

Volume 2: Appendices

## Appendix A22

# Senior Legal Counsel Opinion on NPWS Submission



# OPINION OF COUNSEL

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*Querist:* North Irish Sea Array Windfarm Limited

*Agents:* McCann FitzGerald LLP

*Date:* 28 May 2026

*Subject:* North Irish Sea Array application for planning permission (ref. [OA29N.319866](#))

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# CONTENTS

A. INTRODUCTION .....	1
B. BACKGROUND .....	1
C. THE OBSERVATION .....	3
D. INTERPRETIVE APPROACH IN APPROPRIATE ASSESSMENT .....	5
E. NWIS SPA CONVERSATION OBJECTIVES .....	8
F. ANALYSIS OF THE OBSERVATION WITH REFERENCE TO THE CONSERVATION OBJECTIVES .....	11
G. CONCLUSION.....	15

## A. INTRODUCTION

1. I have been asked to advise on the legal considerations that apply to the analysis contained in certain observations offered by the National Parks and Wildlife Service (the “NPWS”) on an application for planning permission made by North Irish Sea Array Windfarm Limited (“NISA”).

## B. BACKGROUND

2. On 7 June 2024, NISA submitted a planning application to An Coimisiún Pleanála (the “Commission”) for the proposed development of the North Irish Sea Array Offshore Wind Farm (ref. [OA29N.319866](#)) (the “Proposed Development” or the “Project”).
3. On 23 December 2022, under special transitional provisions of the Maritime Area Planning Act, 2021 (as amended), the Project was one of six Phase One offshore wind farm projects to be granted a maritime area consent (ref. 2022-MAC-005) (the “MAC”). From the commencement of the MAC, NISA had 18 months in which to submit its planning application.
4. On 11 May 2023, the Project was one of four Phase One projects to receive a provisional award of 500MW capacity in the Government’s first offshore renewable energy support scheme.
5. The Proposed Development is located within a special protection area (“SPA”) designated as such under the auspices of Directive 2009/147/EC (the “Birds Directive”), namely the North-west Irish Sea SPA (site code: [004236](#)) (the “NWIS SPA”). The NWIS SPA covers a large maritime area of approximately

2,333km<sup>2</sup> (*i.e.* over 233,000ha) which, according to the [site synopsis](#), “*extends offshore along the coasts of counties Louth, Meath and Dublin*”. In a [press release](#) by the NPWS dated 13 July 2023, the Minister of State for Heritage and Electoral Reform, Malcolm Noonan TD, described the NWIS SPA as “*the largest SPA designation for birds in Ireland’s history*”.

6. According to my instructions, although NISA had by this time obtained the MAC and a provisional capacity award, it did not receive any formal notification or request to engage with the Department prior to the announcement of the proposed designation of the NWIS SPA. I understand also that the NPWS was of the view that, before submission of the present planning application, it was unable to engage with NISA in connection with the Proposed Development and its likely effects on any SPA or Special Area of Conservation (“SAC”) designated under Directive 92/43/EEC (the “**Habitats Directive**”).
7. Under Article 6(3) of the Habitats Directive, the Commission may grant consent for the Proposed Development only “*after having ascertained that it will not adversely affect the integrity of*” the NWIS SPA.<sup>1</sup> As part of the assessment process in connection with the Proposed Development, the Commission invited observations from the NPWS, as the State agency with special responsibility for SPAs.
8. Following submission of the planning application, and NISA’s receipt from the Commission of a request for further information (“**RFI**”) dated 10 April 2025, the NPWS has expressed a concern that siting the Proposed Development within the NWIS SPA would adversely affect the integrity of that SPA.
9. The issue was raised by the NPWS in observations submitted by its Development Applications Unit (“**DAU**”) to the Commission on 2 August 2024 (the “**Observation**”). In particular, the DAU has queried whether the Proposed Development would contravene the site-specific conservation objectives for the NWIS SPA.

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<sup>1</sup> The possible application of Article 6(4) of the Habitats Directive is not addressed in this opinion.

10. I have been asked to provide a legal analysis of the reasoning contained in the Observation. My analysis is contained in this advice, which represents my considered view on the issues discussed. It is, however, necessary to remark that I accept no responsibility to any person other than my client (NISA) for reliance upon the contents of this advice.

### **C. THE OBSERVATION**

11. NISA has undertaken considerable work to assess the impacts of the Proposed Development on the NWIS SPA, and other SPAs and SACs. The NISA planning application was accompanied by a Natura Impact Statement dated 2024 (the “NIS”). The NIS concluded that the Proposed Development would not have any adverse effect on the integrity of the NWIS SPA (or any other SPA or SAC), either alone or in combination with any other plan or project.
12. However, in the Observation, at §2.3.6 (p.27), the DAU raised concerns regarding displacement effects. The DAU identified certain species as being vulnerable to such effects, including guillemot, razorbill, and puffin, which are listed as Qualifying Interests (“QIs”) for the NWIS SPA and are described in the Observation as Special Conservation Interests. The Observation focuses, by way of example, on guillemot.
13. Certain aspects of the Observation raise technical issues that will be more appropriately addressed on their ecological merits by NISA’s expert consultants. However, one aspect of the Observation appears to raise a legal issue, which I have been asked to consider. Specifically, the Observation states as follows at p.32:

“The site-specific conservation objectives for this SPA include a target for a sufficient number of locations, area, and availability (in terms of timing and intensity of use) of suitable habitat to support Guillemot across both the breeding and non-breeding periods (NPWS, 2023).

The proposed array + 2km area (and factoring out the circa 2.8km<sup>2</sup> of this area overlapping with Rockabill SPA) accounts for circa 8.5% [of] the total marine area under designation as North-west Irish Sea SPA.

The boundary of this SPA was defined in part due to the relatively high suitability of these marine waters as a resource for Guillemot. Recent modelling of auk densities in Irish waters based on ObSERVE II data show that the proposed array + 2km area contains, relative to some other areas within the SPA, high density areas.

Even if one was to assume a uniform suitability of the marine waters of this SPA for Guillemot, and taking into account the UK SNCBs advice in relation to the adoption of a 2km buffer, the proposed development would reduce the suitability of an area equating to 8.5% of the Northwest Irish Sea SPA. The Board is advised that it is NPWS's view that this would contravene the conservation objective for the SPA, which is to maintain its favourable conservation condition."

14. Since this is the passage in respect of which my advice has been sought, it seems to be important to identify carefully the progression of the DAU's analytical steps.
  - 14.1 First, the DAU's analysis is based on the area of the wind turbine array of the Proposed Development, plus a buffer zone around it extending outwards in every direction by 2km (the "**Array and Buffer Zone**").
  - 14.2 Second, the DAU takes the area of the NWIS SPA, less the area of the Rockabill SPA (which is entirely within the NWIS SPA) (the "**Net SPA Area**").
  - 14.3 Third, the DAU compares the first area to the second, and finds that the first corresponds to 8.5% of the second.
  - 14.4 Fourth, the DAU notes that there is some evidence to suggest that the Array and Buffer Zone has a relatively high concentration of auk species (the family of which guillemots, puffins and razorbills are members). However, the analysis nonetheless proceeds on the assumption of uniform distribution across the Net SPA Area.

- 14.5 Fifth, the DAU states that the Proposed Development would “*reduce the suitability*” for guillemot of an area corresponding to 8.5% of the Net SPA Area, *i.e.* the area of the Array and Buffer Zone.
- 14.6 Sixth, the DAU expresses the view that this reduction of suitability would contravene the conservation objective for the NWIS SPA “*to maintain its favourable conservation condition*”. It is not entirely clear whether the word “*its*” here refers to the NWIS SPA or to guillemot; I think the latter makes more sense.
15. Point 5 of the analysis above is an assertion of an ecological nature. I therefore express no view on it, as its merits seem to me to be a matter for experts. I am advised that this is something that is addressed more fully in the 2026 Addendum to the NIS and its appendices. The degree of reduction in relative suitability is not stated by the DAU, and is a matter outside my competence.
16. From a legal perspective, the real question concerns the progression from Point 5 to Point 6. The DAU appears to have concluded that the reduction in suitability for guillemot of an area comprising 8.5% of the Net SPA Area would breach the relevant conservation objective. Precisely why this is so is not expressly articulated. On the face of it, the Observation seems to assume that the conclusion simply follows, *ipso facto*. To determine whether it does follow in this way, it is necessary to set out the full detail of the relevant conservation objective. However, before turning to that issue, it is appropriate to consider the proper interpretive approach in the context of assessment of a project under Article 6(3) of the Habitats Directive.

#### **D. INTERPRETIVE APPROACH IN APPROPRIATE ASSESSMENT**

17. Article 6(3) of the Habitats Directive provides:

“3. Any plan or project not directly connected with or necessary to the management of the site<sup>2</sup> but likely to have a significant effect thereon,

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<sup>2</sup> In context, a “*site*” is either an SAC under the Habitats Directive, or an SPA under the Birds Directive. By virtue of Article 7 of the Habitats Directive, the obligations in Article 6(2)-(4) of that Directive “*replace*” any obligations arising under the first sentence of Article 4(4) of the Birds Directive. Further, under Article 3(1) of the Habitats Directive, SPAs are included in the Natura 2000

either individually or in combination with other plans or projects, shall be subject to appropriate **assessment of its implications for the site in view of the site’s conservation objectives. In the light of the conclusions of the assessment** of the implications for the site and subject to the provisions of paragraph 4, **the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned** and, if appropriate, after having obtained the opinion of the general public.” (emphasis added)

18. The words emphasised in the first sentence of Article 6(3) make it clear that the assessment it provides for is to be undertaken with reference to the conservation objectives of a site. This assessment forms the basis for the determination (*i.e.* what is ascertained) mentioned in the second sentence. The link suggests strongly that effects on the integrity of a site are to be judged by reference to conservation objectives. This textual analysis is fully consistent with how Article 6(3) has been interpreted by the Court of Justice of the European Union and with EU Commission guidance.
19. In *Waddenzee*,<sup>3</sup> the Court of Justice said:

“46. As is clear from the first sentence of Article 6(3) of the Habitats Directive in conjunction with the 10th recital in its preamble, the significant nature of the effect on a site of a plan or project not directly connected with or necessary to the management of the site **is linked to the site’s conservation objectives.**

47. So, **where such a plan or project has an effect on that site but is not likely to undermine its conservation objectives, it cannot be considered likely to have a significant effect on the site concerned.**

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network. The Court of Justice of the European Union has consistently interpreted the two Directives and their aims in conjunction (see *e.g.* [Case C-164/17](#) *Grace & Sweetman v. An Bord Pleanála*).

<sup>3</sup> *Waddenzee*, Case C-127/02, [ECLI:EU:C:2004:482](#).

48. Conversely, **where such a plan or project is likely to undermine the conservation objectives of the site concerned, it must necessarily be considered likely to have a significant effect on the site.** As the Commission in essence maintains, in assessing the potential effects of a plan or project, their significance must be established in the light, *inter alia*, of the characteristics and specific environmental conditions of the site concerned by that plan or project.” (emphasis added)

20. EU Commission guidance from 2018 states:<sup>4</sup>

**“4.6.4. The concept of the ‘Integrity of the site’**

It is clear from the context and from the purpose of the Directive that the ‘integrity of a site’ relates to the site’s conservation objectives... For example, it is possible that a plan or project will adversely affect the site only in a visual sense or only affect habitat types or species other than those listed in Annex I or Annex II for which the site has been designated. In such cases, the effects do not amount to an adverse effect for purposes of Article 6(3).

In other words **if none of the habitat types or species for which the site has been designated is significantly affected then the site’s integrity cannot be considered to be adversely affected.**” (emphasis added)

21. More recent EU Commission guidance, from 2021, states:<sup>5</sup>

“The ‘integrity of a site’ thus relates to the site’s conservation objectives, its key natural features, ecological structure and function. If the site’s conservation objectives are not undermined by the proposed plan or

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<sup>4</sup> *Managing Natura 2000 sites: The provisions of Article 6 of the ‘Habitats’ Directive 92/43/EEC*, Commission Notice C(2018) 7621 final, Brussels, 21.11.2018.

<sup>5</sup> *Commission notice Assessment of plans and projects in relation to Natura 2000 sites – Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC*, [2021/C 437/01](#), §3.2.3.

project (alone and in-combination with other plans and projects) then the site’s integrity is not considered to be adversely affected.”

22. The same guidance states (§3.2.2):

“Conservation objectives for each of the habitat types and species present in the site should be related to their ecological requirements and set with reference to the parameters used for determining its conservation condition on the site (*e.g.* their area, structure and functions or populations). They should specify targets to be achieved for each of these attributes/parameters. They should also include targets/limits for the ecological functions and processes on which the habitats and species depend (*e.g.* defining the required water quality and quantity for aquatic species).”

23. Having regard to this commentary, it was entirely appropriate for the NPWS DAU to focus on the effect of the Proposed Development on the conservation objectives of the NWIS SPA, to which we must now turn.

## **E. NWIS SPA CONSERVATION OBJECTIVES**

24. Site-specific conservation objectives for the NWIS SPA are set out in a document dated 19 September 2023.<sup>6</sup> The document begins (p.3) by stating:

“The overall aim of the Habitats Directive is to maintain or restore the favourable conservation status of habitats and species of community interest.”

25. It continues:

**“A site-specific conservation objective aims to define favourable conservation condition for a particular habitat or species at that site.**

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<sup>6</sup> [NPWS \(2023\) Conservation Objectives: North-west Irish Sea SPA 004236. Version 1.](#)

The favourable conservation status of a species is achieved when:

- population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and
- the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and
- **there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis.**” (emphasis added)

26. Guillemot is listed as a QI (p.4) and the species is addressed in more detail at pp.39-40. The overall conservation objective is:

“To maintain the favourable conservation condition of guillemot in North-west Irish Sea SPA, **which is defined by the following list of attributes and targets:...**” (emphasis added)

27. What follows is a table containing five attributes, stating how those attributes are to be measured or quantified (the “*Measure*” column), in each case with a target. A fourth column contains notes. Leaving the notes to one side, the table is as follows (with numbering added to the attributes for clarity):

Attribute	Measure	Target
[1] Population size	Number	No significant decline
[2] Spatial distribution	Hectares, time and intensity of use	Sufficient number of locations, area, and availability (in terms of timing and intensity of use) of suitable habitat to support the population
[3] Forage spatial distribution, extent, abundance and availability	Location and hectares, and forage biomass	Sufficient number of locations, area of suitable habitat and available forage biomass to support the population target
[4] Disturbance across the site	Intensity, frequency, timing and duration	The intensity, frequency, timing and duration of disturbance occurs at levels that do not significantly impact the achievement of targets for population size and spatial distribution

Attribute	Measure	Target
[5] Barriers to connectivity	Number; location; shape; area (hectares)	The number, location, shape and area of barriers do not significantly impact the site population's access to the SPA or other ecologically important sites outside the SPA

28. It is notable that the target for population size, meaning the number of birds, is that there should be no significant decline. That is to say, maintenance of the existing population without significant loss is the population target.
29. The targets for the second and third attributes (spatial distribution and forage spatial distribution *etc.*) are expressed in terms related to the “*population*” and the “*population target*”, respectively, which as we have seen mean the same thing, namely the existing population. In each case, the target is one of *sufficiency* to support the existing population. It is notable in this regard that the targets are *not* expressed in terms, for example, of maintaining areas or numbers of locations. Rather, the touchstone in each case is sufficiency for population maintenance.
30. Likewise, the target for the fourth attribute (disturbance across the site) is expressed in terms of not significantly impacting the achievement of targets for population size and spatial distribution. As already noted, the population size target is essentially maintenance of the existing population. And the spatial distribution target is itself expressed by reference to the same objective.
31. Thus, the targets for the first four attributes all have as their ultimate objective avoiding any significant decline in the existing guillemot population. It follows that, if a project will not cause a significant decline in population, it is not incompatible with the targets for these attributes.
32. The final attribute (barriers to connectivity) also mentions the site's population, but less as an end in itself. Rather, the focus of this target is on preserving access for that population to the SPA and to other ecologically important sites outside the SPA.

## F. ANALYSIS OF THE OBSERVATION WITH REFERENCE TO THE CONSERVATION OBJECTIVES

33. The DAU's Observation does not address barriers to connectivity (the fifth attribute). Accordingly, it is not necessary to consider it further. With its emphasis on the reduction of suitability of a specified area, the Observation seems to be more focused on the other attributes.
34. From a legal perspective, it seems to me that there is something of a leap between the fifth and sixth stages of the DAU analysis, as set out in paragraph 14 above. That is to say, it is not clear from the Observation *why* a reduction in suitability of 8.5% of the Net SPA Area should give rise to a breach of the conservation objective. To put it another way, it is not apparent from the reasoning that this reduction will lead to a reduction in population. There is, for example, no consideration of whether, even taking the NPWS' observation at face value and allowing for the reduction in suitability, the remainder of the site (c.91.5%)—and noting this excludes entirely the question of whether any benefit can be derived from the Array and Buffer Zone area, even if somewhat less suitable than heretofore—would be *sufficient* to maintain the existing population, without significant decline.
35. I express no view on the merits of whether a link between the fifth and sixth stages sufficient to justify this leap could be shown. That is a matter for experts in the field, and I note that ecological evidence on this issue has been presented separately to the NPWS. However, as a matter of purely legal reasoning, it appears that, at present, the necessary link is missing from the Observation.
36. In these circumstances, it is not improper to offer an educated guess as to what, in the DAU's analysis, might be regarded as providing the missing link. It has been noted above that the analysis seems to proceed on the basis that a reduction in SPA area (even where the affected area is only reduced in suitability) means, *ipso facto*, that the integrity of the SPA has been adversely affected. This may be based on a reading of the judgment of the Court of Justice in *Sweetman* (Case

C-258/11).<sup>7</sup> If that is correct, I think it doubtful that *Sweetman* can indeed supply the missing link.

37. In *Sweetman*, the proposed road development would have affected a site protected under the Habitats Directive due to the presence there of a number of habitats listed in Annex I to the Directive, including karstic limestone pavement. The Court of Justice stated:

“26. It is apparent from the order for reference that the implementation of the N6 Galway City Outer Bypass road scheme would result in the permanent and irreparable loss of part of the Lough Corrib SCI’s limestone pavement, which is a priority natural habitat type specially protected by the Habitats Directive.”

38. The habitat to be lost amounted to some 1.47 hectares of a protected habitat section comprising 85 hectares, itself part of the site-wide total area of 270 hectares, all of which was a habitat protected pursuant to Annex I to the Habitats Directive (see §12). The Court went on to say:

“39. ...in order for the integrity of a site as a natural habitat not to be adversely affected for the purposes of the second sentence of Article 6(3) of the Habitats Directive the site needs to be preserved at a favourable conservation status; this entails, as the Advocate General has observed in points 54 to 56 of her Opinion, the lasting preservation of the constitutive characteristics of the site concerned that are **connected to the presence of a natural habitat type whose preservation was the objective justifying the designation of that site** in the list of SCIs, in accordance with the directive.” (emphasis added)

39. In this connection, the Court stated of the site in question (§45): “*the conservation objective thus corresponds to maintenance at a favourable conservation status of that site’s constitutive characteristics, namely the presence of limestone pavement*”.

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<sup>7</sup> *Sweetman*, [Case C-258/11](#), [ECLI:EU:C:2013:220](#).

40. In summary, the preservation of the habitat of limestone pavement was a conservation objective of the site concerned. In these circumstances, it followed inevitably that the irreparable destruction of part of that habitat was incompatible with the conservation objective.
41. By contrast, in the present case, the conservation objective is *not* for the preservation of habitat *per se*. Rather, to the extent that habitat is to be preserved, this is for instrumental reasons, rather than as an end in itself. What is to be preserved is *sufficient* habitat (in terms of number, location and area) to achieve the targets related to particular *species* which are protected pursuant to Annex I of the Birds Directive, for present purposes the guillemot.
42. These distinctions between the two cases are such that, in my opinion, there can be no direct “*read across*” from *Sweetman* to the present case.
43. In my view, *Sweetman* was decided based on the implications of the project at issue for the conservation objectives of the site concerned. There is no substitute for that analysis. The case does not establish any proposition of law to the effect that any loss of habitat in a protected site means, *ipso facto*, that there will be an adverse effect on site integrity. Whether that is the case or not must depend on the implications of the particular project for the relevant conservation objective(s), to be judged by reference to the attributes and targets set and which define the objective(s).
44. This analysis has recently received judicial support in the Irish case of *Friends of the Irish Environment CLG v. An Coimisiún Pleanála*.<sup>8</sup> In that case, the proposed development of a power station on the banks of the Shannon estuary would have led to the loss—at least for the duration of the project—of a (very) small section of Annex I habitats. Notwithstanding this and, notably, notwithstanding the negative assessment by the DAU of the habitat loss in its observation, the Commission granted permission. That decision was challenged by the applicant, on grounds including that, based on *Sweetman*, “*loss of part of a Qualifying Habitat which was a priority habitat is by definition an effect*

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<sup>8</sup> [2026] IEHC 205 (1 April 2026).

on the integrity of a European Site”.<sup>9</sup> The High Court held (§100) that this was a misreading of *Sweetman* and upheld the grant of planning permission.

45. It is necessary also to consider the judgment of the Court of Justice in *Grace & Sweetman* (Case C-164/17).<sup>10</sup> In that case, the proposed development of a wind farm would have led to a significant loss of foraging habitat for hen harrier, a species for which the relevant SPA had been designated. It was, however, contended by the developer that a management plan to be implemented as part of the proposed development would (through managed tree-felling) restore certain other areas to blanket bog, making them more suitable habitat for hen harrier. Other active works were also envisaged to attempt to improve the suitability of the site for this species. The Court of Justice answered the question posed to it as follows:

“57. ...Article 6 of the Habitats Directive must be interpreted as meaning that, where it is intended to carry out a project on a site designated for the protection and conservation of certain species, of which the area suitable for providing for the needs of a protected species fluctuates over time, and the temporary or permanent effect of that project will be that some parts of the site will no longer be able to provide a suitable habitat for the species in question, **the fact that the project includes measures to ensure that, after an appropriate assessment of the implications of the project has been carried out and throughout the lifetime of the project, the part of the site that is in fact likely to provide a suitable habitat will not be reduced and indeed may be enhanced may not be taken into account for the purpose of the assessment that must be carried out in accordance with Article 6(3) of the directive** to ensure that the project in question will not adversely affect the integrity of the site concerned; that fact falls to be considered, if need be, under Article 6(4) of the directive.”  
(emphasis added)

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<sup>9</sup> See §104 of the Statement of Case, quoted at [2026] IEHC 205, §94.

<sup>10</sup> *Grace & Sweetman*, Case C-164/17, [ECLI:EU:C:2018:593](https://eur-lex.europa.eu/eli/cejoc/2018/593).

46. Again, the present case is distinguishable. *Grace & Sweetman* sought to rely on what were, in effect, compensatory measures, legally cognisable only under Article 6(4) of the Habitats Directive, as part of the appropriate assessment under Article 6(3). This attempt was, unsurprisingly, deprecated. In the present case, however, the issue is not whether compensatory measures make up for the reduction in suitability for guillemot of the Array and Buffer Zone area. Rather, the question is whether, having regard to the attributes and targets that define the conservation objective, the reduction in suitability will actually have a significant effect on the guillemot population. Whether that is so, or not, is a question to be answered by reference to the evidence and ecological analysis submitted by NISA. The law does not supply an automatic answer.
47. In summary, and at the risk of repetition, the caselaw establishes that there is no substitute for analysis of the ecological implications of the Proposed Development for the conservation objective of the NWIS SPA pertaining to guillemot, interpreted in the light of the relevant attributes and targets.

## **G. CONCLUSION**

48. In the light of the analysis set out above, in my opinion, the Observation submitted to the Commission by the NPWS DAU does not explain *why* the reduction in suitability for guillemot of the area comprising the Array and Buffer Zone would have an adverse effect on the integrity of the NWIS SPA. Leaving aside the attribute relating to barriers to connectivity, which was not relied upon by the DAU, the targets for the other four attributes are ultimately all expressed in terms of effect on population. Those pertaining to spatial distribution of habitat and foraging locations, which seem to be the most relevant, require only sufficiency to support the existing population, without significant decline. I reiterate that whether the Proposed Development would or would not adversely affect this criterion of sufficiency is not a point on which I wish to express a view, as it requires the exercise of expert ecological judgment. However, what can be said is, first, that there does appear to be material supportive of NISA's position in this regard, and second, that the Observation

does not appear (without further explanation) to be sufficient to explain the conclusion to the contrary.

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