

5. Approval would breach Habitats Regulations – giving grounds for judicial review

- 5.1. **Evidence of the presence of European Protected Species (EPS).** The site is a biodiverse, species rich, riparian woodland. EPS, and Nationally Protected Species (Scottish Biodiversity List) records from the National Biodiversity Network [\[NBN1\]](#) show 10,612 individual biological records, with 100 different protected species present on or near the site, including bats (multiple species) and otter – both are EPS.
- 5.2. **Habitats Regulations Appraisal (HRA) is mandatory but has not been performed.** NatureScot confirm that “construction of the residential development ... 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”, i.e. HRA [\[ECOL5\]](#). Habitat Regulations would require an HRA prior to approval, but planners confirm that HRA has not been performed [\[ECOL7\]](#) and no ecological reports are available (see section 4.3 above) on which to perform HRA.
- 5.3. **The Environmental Rights Centre for Scotland (ERCS) letters to SBC.** SBC did not consult their own ecologist or NatureScot until ERCS intervened on 9 Jul 2025 [\[ECOL4\]](#) owing to the nationally significant issues SBC’s approval of this application without HRA would raise. Full details are contained in our 21 Jul 2025 letter [\[PCC3\]](#) explaining why Habitats Regulations require refusal of 24/00031/FUL.
1. The proposal to build has likely significant effect on SAC and requires HRA
 2. SBC is the decision maker under Habitat Regs (NatureScot’s role is to advise)
 3. SBC ecologist 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 Act does not apply to Habitats Regulations.
- 5.4. **Planners decide to refuse 24/00031/FUL under delegated powers.** On 22 Sep 2025, planners wrote to the applicant [\[RFS25\]](#) explaining “we are unable to make a positive recommendation on this application.” “A recommendation would be made under delegated powers. That would be a recommendation to refuse permission.” We invite the LRB to support the planning officers by refusing permission.
- 5.5. **ERCS say approval of this application gives grounds for judicial review.** ERCS’ 3 Nov 2025 email to SBC [\[ECOL7\]](#) set out why HRA was required and that approval without HRA would give grounds for judicial review:

“There are two reasons why an appropriate assessment is required. First, NatureScot appears to have misunderstood the nature and implications of 24/00031/FUL and 24/00247/FUL. NatureScot’s advice should be interpreted accordingly.

Second, advice received from the Council’s ecology officer indicates that 24/00031/FUL and 24/00247/FUL are likely to have a significant effect on the River Tweed SAC.”

“Our view is that if the Council determines [i.e. approves] 24/00031/FUL and 24/00247/FUL without an appropriate assessment, **there would be grounds for a judicial review** arising from a breach of the Regulation 48(1) duty.”

- 5.6. **CG Fry [2025] UKSC 35.** This recent UK Supreme Court decision underscores the importance of the Habitats Regulations, emphasising that HRA must be performed by law when the need is discovered at any point in the planning process – regardless of any prior failings to carry one out during PPP (as happened here):

[47] “The object of [the Habitats] Directive was to ensure a high degree of protection for vulnerable habitats and sites of various kinds as identified for the purposes of the Directive [including the Tweed SAC], and to ensure careful scrutiny of development proposals likely to have an impact on such habitats and sites with a view to minimising or avoiding such impact.”

[56] “It is clear that the protective purpose of the Habitats Regulations and the precautionary principle would be defeated, rather than promoted and respected, if the Regulations are read as precluding any opportunity for an appropriate assessment to be carried out at a later stage in a multi-stage planning process, such as that in issue in the present proceedings, where the planning authority has for any reason (eg by oversight, misinterpretation of the law or being ignorant of relevant science or misunderstanding that science) failed to carry one out at the stage of assessing whether to grant outline planning permission.” [\[Prec2\]](#)

- 5.7. HRA must be carried out if the need for one becomes apparent – regardless of the stage of planning. Here (like CG Fry) we are concerned with conditions, the grant of which also has the effect of renewing PPP. HRA has never been carried out for Kingsmeadows (though even if it had, it would still need to be carried out for this application). There are no ecological data on which that HRA could be based. Thus, in order to avoid a breach of Habitats Regulations, which would give grounds for judicial review, permission should be refused.