



Community Council of the Royal Burgh of Peebles & District

21 July 2025

Ranald Dods
Planning and Regulatory Services
Scottish Borders Council
By email: DC Consultees

Dear Ranald Dods / Planning & Regulatory Services,

24/00031/FUL & 24/00247/FUL implications of scientific appraisal by SBC ecologist & NatureScot under Habitat Regs (objection)

Thank you for consulting SBC's ecologist and NatureScot in respect of Habitat Regulations Appraisal (HRA)ⁱ for these applications on 15 July 2025.

Now that SBC's ecologist and NatureScot have replied (on 17 and 16 July 2025 respectively) I believe the Habitat Regulationsⁱⁱ require you to reject these applications:

1. The proposal to build has likely significant effect on Tweed SAC and requires HRA
2. SBC is the decision maker under Habitat Regs (NatureScot's role is to advise)
3. SBC ecologist's scientific appraisal says condition 7 is vital to protect Tweed SAC
4. NatureScot concurs condition 7 is vital to protect the integrity of the Tweed SAC
5. HRA requires rejection without proof of no impact beyond scientific doubt
6. Discretion under the Planning Act does not apply to Habitat Regulations

1. Proposal has likely significant effect on the River Tweed SAC

NatureScot's advice that the proposal to build flats has a likely significant effect and therefore requires HRA is unequivocal:

"Advice on Construction of the Residential Development ...

In our view, this proposal is likely to have a significant effect on the River Tweed SAC. Consequently, Scottish Borders Council, as competent authority, would be required to carry out an appropriate assessment [HRA] in view of the site's conservation objectives for its qualifying interests."

NatureScot's somewhat contradictory comments that altered forms of words for conditions 2 and 7 should not in themselves trigger HRA have several fatal flaws including:

- a. SBC's ecologist disagrees: altered condition 7 drops the no-development strip, necessary according to NatureScot (see section 4) to prevent impact on the Tweed SAC – and the SBC ecologist's views prevail (see section 2).
- b. The correct criteria is: "Is the plan or project (either alone or in combination with other plans or projects) likely to have a significant effect on the site?"
That is, the conditions cannot be considered separately from the proposal itself.

NatureScot's misunderstanding that applications 24/00031/FUL and 24/00247/FUL might somehow result in a change of wording to 19/00182/PPP, which somehow is still in force,

seems likely the result of taking the applicant's misrepresentations in this regard at face value.

As we now know following SBC Chief Legal Officer Nuala McKinlay's intervention in December 2024, this is not what SBC is considering. Changing conditions on an existing permission is not possible as a result of section 42 applications. Regardless of the outcome of these applications, permission 19/00182/PPP will remain in place, unmodified, expired and incapable of execution.

What SBC is considering, is whether to grant two wholly new applications to construct flats, each in their own right, where there is no existing permission (19/00182/PPP having expired). Because it is the full proposal that is subject to HRA, in each case we can rely on NatureScot's unequivocal advice that the proposal to build flats requires HRA.

2. SBC is the HRA decision maker (NatureScot's role is to advise)

In any event, it is SBC who is the decision maker (not NatureScot), both in terms of whether there is likely significant impact (and therefore whether HRA is required) and on the outcome of the HRA itself.

SBC's ecologist has clearly articulated the need for HRA and the necessity of any permission containing the full wording of condition 7, which would otherwise fail HRA owing to impact on otters and the Tweed SAC (see section 3).

Given the requirement for scientific decision making (see section 5) it is difficult to imagine any grounds SBC might have for departing from their expert ecologist's assessment.

3. SBC ecologist appraisal: condition 7 vital to protect Tweed SAC

The SBC ecologist's professional scientific appraisal provides two reasons why it would harm the Tweed SAC to grant new permission without the full protections afforded by condition 7 in 19/00182/PPP:

1. Protecting the Tweed SAC requires protecting the wider habitat – not just the site:
 - a. "landscapes and habitats are a lot more than just the woodland present on the site and any such plan will need to cover more than just the woodland"; and
 - b. "It would also be in direct contradiction to condition 13 which requires a Landscape and Habitat Management Plan"
2. A no-development strip is required to protect the Tweed SAC, without which:
 - a. "I'm not sure how an appropriate level of habitat management can be achieved"
 - b. "it would likely impact otters" [which are European Protected Species (EPS)]
 - c. and "would, in my opinion, likely fail an HRA/Appropriate Assessment because of potential impacts on otters."

This is the heart of the matter and the ecologist echoes what was said in the 170 public objections to these applications – protection of the wider woodland is clearly vital, particularly given its riparian (riverbank) character, proximity to the Tweed SAC and the otters it supports. Condition 7 in its full form is vital.

Reference to the failure of Appropriate Assessment also has a statutory implication – this is the threshold for triggering rejection of these applications under section 48 (5) of the Habitat Regulations.

4. NatureScot concurs condition 7 vital to protect the Tweed SAC

NatureScot's "Advice on Construction of the Residential Development" tells us that conditions (including condition 7) are vital:

- "In our view, this proposal is likely to have a significant effect on the River Tweed SAC."
- "Because it could affect internationally important natural heritage interests, the proposal requires to be made subject to conditions so that the works are done strictly in accordance with that mitigation."

That is, development is unable to proceed without negative impact on the Tweed unless conditions are imposed and strictly adhered to. On NatureScot's advice, those necessary, site-specific conditions include the watercourse buffer strip mandated by condition 7:

- "The following site-specific measures will also be required"
- "Watercourse Buffer Strips – water courses will have buffer strips retained where no works take place. A buffer strip of 10 metres is advised."

NatureScot's advice is in full agreement with SBC's ecologists (both now and when 19/00182/FUL was approved) – the watercourse buffer strip (which the developer seeks to remove) must remain a condition of any permission – otherwise the Tweed SAC will be harmed.

5. HRA requires rejection without proof beyond scientific doubt

The requirement under HRA is to reject the proposal unless the applicant proves beyond reasonable scientific doubt that there will be no impact on the Tweed SAC:

"In light of the appropriate assessment the competent authority must decide whether it can be ascertained that the plan or project in question **will not** adversely affect the integrity of the site. The way in which this requirement is framed means that proof of the negative is needed, and that the burden of proof for consent is on the applicant."
[HRA 5.1]

However, no evidence that would support an alternate view is provided with either application. No environmental assessments have been provided by the applicant with these applications and the validity period of the assessments supplied with 19/00182/PPP expired years ago.

"The competent national authorities, taking account of the appropriate assessment of the implications ... for the site concerned in the light of the site's conservation objectives, are to authorise such an activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable

scientific doubt remains as to the absence of such effects.” [Waddenzee judgement, referenced at HRA 5.2]

In this case, the only scientific assessment available is that provided by SBC’s ecologist and supported by NatureScot’s advice. We see (at the very least) reasonable scientific doubt as to whether a new permission with substantially weakened condition 7 would negatively impact the Tweed SAC.

SBC’s only credible option appears to be to reject these applications.

6. Planning Act discretion does not extend to Habitat Regulations

Whereas the Town and Country Planning (Scotland) Act 1997 gives the relevant authority wide discretion to deviate from the Statutory Development Plan, where warranted by material factors, no such latitude or discretion applies in respect of consideration under the Habitat Regulations (which is a separate piece of legislation).

The Habitat Regulations mandate decision making based on objective, scientific evidence. Without proof beyond reasonable scientific doubt that there will be no impact, the Habitat Regulations mandate rejection of these proposals. The regulations provide no discretion for the authority to deviate.

Request to reject these application

In this case, both SBC’s ecologist and NatureScot provide expert, scientific appraisals showing why the full form of condition 7 is necessary to prevent harm to the Tweed SAC.

However, the burden of proof under Habitat Regulations is a negative one. It is not for the decision makers to prove harm, but rather for the applicant to prove beyond a reasonable scientific doubt that there will be no harm – which the applicant simply has not done.

We respectfully submit that, in the absence of scientific evidence that the proposal will not harm the Tweed SAC, section 48 (5) of the Habitat Regulations requires the applications to be rejected.

Yours faithfully
Peebles & District Community Council

Michael Marshall, PhD
Planning Convener

ⁱ European Site Casework Guidance: How to consider plans and projects affecting Special Areas of Conservation (SACs) and Special Protection Areas (SPAs) (“HRA”), available <https://www.nature.scot/doc/european-site-casework-guidance-how-consider-plans-and-projects-affecting-special-areas-conservation>

ⁱⁱ The Conservation (Natural Habitats, &c.) Regulations 1994, available <https://www.legislation.gov.uk/ukSI/1994/2716/part/IV/crossheading/general-provisions-for-protection-of-european-sites>