the Habitats Directive, including:

- 3.3.40.1 The duty only applies to species for which a protected site has been designated, and none have been designated for bees, so the obligation could not have arisen in respect of bee protection;
- 3.3.40.2 The Secretary of State's conclusions on the 2023 and 2024 Authorisations, taking into account expert advice, were such that the significance threshold in article 6(2) for the disturbance of species could not have been met, in respect of bees or other species; and
- 3.3.40.3 If an obligation had arisen it had been discharged by the conditions and limitations applying to the 2023 and 2024 Authorisations, which were imposed in the light of the detailed expert advice received by the Minister.

3.3.41 Over the course of the investigation, Defra engaged in constructive discussions with us and now accepts that the Habitats Regulations are potentially engaged by decisions to grant emergency authorisations under article 53 of the PPP Regulation. Specifically, Defra accepts that an

emergency authorisation decision under article 53 may give rise to a 'generalised risk' to protected sites for the purposes of regulation 9 of the Habitats Regulations and article 6(2) of the Habitats Directive, and that it would be appropriate to expressly recognise this in the assessment process.

### OEP's analysis

3.3.42 As set out above, our view is that the section of the 2024 decision's Annex A headed '[r]isks to protected areas' demonstrates that the risk of harm to the integrity of European sites had been recognised. We note also that Defra has stated that the same approach was taken for the 2023 Authorisation. We also consider that the risk of disturbance to species must have been considered as 'significant' (as required under article 6(2)) otherwise the Minister would not have considered it necessary to impose conditions on the 2023 and 2024 Authorisations.

3.3.43 We do not agree that article 6(2) of the Habitats Directive only applies to the species for which the European site has been designated; it is the conservation objectives of the site which are the key considerations<sup>36</sup> (for example, a protected plant species on the site may be affected by an adversely affected localised bee population).

3.3.44 Whilst the conditions imposed on the 2023 and 2024 Authorisations amount to a recognition of risk, we do not consider that they can be regarded as discharging the duty under article 6(2) because they were not imposed with regards to the conservation objectives of sites protected under the Habitats Regulations.

3.3.45 We welcome Defra's change in position in relation to the law underpinning this ground, which has been a significant factor in our decision to bring this investigation to a close. We discuss Defra's proposals for updating the emergency authorisation assessment process in Chapter 4 below.

## Finding

3.3.46 On ground 3, we find that regulation 63 of the Habitats Regulations was engaged by the 2023 and 2024 Authorisations, and that the Secretary of State unlawfully failed to comply with environmental law in that they failed to take proper account of regulation 63 of the Habitats Regulations when exercising their functions under article 53 of the PPP Regulation. This is because the reasons given for not carrying out an appropriate assessment of the implications for European sites of the 2023 and 2024 Authorisations, and consequently not consulting Natural England and having regard to any representations it may have made for the purposes of those assessments, as required by regulation 63(1) and (3) of the Habitats Regulations, were not lawful reasons.

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<sup>36</sup> See the opinion of AG Sharpston in *Sweetman and Others v An Bord Pleanála* (C-258/11), which states at para 44 that article 6(2) 'is to be measured having regard to the conservation objectives of the site, since that is why the site is designated. The requirement is thus to take all appropriate steps to avoid those objectives being prejudiced.'

3.3.47 On ground 4, we find that the duties under regulations 9(1) and (3) of the Habitats Regulations were engaged, and that the 2023 and 2024 Authorisations were granted without taking appropriate steps to understand, and thereafter to avoid or mitigate, the known risk of harm to European sites. We conclude that when granting the 2023 and 2024 Authorisations, the Secretary of State unlawfully failed to exercise their functions so as to secure compliance with the relevant requirements of the Habitats Directive and the Birds Directive and to have regard to the requirements of the Habitats and Birds Directives so far as they may be affected by the exercise of those functions, as required by regulations 9(1) and (3) of the Habitats Regulations.

## 3.4. Duties under the Wildlife and Countryside Act 1981

### Alleged failures as set out in the Information Notice

- 3.4.1 Ground 5: When granting the 2023 Authorisation and/or the 2024 Authorisation, unlawfully failing to take reasonable steps to further the conservation and enhancement of SSSI features when exercising functions that are likely to affect those features, as required by section 28G(1)-(2) of the WCA 1981.
- 3.4.2 Ground 6: Unlawful failure to give notice to Natural England before granting the 2023 Authorisation and/or the 2024 Authorisation in view of likely damage to SSSIs and take any advice received into account, as required by section 28I(2) and (5) of the WCA 1981.

### Relevant law

- 3.4.3 The WCA 1981 provides for the designation and safeguarding of SSSIs, which are areas of land considered to be of special interest by reason of their flora, fauna or geological or physiographical features<sup>37</sup> ('designated SSSI features').
- 3.4.4 Section 28G of the WCA 1981 provides, so far as is relevant:
- (1) An authority to which this section applies (referred to in this section and in sections 28H and 28I as "a section 28G authority") shall have the duty set out in subsection (2) in exercising its functions so far as their exercise is likely to affect the flora, fauna or geological or physiographical features by reason of which a site of special scientific interest is of special interest.*
- (2) The duty is to take reasonable steps, consistent with the proper exercise of the authority's functions, to further the conservation and enhancement of the flora, fauna or geological or physiographical features by reason of which the site is of special scientific interest.*
- (3) The following are section 28G authorities—*
- (a) a Minister of the Crown (within the meaning of the Ministers of the M20 Crown Act 1975) or a Government department;*
- [...]*
- (d) a person holding an office—*
- (i) under the Crown, [...]*
- [...]*
- (f) any other public body of any description.*

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<sup>37</sup> s.28, WCA 1981.

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

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

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

132. Similarly here, the section 28G duty does not seek to protect SSSIs by weighting the desirability of their protection as against other factors, but by requiring relevant authorities to take reasonable steps to “further the conservation and enhancement of the flora, fauna or geological or physiographical features by reason of which the site is of special scientific interest”. I gain some comfort that my view, based upon the wording of the relevant statutory provision, appears to be shared by the academic authors to whom I was referred (see *Burnett Hall on Environmental Law, 3rd Edition* (2012) at paragraph 9/087).

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

3.4.6 Section 28I of the WCA 1981 provides, so far as is relevant:

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

(2) Before permitting the carrying out of operations likely to damage any of the flora, fauna or geological or physiographical features by reason of which a site of special scientific interest is of special interest, a section 28G authority shall give notice of the proposed operations to Natural England.

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

[...]

(5) The authority shall take any advice received from Natural England into account—

(a) in deciding whether or not to permit the proposed operations, and

(b) if it does decide to do so, in deciding what (if any) conditions are to be attached to the permission.

[...]

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

## Analysis

### Ground 5

- 3.4.7 Ground 5 concerns the duty under section 28G WCA 1981 on the Secretary of State, as a section 28G authority, to take reasonable steps, consistent with the proper exercise of their functions, to further the conservation and enhancement of designated SSSI features.
- 3.4.8 The duty arises where the exercise of the Secretary of State’s functions are ‘likely to affect’ designated SSSI features. For these purposes, the relevant function is that of determining applications for emergency authorisation under article 53 of the PPP Regulation.
- 3.4.9 As quoted above in respect of ground 3, the risks to SSSIs were considered under the heading ‘Risks to protected areas’ in the Annex A document for the 2024 decision, and Defra has confirmed that the same approach was taken for the 2023 decision. Paragraph 152 of Annex A states ‘[a]ny decision to give emergency authorisation for the use of Cruiser should include an assessment of impacts on sites designated as sites of special scientific interest (“SSSIs”) under the Wildlife and Countryside Act 1981.’ Paragraph 154 refers to the highest risks being ‘mitigated to a certain extent’ in relation to potential use within a SSSI, because that may require separate consent from Natural England. We consider that this shows that Defra recognised that approval of the 2023 and 2024 applications was likely to affect designated SSSI features, triggering the duty under s.28G(2).
- 3.4.10 However, the Secretary of State did not take any steps to discharge that duty, for the same reason as stated for ground 3, namely that it was not considered possible to do so, on the basis that it was not known exactly where the treated seed would be used in relation to SSSIs.

### Defra’s position

- 3.4.11 Defra’s position is that section 28G WCA 1981 was not engaged in respect of the 2023 and 2024 Authorisations because it could not identify which individual SSSIs potentially could be harmed. This relies on the points on geographic specificity made in relation to ground 3.
- 3.4.12 Defra has also pointed to the conditions and limitations that were imposed on the 2023 and 2024 Authorisations to show that, in any event, reasonable steps were taken to avoid damage to designated SSSI features.

### OEP’s analysis

- 3.4.13 We consider that Defra misinterpreted s.28G, not least because the obligation is expressed in terms of ‘likely’ effect. In this case, where Defra knows the location of SSSIs, and the location of the potential risk (the location of farms that may grow sugar beet in the relevant growing season or

in England), an inability to identify a specific impact on a specific site with certainty does not make assessment impossible, nor mean its obligations under section 28G WCA 1981 do not arise. On the contrary, paragraph 153 of Annex A states '[t]here are many hundreds of protected areas in the part of England where sugar beet is grown', which would seem to increase the likelihood of designated SSSI features being affected.

- 3.4.14 The threshold of 'likely to affect' is relatively low. Defra's advice to the Minister that an assessment of the impacts on SSSIs should be carried out (before going on to conclude that it was not possible to do so), indicates a recognition that this threshold had been met. In addition, the potential for the use of Cruiser SB to affect the environment more generally, though its impact on bees in particular, was clearly recognised in the decision-making process, including in the conditions imposed. Moreover, this was all in the context of considering authorising the use of a substance otherwise banned due to the risk it poses to pollinators.
- 3.4.15 In respect of the conditions and limitations imposed on the 2023 and 2024 Authorisations, there is no evidence to suggest that these were tailored to the impact on designated SSSI features, or imposed with them in mind, such that they could be considered reasonable steps to further the conservation and enhancement of those features. Since an assessment of the impact on SSSIs was not carried out, there was no evidence base for determining what steps might have been reasonable in the circumstances.
- 3.4.16 In our view, the duty under s.28G(2) to take reasonable steps to further the conservation and enhancement of designated SSSI features was triggered by the 2023 and 2024 Authorisations. Reasonable steps could have been identified by the assessment referred to in Annex A, and could have included steps to avoid damaging those features – although we note that the requirement to further conservation and enhancement is broader than simply avoiding damage. However, no such steps were taken because the Secretary of State wrongly concluded that it was not possible to carry out a meaningful assessment.

## Ground 6

- 3.4.17 In addition to the general duty under s.28G, s.28I WCA 1981 imposes a number of specific duties on s.28G authorities, including the Secretary of State, in relation to their powers to permit others to carry out 'operations that are likely to damage' designated SSSI features.
- 3.4.18 Before permitting such an operation, s.28I(2) requires the Secretary of State to give notice to Natural England of the proposed operation. Under s.28I(4)-(5), the Secretary of State must wait 28 days, and then take into account any advice received from Natural England in that time when deciding whether to grant permission and, if so, what conditions to impose. Section 28I(3) specifies that the requirements apply even if the operations would not take place on land within a SSSI.

3.4.19 As set out in the Information Notice, it appeared that to us that ground 6 arose out of the same failure as ground 5, namely the erroneous conclusion that s.28G was not engaged. If it had not so erred, Defra should have given notice of the proposed authorisation of Cruiser SB for the 2023 and 2024 growing seasons to Natural England before it was granted, and the Minister should have taken into account any advice received from Natural England in deciding whether to grant each authorisation and what, if any, conditions should be attached to the permission.

#### Defra's position

3.4.20 In addition to the points on geographic specificity made in relation to s.28G, Defra stated that it would be a waste of Natural England's limited resources to provide advice in respect of any number of SSSIs that might hypothetically be affected, and that there was nothing to suggest that this had been Parliament's intention.

3.4.21 Defra also stated that s.28I did not apply because its reference to 'operations' should be construed narrowly, in accordance with the provision being one that can give rise to criminal liability. Defra said the conventional meaning of 'operations' covers only the practical steps required to implement a decision, as opposed to preliminary steps, and so would not apply to emergency authorisations under article 53.

#### OEP's analysis

3.4.22 We consider that ground 6 flows from the same error of law as ground 5. Having concluded that section 28G WCA 1981 was not engaged, and that an assessment of impacts on SSSIs was not possible, the Secretary of State did not turn their mind to the question of whether there was a likelihood of damage to designated SSSI features, in accordance with section 28I(2) of the WCA 1981, before granting the 2023 Authorisation or the 2024 Authorisation. This is ultimately a matter for the Secretary of State's judgement, but we consider that in the circumstances it was a judgement that had to be exercised one way or the other.

3.4.23 In our view, the 'operation' in question is the use of Cruiser SB, and the granting of the 2023 and 2024 Authorisations is what would permit it to be carried out, bringing both Authorisations within the scope of s.28I.

3.4.24 The threshold of 'likely to damage' is higher than that of 'likely to affect'. In principle, conditions imposed on an authorisation might reduce or avoid the risk of damage but, as noted above, in the case of the 2023 and 2024 Authorisations, the conditions were not informed by any assessment of the impact on designated SSSI features. The Secretary of State should have made a judgement on whether there was a likelihood of damage or not in respect of the proposed authorisation of Cruiser SB for the 2023 and 2024 growing seasons. If they had concluded that there was, they should have given notice to Natural England, and taken into account any advice received from Natural England in deciding whether to grant each authorisation and what, if any, conditions should be attached to the permission, as required by

s.28I(2) and (5) WCA 1981. For the purposes of this investigation, however, we do not consider that it is necessary to go beyond the conclusion that the Secretary of State should have turned their mind to the question of likely damage but did not do so.

## Finding

3.4.25 On ground 5, we find that the duty under s.28G of the WCA 1981 was engaged, and that it had been recognised that approving the 2023 and 2024 Authorisations was likely to affect designated SSSI features, but that the Secretary of State unlawfully failed to take reasonable steps to further the conservation and enhancement of designated SSSI features when approving the 2023 and 2024 Authorisations, as required by section 28G(1)-(2) of the WCA 1981.

3.4.26 On ground 6, we find that as a result of the failure in ground 5, the Secretary of State unlawfully failed to turn their mind to the question of whether permitting the use of Cruiser SB by approving the 2023 and 2024 Authorisations was likely to damage designated SSSI features, as required by section 28I(2) of the WCA 1981.



# **Conclusions and recommendations**

## 4. Conclusions and recommendations

- 4.1 For the reasons set out in Chapter 3, we conclude that the Secretary of State failed to comply with environmental law in respect of the nature conservation obligations identified under the Habitats Regulations and the WCA 1981.

### Defra's planned updates to the emergency authorisation assessment process

- 4.2 Since we sent the Information Notice, Defra has confirmed that the updated assessment procedure referred to at paragraphs 2.24-2.25 above will include the following changes:
- 4.2.1 In addition to the current process,<sup>38</sup> HSE will address the question of whether emergency authorisation of the requested plant protection product would have a negative impact on protected sites. This would be considered generally – against all possible conservation objectives – rather than in relation to individual sites.
- 4.2.2 Where the assessment determines that the risk is negligible, a likely significant effect on protected sites may be ruled out and, provided that all other tests for granting emergency authorisation are also met, authorisation would be given.
- 4.2.3 Where the assessment concludes that there may be a risk, the application of standard protective conditions will be considered for incorporation into the authorisation.<sup>39</sup> Such conditions would be of a standard form and apply universally, for example buffer zones or prescribed methods of application. HSE may seek advice from Natural England, as appropriate. In the majority of cases, Defra expects that the conclusion would be that significant adverse effects on protected sites may be ruled out and, provided that all other tests for granting emergency authorisation are also met, authorisation would be given.
- 4.2.4 Where it is not possible to exclude a risk, despite the application of standard protective conditions, HSE would be likely to recommend refusal for the emergency authorisation, even where all other tests for granting emergency authorisation are met.
- 4.2.5 In scenario 4.2.4 above, authorisation would only be given, following consultation with Natural England, if the Secretary of State were satisfied that a 'derogation' case (akin to that provided for in regulations 64 and 68 of the Habitats Regulations) was made out, such that: (i) there are no

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<sup>38</sup> HSE's current guidance for applicants: HSE, *Guidance on Article 53 emergency authorisation applications* (updated January 2026) <<https://www.hse.gov.uk/pesticides/applicant-guide/emergency-authorisations.htm>>.

<sup>39</sup> In accordance with the guidance in Case C 721/21 *Eco Advocacy CLG v An Bord Pleanála* [48]-[49].

alternative solutions; (ii) there are imperative reasons of overriding public interest; and (iii) appropriate monitoring and compensation measures are provided for.

- 4.3 Defra subsequently confirmed the following additional points:
- 4.3.1 The updated assessment process will apply to all protected sites, including SSSIs, and HSE will consider risks to designated SSSI features and the s.28G(2) WCA 1981 duty to take reasonable steps to further the conservation and enhancement of designated SSSI features as part of that process.
  - 4.3.2 The application of standard protective conditions (also referred to as universal conditions) will be done through the detailed assessment process, rather than as part of a screening exercise.
  - 4.3.3 Where it is not possible to exclude a risk through the use of standard protective conditions and a derogation is considered necessary, Defra would work with Natural England and HSE to identify the specific sites likely to be affected and consider whether further measures could be taken to minimise the risk. Defra would also seek advice from Natural England on compensation measures.
- 4.4 We expect that the updated assessment process that Defra has confirmed to us should prevent the reoccurrence of the failures to comply with environmental law we found on Grounds 3 to 6, provided our first recommendation below is accepted. If correctly applied, we consider that the assessment process is capable of meeting the requirements of regulation 63 of the Habitats Regulations, article 6(2) of the Habitats Directive and sections 28G and 28I of the WCA 1981 with respect to emergency authorisations under article 53 of the PPP Regulation.
- 4.5 Defra estimates that this updated assessment process will be fully integrated into HSE's article 53 assessment process by November 2026.
- 4.6 We will monitor Defra's implementation of the proposed new assessment process, including requiring an update that these changes have been made by November 2026 and reviewing the updated risk assessment guidance when it is in place.
- 4.7 We also want to be assured that the new process is being effectively implemented. This can be achieved by our reviewing one or more assessments post November 2026.
- 4.8 Concluding our investigation at this stage, by publishing this report and by taking steps to monitor future compliance, provides a proportionate means of addressing the areas where we have found failures to comply with environmental law.

## Recommendations

4.9 We make three recommendations to the Secretary of State in relation to our findings (noting that the first two recommendations concern matters which Defra has indicated it intends to implement):

**Recommendation 1:** Ensure that the updated article 53 assessment process expressly recognises the potential relevance of impacts upon protected sites, including by:

- a. Ensuring that the process applies to designated SSSI features as it does for other types of protected sites, so that it takes into account the requirements of s.28G of the WCA 1981;
- b. Ensuring that, within the scope of the risk assessment for emergency authorisations, suitable universal conditions are applied if the HSE risk assessment flags a significant effect on a European site against a specific conservation objective; and
- c. Where derogation is necessary under the updated assessment process, because it is not possible to exclude a risk to the relevant conservation objectives, Defra (or HSE in the first instance) checking at that stage which specific sites the affected conservation objective(s) relate to in order to determine that (i) that there are no alternative solutions, (ii) that there are imperative reasons of overriding public interest and (iii) that monitoring and compensation are provided for.

**Recommendation 2:** Ensure that the updated assessment process in recommendation 1 is formalised by the agreed deadline of November 2026. HSE should also update its internal guidance and assessment documentation accordingly.

**Recommendation 3:** Ensure that the precautionary principle reasoning process is referred to clearly and appropriately in future emergency authorisation decisions.



# Annex

## Annex: Glossary

Term	Description
<b>2023 Authorisation</b>	The granting of an emergency authorisation for the use of the neonicotinoid pesticide, Cruiser SB, on sugar beet crops in England on 23 January 2023.
<b>2024 Authorisation</b>	The granting of an emergency authorisation for the use of the neonicotinoid pesticide, Cruiser SB, on sugar beet crops in England on 18 January 2024.
<b>Appropriate assessment</b>	An assessment required under regulation 63 of the Conservation of Habitats and Species Regulations 2017 to determine the implications of a plan or project for a European site in view of that site's conservation objectives.
<b>Article 53 (PPP Regulation)</b>	Article 53 of Regulation (EC) No 1107/2009, which permits the grant of an emergency authorisation for a plant protection product for a period not exceeding 120 days, by way of derogation from the normal authorisation regime, where such authorisation appears necessary because of a danger which cannot be contained by any other reasonable means.
<b>Birds Directive</b>	Directive 2009/147/EC of the European Parliament and of the Council on the conservation of wild birds, as amended.
<b>Cruiser SB</b>	A pesticide applied as a coating for sugar beet seeds that contains the active substance thiamethoxam. The chemical, and its breakdown product clothianidin, are neonicotinoid pesticides.
<b>Defra</b>	The Department for Environment, Food and Rural Affairs.
<b>Emergency authorisation</b>	An authorisation granted under article 53 of the Plant Protection Products Regulation permitting the temporary use of a plant protection product that is otherwise not approved for use.
<b>Environmental Principles Policy Statement (EPPS)</b>	The policy statement made under section 17 of the Environment Act 2021, explaining how the environmental principles are to be interpreted and proportionately applied by Ministers of the Crown when making policy.
<b>European site</b>	This is the umbrella term used in the Habitats Regulations to refer to sites in the UK (or just England and Wales for some purposes) with a protected conservation status under the Habitats Directive or the Birds Directive. It includes Special Areas of Conservation ('SAC') and Special Protection Areas ('SPA').

<b>Habitats Directive</b>	Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, as amended.
<b>Habitats Regulations</b>	The Conservation of Habitats and Species Regulations 2017, which transpose the Habitats Directive and Birds Directive into domestic law in England.
<b>Health and Safety Executive (HSE)</b>	The public authority responsible for the regulation of pesticides in Great Britain, including providing advice to Ministers on applications for emergency authorisation under the PPP Regulation.
<b>Minister</b>	The Minister for Food, Farming and Fisheries, acting on behalf of the Secretary of State for Environment, Food and Rural Affairs in relation to the 2023 and 2024 Authorisations.
<b>Neonicotinoids</b>	Systemic pesticides which affect the central nervous system of insects.
<b>Plant Protection Products Regulation (PPP Regulation)</b>	Regulation (EC) 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC, as amended by the Plant Protection Products (Miscellaneous Amendments) (EU Exit) Regulations 2019 (SI 2019/556).
<b>Secretary of State</b>	The Secretary of State for Environment, Food and Rural Affairs.
<b>Site of Special Scientific Interest (SSSI)</b>	A site designated under the Wildlife and Countryside Act 1981 for its flora, fauna, geological or physiographical features.
<b>Wildlife and Countryside Act 1981 (WCA 1981)</b>	The Act providing, among other things, for the protection and management of Sites of Special Scientific Interest and imposing duties on public authorities in relation to those sites.
<b>Virus yellows</b>	A plant disease affecting sugar beet which is spread by aphids.