Appeal number: NV/2018/0006

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
ENVIRONMENT

JULIAN EDWARD WARREN **Appellant**

- and -

NATURAL ENGLAND **Respondent**

TRIBUNAL: JUDGE ALISON MCKENNA

Sitting in public at The Old Bakery, Norwich on 25 and 26 June 2018
Decision Reserved

The Appellant was represented by Sebastian Kokelaar, counsel, instructed by Birketts LLP

The Respondent was represented by Carl May-Smith, Associate Barrister Browne Jacobson LLP

DECISION

The Appellant's appeal is allowed in part.

The Stop Notice dated 5 January 2018 is hereby varied to read as follows:

"A: The grounds on which Natural England relies in serving this Stop Notice are that:

(1) Natural England reasonably believes that some of the Appellant's activities present a significant risk of causing serious harm to the environment, in particular by harming the vegetation, invertebrates and other features of the heath and acid grassland habitats through impacts including (a) physical disturbance by birds and vehicles, and (b) soil enrichment by bird manure.

(2) Natural England reasonably believes that some of the Appellant's activities are likely to involve the commission of an offence under s. 28P(6)[1] of the Countryside and Wildlife Act 1981.

B: The Activities which must be stopped by virtue of this Stop Notice (until the Appellant obtains a Completion Notice, or the Stop Notice is withdrawn by Natural England) are:

(a) The release of pheasants within the SSSI over and above the previously agreed level of 3,060 birds per season;
(b) Vehicular access within the SSSI which exceeds the previously agreed level of 24 days per season for game shooting, (but vehicular access on additional days is permitted where reasonably necessary for the purposes of securing the welfare of game birds and/or conducting predation control);

C: The steps to be taken to remove or reduce the harm or risk of harm are:

As soon as practicable, for the Appellant to make a formal application to Natural England under s. 28E of the Countryside and Wildlife Act 1981 for its consent to conduct any and all activities likely to impact the SSSI's notified features, other than those already permitted, as described above."

REASONS

A: Background

1. This appeal concerns a Stop Notice dated 5 January 2018 served on the Appellant by Natural England pursuant to section 46 of the Regulatory Enforcement and Sanctions Act 2008 and Schedule 3 of the Environmental Sanctions (England) Order 2010.

2. The Appellant runs a commercial shoot on the Blythburgh Estate at Walberswick in Suffolk. Part of the Estate is within the Minsmere-Walberswick Heaths and Marshes Site

[1] http://www.legislation.gov.uk/ukpga/1981/69/section/28P

of Special Scientific Interest ("SSSI"). The SSSI was created in 1993 by notification under the Wildlife and Countryside Act 1981. The SSSI is recognised to be of both national and international significance in respect of its habitats and the bird species that it hosts.

3. The Stop Notice, in summary, prohibits the Appellant from conducting any activities associated with the shoot within the SSSI until he has complied with the steps specified in schedule 1 to the Stop Notice. These steps, in summary, require him to obtain Natural England's consent to the further release of game birds and to the conduct of activities associated with the shoot.

4. The Appellant appealed against the Stop Notice in January 2018. The Tribunal offered the Appellant a Fast Track determination of his appeal in accordance with its Practice Direction for Environmental Stop Notices[2] but he did not wish to expedite the hearing.

5. The appeal was heard in public over two days in June 2018. The Appellant was represented by Sebastian Kokelaar of counsel, instructed by Birketts LLP. The Respondent was represented by Carl May-Smith, Associate Barrister at Browne-Jacobson LLP. The Tribunal heard oral evidence called by both parties. It also considered written and oral submissions from Maurice Sheridan, counsel, on behalf of the trustees for the GRW Blois Estate and Mr Andrew Blois. The trustees were not joined as parties to the appeal, but they asked to be allowed to make representations and their application was granted.

6. After two days of evidence, the Tribunal directed closing submissions from counsel in writing and reserved its Decision. I am grateful to all counsel for their clear written submissions and would also like to express my gratitude to each of the witnesses for their assistance.

B: The Legal Framework

7. The Stop Notice with which I am concerned was served pursuant to The Environmental Civil Sanctions (England) Order 2010[3] which provides at schedule 3 as follows:

> *"Stop notices*
>
> *1.—(1) The regulator may serve a stop notice on any person in accordance with this Schedule in relation to an offence under a provision specified in Schedule 5 if the table in that Schedule indicates that such notice is possible for that offence.*
>
> *(2) A "stop notice" is a notice prohibiting a person from carrying on an activity specified in the notice until the person has taken the steps specified in the notice.*

[2] https://www.judiciary.uk/wpcontent/uploads/JCO/Documents/Practice+Directions/Tribunals/grc_resActandStopNoticePracticeDirect.pdf

[3] http://www.legislation.gov.uk/ukdsi/2010/9780111492512/schedule/3

(3) A stop notice may only be served in a case falling within sub-paragraph (4) or (5).

(4) A case falling within this sub-paragraph is a case where—

(a) the person is carrying on the activity,

(b) the regulator reasonably believes that the activity as carried on by that person is causing, or presents a significant risk of causing, serious harm to any of the matters referred to in sub-paragraph (6), and

(c) the regulator reasonably believes that the activity as carried on by that person involves or is likely to involve the commission of an offence under a provision specified in Schedule 5 by that person.

(5) A case falling within this sub-paragraph is a case where the regulator reasonably believes that—

(a) the person is likely to carry on the activity,

(b) the activity as likely to be carried on by that person will cause, or will present a significant risk of causing, serious harm to any of the matters referred to in sub-paragraph (6), and

(c) the activity as likely to be carried on by that person will involve or will be likely to involve the commission of an offence under a provision specified in Schedule 5 by that person.

(6) The matters referred to in sub-paragraphs (4)(b) and (5)(b) are—

(a) human health,

(b) the environment (including the health of animals and plants).

(7) The steps referred to in sub-paragraph (2) must be steps to remove or reduce the harm or risk of harm referred to in sub-paragraph (4)(b) or (5)(b).

Contents of a stop notice

2. A stop notice must include information as to—

(a) the grounds for serving the stop notice;

(b) the steps the person must take to comply with the stop notice;

(c) rights of appeal; and

(d) the consequences of non-compliance.

Appeals

3.—(1) The person on whom a stop notice is served may appeal against the decision to serve it.

(2) The grounds for appeal are—

(a) that the decision was based on an error of fact;

(b) that the decision was wrong in law;

(c) that the decision was unreasonable;

(d) that any step specified in the notice is unreasonable;

(e) that the person has not committed the offence and would not have committed it had the stop notice not been served;

(f) that the person would not, by reason of any defence, have been liable to be convicted of the offence had the stop notice not been served;

(g) any other reason.

Completion certificates

4.—(1) Where, after service of a stop notice, the regulator is satisfied that the person has taken the steps specified in the notice, the regulator must issue a certificate to that effect (a "completion certificate").

(2) The stop notice ceases to have effect on the issue of a completion certificate.

(3) The person on whom the stop notice is served may at any time apply for a completion certificate.

(4) The regulator must make a decision as to whether to issue a completion certificate within 14 days of such an application.

(5) The person on whom the stop notice was served may appeal against a decision not to issue a completion certificate on the grounds that—

(a) the decision was based on an error of fact;

(b) the decision was wrong in law;

(c) the decision was unfair or unreasonable;

(d) the decision was wrong for any other reason.

Compensation

5.—(1) A regulator must compensate a person for loss suffered as the result of the service of the stop notice or the refusal of a completion certificate if that person has suffered loss as a result of the notice or refusal and—

(a) a stop notice is subsequently withdrawn or amended by the regulator because the decision to serve it was unreasonable or any step specified in the notice was unreasonable;

(b) the operator successfully appeals against the stop notice and the First-tier Tribunal finds that the service of the notice was unreasonable; or

(c) the operator successfully appeals against the refusal of a completion certificate and the Tribunal finds that the refusal was unreasonable.

(2) A person may appeal against a decision not to award compensation or the amount of compensation—

(a) on the grounds that the regulator's decision was unreasonable;

(b) on the grounds that the amount offered was based on incorrect facts;

(c) for any other reason.

Offences

6.—(1) Where a person on whom a notice is served does not comply with it within the time limit specified in the notice, the person is guilty of an offence and liable—

(a) on summary conviction, to a fine not exceeding £20,000, or imprisonment for a term not exceeding twelve months, or both, or

(b) on conviction on indictment, to imprisonment for a term not exceeding two years, or a fine, or both.

(2) In the application of this paragraph in relation to an offence committed before the commencement of section 154(1) of the Criminal Justice Act 2003 the reference in sub-paragraph (1)(a) to twelve months is to be read as a reference to six months."

8. The Tribunal's powers on determining an appeal against a Stop Notice are set out in Article 10 of the 2010 Order[4], as follows:

> **"***10(1) An appeal under this Order is to the First-tier Tribunal.*
> *(2) In any appeal (except in relation to a stop notice) where the commission of an offence is an issue requiring determination, the regulator must prove that offence according to the same burden and standard of proof as in a criminal prosecution.*
> *(3) In any other case the tribunal must determine the standard of proof.*
> *(4) All notices (other than stop notices) are suspended pending appeal.*
> *(5) The Tribunal may suspend or vary a stop notice.*
> *(6) The Tribunal may, in relation to the imposition of a requirement or service of a notice –*
> *(a) withdraw the requirement or notice;*
> *(b) confirm the requirement or notice;*
> *(c) vary the requirement or notice;*
> *(d) take such steps as the regulator could take in relation to the act or omission giving rise to the requirement or notice;*
> *(e) remit the decision whether to confirm the requirement or notice, or any matter relating to that decision to the regulator".*

9. At the hearing of this appeal, I raised with counsel (and invited their submissions as to) the nature of the Tribunal's jurisdiction in determining an appeal against a Stop Notice. As I explained, the general approach in regulatory appeals to this Chamber is that, unless the legislation indicates otherwise, the appeal is *de novo* i.e. it requires the Tribunal to stand in the shoes of the regulator and to take a fresh decision on the evidence, giving appropriate weight to the original decision-maker's decision. The nature of such an appeal is described in *El Dupont v Nemours & Co v ST Dupont* [2003] EWCA Civ 1368 by May LJ at [96][5]. Support for applying this general approach to Stop Notice appeals is to be drawn, in my view, from the full range of powers conferred on the Tribunal in the exercise of its own discretion pursuant to Article 10 (6) of the 2010 Order. This was the approach taken by the Upper Tribunal (Administrative Appeals Chamber) in its only

[4] www.legislation.gov.uk/ukdsi/2010/9780111492512/article/10

[5] http://www.bailii.org/ew/cases/EWCA/Civ/2003/1368.html

Decision to date on the Stop Notice regime - see *Forager Ltd v Natural England* [2017] UKUT 0148 (AAC).[6]

10. I note that the Upper Tribunal in *Forager* approved the First-tier Tribunal's approach to the statutory threshold of "*significant risk of serious harm*" as follows:

> "*We consider that the expression "serious harm" falls to be given its ordinary meaning. In deciding whether there is present a significant risk of serious harm it is plainly relevant to have regard to the nature of the object which is contended would be so harmed. The greater the importance of the object (as recognised by both domestic and international legislative criteria) the greater will be the scope for applying the "precautionary principle" in determining whether activities should be regarded as posing a material or significant risk of serious harm …"*

11. In taking a fresh decision, I note that the Tribunal is not required to undertake a reasonableness review of the Respondent's decision to serve the Stop Notice, but instead to decide whether it would itself issue the Stop Notice on the evidence before it. The Tribunal has no supervisory jurisdiction – see *HMRC v Abdul Noor* [2013] UKUT 071 (TCC)[7].

12. In *R (Hope and Glory Public House Ltd v City of Westminster Magistrates' Court* [2011] EWCA Civ 31[8], the Court of Appeal decided that "*careful attention*" should be paid to the reasons given by an original decision-maker, bearing in mind that Parliament had entrusted it with making such decisions. However, the weight to be attached to the original decision when hearing an appeal is a matter of judgment for the Tribunal, "*taking into account the fullness and clarity of the reasons, the nature of the issues and the evidence given in the appeal"*. The approach in *Hope and Glory* was approved by the Supreme Court in *Hesham Ali (Iraq) v Secretary of State for the Home Department* [2016] 1 WLR 4799.

13. Pursuant to rule 15 (2) (a) (ii) of the Tribunal's Rules[9], the Tribunal may when hearing an appeal admit evidence whether or not it was available to the previous decision maker. The burden of proof in a *de novo* appeal rests with the Appellant as the party seeking to disturb the status quo.

14. The usual standard of proof to be applied by the Tribunal in making findings of fact is the balance of probabilities. Article 10(3) above requires the Tribunal to determine the

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[6] https://assets.publishing.service.gov.uk/media/58ff2605ed915d06ac000234/MISC_0926_2016-00.pdf

[7] http://taxandchancery_ut.decisions.tribunals.gov.uk/Documents/decisions/HMRC_v_Abdul_Noor.pdf

[8] http://www.bailii.org/ew/cases/EWCA/Civ/2011/31.html.

[9] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/367600/tribunal-procedure-rules-general-regulatory-chamber.pdf

appropriate standard of proof in hearing an appeal against a Stop Notice. Both parties submitted, and I agree, that the civil standard should be applied in this case. I am not required to determine whether the Appellant has committed any criminal offences.

C: The Stop Notice

15. The Stop Notice which is the subject of this appeal is dated 5 January 2018, was addressed to the Appellant and states that: "*Natural England reasonably believes that an activity carried on by you is causing, or represents a significant risk of causing, serious harm to human health and/or the environment (including the health of animals and plants); and involves or is likely to involve the commission of a relevant offence*".

16. The grounds for serving the Stop Notice are stated to be as follows:

> "*The numbers of pheasant released within the SSSI and numbers of partridge released adjacent to but outside the boundary of the SSSI presents a significant risk of causing serious harm to breeding and wintering bird assemblages, invertebrate assemblages and heathland vegetation communities that form part of the notified interest of the SSSI;*
>
> *Furthermore, vehicle movements and shooting activity associated with the game shoot days within the SSSI are likely to result in disturbance to wintering bird assemblages and cause damage to vegetation communities forming part of the notified interest of the SSSI;*
>
> *The above activities are likely to involve the commission of an offence under section 28P of the 1981 Act."*

17. The Stop Notice requires the Appellant to stop the activities listed in schedule 1 to the Notice with immediate effect, until such time as he has obtained a Completion Notice, or the Stop Notice is withdrawn by Natural England, or it is cancelled by the Tribunal on appeal. The prohibited activities are as described as follows:

> *"Schedule 1: Activities to be Stopped*
>
> *Further releases of pheasant within the SSSI;*
>
> *Vehicle access and recreational activities (including game shooting) within the SSSI;*
>
> *Further releases of partridge within 500 metres of the boundary of the SSSI".*

18. The "*steps to be taken to remove or reduce the harm or risk of harm*" are stated in the Stop Notice to be as follows:

> "*Obtain NE's written consent to carry out, or cause or permit to be carried out any operation specified in the notification including the release of game birds and associated activities;*
>
> *Obtain NE's written consent to carry out, or cause or permit to be carried out any*

operation specified in the notification including recreational activities (i.e. the shooting of game) and associated activities;

Agree with NE the sustainable levels of partridge release and appropriate management of birds to avoid damage to the SSSI interest features."

19. It was not in dispute before me that the Stop Notice met the basic statutory requirements set out at schedule 3 paragraphs 2 (c) and (d), although there was a dispute as to whether it contained sufficient detail to comply with the requirements of paragraphs 2 (a) and (d).

D: Appeal to the Tribunal

20. The Appellant's Notice of Appeal dated 31 January 2018 relies on Grounds of Appeal that:

(1) a valid Stop Notice had not been served because it does not specify the steps required to be taken by the Appellant personally. As the steps require joint action with the Respondent, it is not within the Appellant's own power to comply and so obtain a completion certificate;
(2) if the Stop Notice is valid then it is nevertheless unreasonable because it requires steps to be taken which are not within the Appellant's own power to take;
(3) the Stop Notice fails to specify with sufficient particularity the grounds relied upon for serving it. No details of the harm alleged are specified and whilst it is asserted that the Appellant has committed or is likely to commit a criminal offence, it provides no particulars of the facts and matters relied upon. Accordingly, the Appellant cannot know the case he has to meet;
(4) the Stop Notice is based on error of fact and/or is unreasonable because there are no grounds upon which the Respondent could reasonably conclude that the statutory criteria for serving it are met;
(5) the Stop Notice is unreasonable in imposing a blanket ban and in failing to distinguish between those parts of the SSSI which are more sensitive than others;
(6) the Stop Notice is unreasonable in failing to specify a minimum level of permitted activity on or near the SSSI given that the Respondent has previously accepted that its consent was not required for the release of up to 3,600 pheasants and 24 shooting days on the SSSI and indicated that it would accept the release of up to 2000 partridges within 250 metres of the boundary of the SSSI.
(7) the Stop Notice has the effect of unreasonably preventing the Appellant from carrying on his business.

21. The Respondent's Response dated 9 February 2018 relies on Grounds of Opposition that:

(1) As confirmed by the Upper Tribunal in *Forager v Natural England*, even a complete absence of steps in a Stop Notice does not render it void;
(2) There is no reason why the steps specified in a Stop Notice must be such as can be completed unilaterally;
(3) The steps specified in the Stop Notice are reasonable and intended to promote an application under the 1981 Act for consent to the use of the SSSI in a manner which is consistent with the Habitats Regulations. Such an application invokes a right of appeal to the Secretary of State so there is no question of the Respondent's consent being unreasonably withheld;

(4) The Stop Notice contains sufficient information for the Appellant to understand the basis on which it was made. In any event, it followed other correspondence which had made the Respondent's concerns clear;
(5) The statutory grounds for serving the Stop Notice are met because the Respondent reasonably believes that the Appellant's activities present a significant risk of causing serious harm to the environment in a number of ways, including:

(i) by harming the vegetation, invertebrates and other features of the heath and acid grassland habitats through impacts including (a) physical disturbance by birds and vehicles (b) soil enrichment by bird manure (c) predation of heathland species such as invertebrates and reptiles;
(ii) By harming breeding birds through impact including (a) food and habitat resource competition (b) direct predation of ground-nesting birds' chicks and eggs (c) attraction of scavengers and predators, such as rats and foxes (d) degradation of supporting habitat, as above (e) spread of disease;
(iii) By harming wintering birds through impacts including those above as well as disturbance by shooting days and management activities.

(6) Further details of the Respondent's assessment of these risks are given at paragraphs 65 to 89 of the Response.
(7) The Respondent also reasonably believes that the Appellant's activities re likely to involve the commission of an offence under s. 28P(6)[10] of the 1981 Act. In particular, carrying out certain operations (specified at the time the land is designated as a SSSI) without gaining the prior written consent of Natural England. The Appellant in this case has no formal written consent for any of his activities, but they have been permitted informally at historic levels which have since been exceeded;
(8) A blanket ban on all the Appellant's activities within the SSSI was necessitated by the Appellant's lack of co-operation and transparency in his dealings with the Respondent. If the Stop Notice had permitted a certain level of activity, it could not also have imposed monitoring requirements and the Respondent reasonably considered that the Appellant would have exceeded the permitted levels of activity.

E: Evidence

22. The Tribunal received witness statements on behalf of the Appellant from the Appellant himself and from an expert witness instructed on his behalf. This was Dr Roger Draycott, an employee of the Game and Wildlife Conservation Trust, which is a charitable research organisation which provides advice on the ecology and management of game species and associated habitats and wildlife. Dr Draycott has an MSc in Land Resource Management and a PhD in pheasant ecology and management. He has overall responsibility for running two GCWT demonstration shoots, provides training and advice to land owners and game keepers and is one of the authors of the GWCT/Savills shoot benchmarking survey. His report disclosed his instructions and included an appropriate declaration of his independence from the parties.

23. The Tribunal received witness statements from the following Natural England employees: Emma Hay, Adam Burrows, Ivan Lakin and Dr Isabel Alonso.

[10] http://www.legislation.gov.uk/ukpga/1981/69/section/28P

24. The Tribunal also received a considerable volume of documentary evidence in seven files, including: correspondence, maps, scientific studies, legal documents, and other materials.

The Appellant's Witnesses

25. The Appellant's evidence was that he had acquired the shooting rights to the estate in 2004 on an informal basis, then entered into a written shooting rights agreement with the estate owner, Sir Charles Blois, in 2015. He stated that he has shooting rights over approximately 7,500 acres of land and that the estate land makes up 3,500 to 4000 acres of the total (it was agreed that 68% of the estate is designated SSSI land). He said he arranges 125 shooting days over the entire area in each season and releases around 100,000 game birds over the entire area (60,000 red-legged partridges and 40,000 pheasants). He estimated that 75% of his shooting is done off the estate. He told the Tribunal that he works seven days a week, fifty-two weeks a year and turns over £750,000 per year of which he estimated that 10% might be profit, depending on the weather and various other factors. He produced many supportive letters from local rural businesses whose own work is dependent on the success of the shoot.

26. Mr Warren described his work, in addition to running the shooting days, as involving: maintaining pens; feeding, hatching and releasing the game birds; planting crops for cover and winter feed; controlling predators such as rats, foxes and corvids; ensuring that the many pedestrian visitors to the area do not cause damage; providing security against vandalism and fly-tipping; ensuring adequate water supply to the game birds; and "*helping to make the estate attractive for the wildlife living on it and the public who visit it".* Mr Warren said he has three vehicles, which are used by himself and his staff to travel along farm tracks and by-ways which are also open to the public. He says occasionally he needs to drive over heathland but he estimates that this is done more frequently by Natural England staff, Sir Charles Blois' staff, and the shepherd whose flock is grazing on the nature reserve land.

27. Mr Warren estimated that wild birds benefit from many of his activities, such as winter feeding, water supply and predator control. He asked who else would prevent the public from doing things they ought not to do or keep predator numbers down if his shoot is put out of business. He stated clearly that he is willing to work with Natural England to agree how the shoot should operate but that the proposals that Natural England had made so far would have the effect of ruining his business. He stated that Natural England has been aware of his activities for years but had only started to object to them in 2015. He did not accept that there has been a dramatic increase in the number of birds released. He did not accept that his activities represented a serious risk of significant harm to the SSSI.

28. In cross examination, Mr Warren described his pest control activities as taking place all year round, but said that if Mr Burrows tells him there are particular birds nesting he stays away from that area. Some of the land in the SSSI is closed to the public during breeding season and he said he does no shooting on the closed land at these times. After discussion with Natural England, he has reduced his vehicle movements within the SSSI on shoot days. It was put to Mr Warren that the number of predators he had killed was exaggerated in his witness statement but he denied this. He described the good husbandry he employed to minimise the risk of disease amongst his game birds, including clean water, clean litter and medication where necessary (for worms or respiratory problems, provided

via the water in the rearing pens). He described the supplemental feeding which continued after the end of the shooting season. It was put to him that the assertion that wild birds benefit from this was speculative, but he denied it. He described how 50% of his shot is lead and 50% non-toxic but said that on the SSSI land it is 100% non-toxic. He described going out after shoots to collect the plastic wads discarded by the guns.

29. It was put to Mr Warren that the historic figures produced to GWCT by Sir Charles Blois as to the number of birds released were his own figures. He replied that Sir Charles had provided them without reference to him and they were not correct. He denied that there had been a dramatic increase in game bird density and said he had operated in the same way for the past ten years. Mr Warren did not accept the accuracy of the figures given by Ms Hay in her (unapproved) minutes of meetings with him.

30. Mr Warren said he did not understand the meaning of 24 shooting days as referred to by Natural England. He described how the shoot might make a number of short visits to the SSSI and would not be there for the whole of the day. He said he did not know if they were talking about any number of visits over 24 days only or 24 visits only. He said he did not recall being warned by Natural England to keep within their stated numbers or having made them any promises. He said there were no records of where each shooting party had been and that it was often a last-minute decision due to the prevailing wind.

31. Asked about the release of pheasants, Mr Warren said that they are released after three days but that they are not all released at the same time. Their wings are not clipped so they can roost off the ground. He said they might move around during the day but return to their roost at night. He said they spend most of the day in their cover strips where there is food and water and shelter. He said that partridges only move a few hundred metres from where they are released, as they regard the cover strip as their home. He did not accept Dr Draycott's recommendation to release partridge 500 metres from the SSSI and said that if he did that he wouldn't have a business. He said he had engaged Dr Draycott on Emma Hay's advice and before that he did not know he needed advice.

32. Dr Draycott's evidence was that determining what constitutes a sustainable level of pheasant release for a particular area is not straightforward. GWCT has produced and published guidelines for general use, but the release density will vary depending on local factors. He told the Tribunal that, as a general guideline, a density of 1000 birds per hectare of pen will not result in any observable negative impact on ground flora. For sensitive sites with diverse ground flora, the recommendation was 700 birds per hectare. It was also recommended that no more than one third of the total woodland area should be constituted as a release pen. However, these figures should be contextualised, in his view because they are based on a practice of containing the pheasant poults in pens for three weeks or more, whereas he understood that Mr Warren's practice was to keep them in pens for only three days and they were encouraged to roost off the ground because their wings were not clipped. He thought that these practices reduced the potential risks to ground flora. His own observations on site supported this view.

33. Dr Draycott's opinion, based on his site visit, was that the woodland in which Mr Warren was operating was not well-managed. He considered that better managed woodland would be advantageous for game birds, wild birds and ground flora.

34. In assessing the risk to the local environment presented by the release of game birds, Dr Draycott's evidence was that the density of gamebirds on the ground reduced from the point of release until the end of the season due to both shoot-related and non shoot-related mortality. It followed in his view that it was important to calculate the actual figure of birds on the ground at different sensitive times of the year when assessing risk, rather than making one's assessment on the basis of release figures only.

35. Dr Draycott helpfully considered each category of risk specified by Natural England in its Response to the appeal. I summarise his evidence about this as follows:

(a) Risk of harm to heath and acid grassland

There is a potential risk of physical disturbance from high density gamebird release, but it is impossible to qualify it without a detailed botanical survey.
There is a risk of soil enrichment but GWCT research indicates that this is limited to localised release and feeding sites. Other factors, such as the high number of corvids and seagulls he had observed on his visit, could contribute to such an effect. The varying number of gamebirds over the year would need to be calculated to assess impact. He added that he would have expected such damage to be visible already if it had occurred from what he understood to have been the release numbers over the past ten years.
The impact of gamebirds on vegetation, invertebrates and songbirds is well-understood but the effects on amphibians less so. He had never heard of a pheasant eating amphibians or reptiles or blinding a snake, as suggested by Dr Alonso. He concluded that there is a risk of harm but insufficient evidence to conclude that it is a serious risk.

(b) Risk of harm to breeding birds

In theory, gamebirds compete with wild birds for resources, but GWCT research indicates that 26% of grain provided for game birds is taken by wild birds. He suggested that declining farmland songbirds make use of game cover plots. Any resource competition therefore needed to be considered in the context of the conservation benefits provided by good gamebird management.
Gamebirds can present a risk to woodland invertebrates but the density of gamebirds and the length of time that they are penned would need to be factored into any calculation.
There is anecdotal evidence of direct predation by gamebirds of nesting birds' chick and eggs. But scientific evidence shows the main predators to be foxes. Predator control by game keepers benefits nest survival and breeding success. The conservation impact of the shoot in this regard is more likely to be positive than negative.
Game management can attract scavengers and predators but good predation control by professional game keepers maximises conservation benefits. The presence of pigs local to the shoot can also attract scavengers. If there was no effective predation control, the impact of this local factor would be worse.
There is no evidence of degradation to birds' supporting habitat from the shoot. On the contrary, game cover crops are likely to be providing conservation benefits to many species.
Game birds are susceptible to diseases but so are wild birds, which were the source of recent avian flu outbreaks. There are good practice guidelines available for the management of disease risk in game birds.

(c) Risk of harm to wintering birds

The negative impact from disturbance would need to be calculated by reference to the number of shoot days and the proximity of shooting to the birds. He was unable to calculate this from the evidence available. He recommended that any particular pheasant or partridge drive is undertaken no more than once a week (ideally ten days to a fortnight). This would also improve the return rate for the shoot as it gave disturbed game birds time to return to the drives.

36. In conclusion, Dr Draycott's opinion was that Mr Warren's practice of releasing birds after only three days meant that the damage he might have expected to see to the ground flora in other circumstances was not evident. Nevertheless, he recommended that partridge release pens should be sited more than 500 metres from the boundary of the SSSI in future. He expressed some concerns about the frequency of drives in the same area and recommended their reduction to no more than once a week. He recommended improvements to woodland management. He thought there was little risk to wading birds but a more substantial risk to invertebrates. He commented that *"…there needs to be some compromise on both sides to ensure that there is a net conservation gain arising from the game management activities. One the one hand, the sporting tenant must operate in a manner that does not compromise the integrity of the sensitive habitats and wildlife, while on the other, there needs to be greater recognition from the respondent of the conservation gains that can arise from game management".*

37. In his second witness statement, Dr Draycott commented on Mr Lakin's witness statement, stating that it contained "*poor separation of fact from speculation"*. Asked about that in his oral evidence, he said that Mr Lakin had made an incorrect assumption that the study he referred to (his own) had not included large commercial shoots. Dr Draycott said that in his view Mr Lakin's evidence did not contain a fair acknowledgement of the conservation benefits that can arise from game management.

38. Dr Draycott's view of Dr Alonso's report was that it contained "*errors of interpretation"*. In particular, she had said that large numbers of game birds attract higher numbers of corvids, but Dr Draycott thought this was a localised effect around feed hoppers only.

39. Dr Draycott recommended that more detailed investigations into the impact of the game shoot on the SSSI should be undertaken. He had produced a critique of *Bicknell* report which he had exhibited, pointing out that it was merely a review of the literature. He therefore advised caution when relying on it without considering the studies to which it referred.

40. Asked about Mr Burrows' biomass calculation, he thought it was a simple calculation but that you would need to consider a range of factors in relation to this site, such as the presence of sheep, and you could not base your calculation on the adult weight of game birds only. He did not regard it as an exact scientific method of calculation but as a bench mark which could be used as one part of an overall picture.

41. In cross examination, Dr Draycott maintained his position that he would have expected to have seen evidence of ground flora damage on his site visit if the risk of harm was as Natural England suggested. He said you needed to take the means of management of the

birds into account when assessing the risks. He thought that the number of predators killed, as given by Mr Warren, was comparable to similar shoots. It was put to Dr Draycott that the use of guns in predation control could disturb the birds. He accepted that this was the case but commented that effective predator control can increase the breeding success of waders and observed that Natural England had imposed no upper limit on the number of days on which shooting for predator control could be undertaken. He said a judgement has to be made. With regard to disease risk, Dr Draycott said that as much disease is species-specific, it is easy to over-estimate the risk of transfer.

42. In re-examination, Dr Draycott accepted that, using GWCT guideline figures, 37,000 pheasants could safely be released in or near the SSSI so long as the woodland provided a suitable habitat for them. He also said that a figure of 24 days per year for shooting was too crude a figure for him to comment on meaningfully and that a drive-by-drive impact assessment should be undertaken.

The Respondent's Witnesses

43. As discussed at the hearing, none of Natural England's witnesses has the status of an expert witness in this appeal. This is because they are employed by a party and so lack the requisite independence. Nevertheless, I readily acknowledge their professional standing and/or their knowledge of the SSSI in question. I am willing to admit their opinion evidence and I shall give such weight to it as I consider appropriate in the circumstances. Rule 15 (20(a)(i) permits me to admit evidence which would not be admissible in a civil trial.

44. Adam Burrows is Natural England's Senior Reserve Manager for the Suffolk Coast. He described himself as the National Nature Reserve's "man on the ground" and said he had visited the area of this SSSI every day for the past nineteen years, except when he was on holiday. He explained that the land leased from Sir Charles Blois as a nature reserve had been managed by Natural England in partnership with the estate for the past twenty-one years until the lease expired this year. He said he was hopeful that there would be another lease but, even if there were not, the statutory responsibilities for owners and occupiers of SSSI sites applied.

45. Mr Burrows' witness statements describe the national and international significance of the site, its management and his contacts with Mr Warren. He describes the effects of gamebird related activities as including disturbance to wild birds from shooting, beating, vehicle movements, and the use of dogs. He refers to a "*potential*" reduction in breeding numbers which "*may affect*" the viability of the local population. He also expresses concerns over the risk that pheasants may eat invertebrates. He refers to the loss of the silver-studded blue butterfly in recent years and states that game birds "*may*" eat the caterpillars. He comments that breeding bird figures "*seem to show an inverse relationship with game bird releases".* He says he counted 273 dead game birds on a stretch of road which was 2.2 miles long in the summer of 2016.

46. Mr Burrows' evidence was that he had been present at the meetings between Ms Hay and the Appellant and considered Ms Hay's minutes to be correct. He did not think that Mr Warren had been asked to approve the minutes, but he said it would have been intended that he should say if he did not agree with anything in them.

47. In cross examination, Mr Burrows accepted that the estate woodland was not in good condition. He looked at the photographic evidence produced by Dr Draycott and agreed that much of the woodland looked like that, with an absence of under-storey and discarded tree guards lying on the ground. He did not dispute Dr Draycott's evidence that the state of the woodland reduced its capacity for holding game birds in the day time and that they were more likely to wander into the SSSI if they could not stay in the woods. He explained that responsibility for woodland management rested with the estate. He agreed that better woodland management would mean fewer game birds could be released to achieve the same return rate for the shoot.

48. Mr Burrows said that there are 150,000 visitors per year to the area. Some areas are closed to the public during the breeding season and other areas are not open to the public at all. He thought that the public generally observed the rules and kept their dogs on leads, but some did not. He accepted that Mr Warren and his staff provided helpful assistance in managing the public at the site. Mr Burrows accepted that the number of people visiting the SSSI greatly exceeded the number who attended for shoots and that shooting only took place for five months of the year and not when birds were breeding. He agreed that the shoot might spend only a short time on the drives located within the SSSI and did not disagree with Mr Warren's estimate of one hour per drive. He thought that the disturbance caused to birds by the shoot and the disturbance caused by visitors were different. He was aware that a Habitats Regulations Assessment had been conducted in relation to the number of visitors to the site, triggered by increased rights of public access. He was not aware of a similar assessment having been conducted in relation to the shoot.

49. Asked about predator control, Mr Burrows said that the shooting of predators caused a certain amount of disturbance but that he had liaised with Mr Warren to ensure it was minimal. He thought that alternative predator control measures would be required if Mr Warren did not do this work. He thought that the number of deer should be reduced, as their browsing contributed to the loss of vegetation in the woods. When asked by Mr Kokelaar about his witness statement expressing concern about the viability of the wild bird population, Mr Burrows explained that he was concerned about this, but had no hard evidence to produce and no reason to link his concerns to the presence of game birds. He accepted that the recording of numbers over one year could not be described as a robust data set. When asked about the disappearance of the Silver-Studded Blue Butterfly from the site, he said he'd never actually seen a pheasant eat one of their caterpillars and that there was no data to link the decline of this species of butterfly with game bird predation.

50. Emma Hay is Natural England's lead conservation adviser for Norfolk and Suffolk and the Responsible Officer for the particular SSSI with which we are concerned. She filed two witness statements for the Tribunal. Her evidence was that Natural England recognises the sustainable stocking and harvesting of quarry gamebirds through controlled shooting as a legitimate use of a wildlife resource and would be minded to provide consent to this activity under section 28E of the Countryside and Wildlife Act 1981, provided that the overall regime was sustainable and that safeguards were in place to prevent deterioration of habitats or increased mortality or displacement of native bird species. Her view was that consent for the Appellant's shoot was only required where it departed from the operations recorded at the time of notification. She understood the operations at that time of notification to have consisted of 24 days "dry" shooting and the release of 3060 pheasants. She explained that the figure of 3060 is an estimate because

records refer to the release of 4500 pheasants across the entire estate. As 68% of the estate is SSSI land, the percentage of birds permitted to be released on the SSSI has been adjusted accordingly. She says she is satisfied that these numbers do not have an adverse ecological impact on the SSSI features. She regarded the release of pheasants above this number and without Natural England's consent as constituting an offence under the 1981 Act.

51. Ms Hay explained that, in addition to its SSSI status, this site is a Special Protection Area (SPA) under the European Birds Directive and a Special Area of Conservation (SAC) under the European Habitats Directive. In considering an application for consent to any activity on a SSSI, she said that Natural England must also consider its obligations to protect land with SAC and SPA designation. She exhibited a condition assessment survey of 30 land units within the SSSI, undertaken between 2009 and 2014. Only two units were marked as in an unfavourable condition, but she says that recently all 30 assessments have been re-marked as under threat due to changes in the management of the shoot.

52. Ms Hay's witness statement says that the numbers of pheasants released increased "dramatically" in 2016 without Natural England's consent. She describes discussing this with the Appellant but did not think that he had kept to their verbal agreement. When asked about her meeting notes, she said that she had sent them to Mr Warren by recorded delivery but they had initially not been delivered because he had moved house. She had then re-sent them to his new address. She said he had not disputed their accuracy. She did not suggest that Mr Warren had lied about the release figures when they met, and said it was possible she had misunderstood him.

53. Ms Hay said that she visits the SSSI with which we are concerned about once a fortnight and that it has been the focus of her work for the past two years, although she has other areas of responsibility also. She agreed that the woodland was not well managed but said that as the woodland was not one of the notified features of the site, Natural England had not considered taking any action to ensure that Sir Charles complied with his obligations regarding the woodland. She thought that the damage done to the woodland by deer was a key issue and that Mr Warren could control the deer numbers better through shooting.

54. Ms Hay had sent Mr Warren a draft form of application for consent and a draft grant of consent in November 2017[11]. She said this had been sent in an effort to encourage him to make an application. She said that a Habitat Regulations assessment would usually be carried out in response to a formal application, but that she had undertaken an informal assessment herself in order to develop her draft. The draft gives consent for the release of 3525 pheasants each year, and a maximum of 24 shooting days on the SSSI. It does not mention the release of partridges, but the covering letter to Mr Warren refers to partridges as follows. It states that, as no partridges are released onto SSSI land, no consent is needed. However, in order to prevent damage to the SSSI by partridges entering the designated area, it is recommended that no more than 2000 birds are released within 250 metres of the SSSI boundary. Ms Hay's evidence was that Natural England would have been unlikely to grant consent for Mr Warren's activities as they are now described in the Appellant's Notice of Appeal. She states that he has not provided evidence in support of them and that she *"…is not aware of any other information that would satisfy me that*

[11] Exhibited at Respondent's documents file 1 tab 27.

there was not likely to be an adverse effect on site integrity if these activities were permitted".

55. Ms Hay confirmed that she had no concerns about shooting on the SSSI at the historic levels. She said that the Stop Notice had to prohibit those activities as well because of Natural England's lack of faith that Mr Warren would stick to the agreed level. She described the Stop Notice as one step in the process of enforcement action. She was not sure where the historic levels of activity were recorded, she thought they were mentioned in the old file notes. She said she had no reason to believe that the figures she had quoted were not an accurate record of the historic agreement. She had seen the game bag figures submitted to GWCT but could not comment on their accuracy. Ms Hay said she knew that Natural England was comfortable with the level of shooting that had been conducted in 1993 but that it did not have a position beyond that as it had not carried out the relevant assessments.

56. Mr Kokellar put to Ms Hay that when the estate had been put on the market recently, a consortium of wildlife charities had been interested in buying it but that the presence of the shoot had been a stumbling block. It was put to her that this had prompted Natural England's decision to serve the Stop Notice. Ms Hay said that she had not heard about this officially and that the action had been prompted by the high number of birds on the roads. She thought that high numbers of birds on the roads was a "*common sense*" indicator of higher release numbers, although she accepted it could be caused by other factors. She denied that there was any connection between the potential sale and Natural England's decision to serve the Stop Notice. She said that she had spoken to Dr Alonso before serving the Stop Notice and to her legal advisers. She said it had been a last resort because Mr Warren said in November 2017 that he was too busy to meet her. Cross examined about this, she accepted that Mr Warren may have offered to meet her in the evening or on a Sunday. However, she said that it had been important for them to meet and that he had not been willing to make it a priority.

57. When asked by Mr Kokelaar for her assessment of risk to the SSSI, Ms Hay said that there was evidence of damage available, but that she had not been resourced to produce it for the Tribunal. In response to a question from the Tribunal about whether that was an acceptable approach to legal proceedings, she said that demonstrating damage to the site was quite hard. It was put to her by Mr Kokelaar that it had been inappropriate to serve the Stop Notice in the absence of such evidence. She responded that this question would be more appropriately answered by her colleagues.

58. Dr Alonso is Natural England's Senior Heathland Specialist and a recognised expert on lowland heathland in the UK. Her evidence was that she had visited the site with which I am concerned in 2003, 2007 and 2018. Her witness statements give some contextual information about the importance of the site and provide her opinion about the adverse impact to the site of unconsented activities.

59. Dr Alonso's evidence was that heathland is one of the most biodiverse habitats in the UK, providing shelter, food, nesting or germination space for some 133 specialised or geographically restricted species of flor and fauna. These have been identified as threatened under the UK Biodiversity Action Plan. She describes the internationally-agreed limits of the amounts of atmospheric nitrogen which affect sensitive environments (known as "critical loads"). Her evidence is that the background atmospheric nitrogen at

this SSSI site is at a level which can transform heathlands into grasslands. She regards this as harmful because certain features of the SSSI rely on nutrient-poor conditions and an increase in nitrogen levels adds nutrients. She states that sources of nitrogen can include vehicle use and animal manure "*which are both associated with the activity of shooting and rearing gamebirds".*

60. Dr Alonso describes visiting the site in April 2018 but says she did not conduct a condition assessment. She walked around and observed what she describes as an *"enriched habitat*" (i.e. higher nutrient input than expected) around the pheasant pen in unit 20. She says it looked like grassland, but it should have been heather. She describes heather at other parts of the SSSI and the presence of sheep. She describes the pens in unit 34 as exhibiting low structural diversity and says they showed signs of vehicle disturbance. Commenting on the assertion by other witnesses that they can see no evidence of damage to the vegetation, Dr Alonso stated that *"..damage occurs progressively by one type of vegetation (heathland) changing into another lower conservation value (improved grassland) resulting in the loss or deterioration of the notified feature".*

61. Dr Alonso's evidence was that there are no studies of the direct impact of rearing pheasants or partridges on vegetation, invertebrates or other heathland or acid grassland features. However, she says there is evidence of impact on other habitats and some conclusions can be confidently extrapolated. She concludes that there is a risk of physical disturbance and soil enrichment associated with the Appellant's activities. She refers to the use of 6-8 vehicles a day for 125 days and states that this magnitude of vehicle movement is likely to result in significant damage to the habitat through soil compaction, potential erosion, reduced plant germination and disturbance of characteristic birds. She states that if there had been the same level of movement for the past ten years as now she would expect the impact to have been more evidence, but a continuation of this level of use would increase the amount of bare ground and thus have a detrimental impact on the SSSI. In relation to soil enrichment, she refers to the supplementary feeding of game birds and the risk that their manure will increase phosphate and potassium levels in the soil. She describes the release of 100,000 game birds as representing a significant risk of serious harm through the decline or loss of heathland features. Dr Alonso also identifies a risk of increased predation of reptiles and amphibians by pheasants. She cites evidence of pheasants eating reptiles and of blinding larger snakes. She concludes that *"In my professional opinion, if game birds continue to be released onto the SSSI in the numbers stated by the Appellant, then there is a significant risk of serious harm being caused to the environment. Based on my assessments above, I am of the opinion that large numbers of game birds and the corresponding shooting activity will degrade the heathland and acidic grassland. This in turn will result in the loss of habitat for the unique flora and fauna that exist on the SSSI leading to their degradation".*

62. In her second witness statement, Dr Alonso is more specific, expressing the opinion that even with a reduction in Mr Warren's activities, they are *"likely to cause significant harm to the '4030 Dry European Heaths', a habitat that is one of the primary reasons for the selection of Minsmere and Walberswick Heaths and Marshes as a Special Area for Conservation (SAC). This will be as a result of continuing nutrient enrichment (potentially still over 2 tonnes of manure a day at maximum density) which will change the designated habitat into others of lower ecological value…".*

63. In cross examination, Dr Alonso confirmed that she had visited the site to assess potential damage to the heathland for her witness statement only after the service of the Stop Notice. Asked about the various risk factors she had identified in her witness statement, she accepted that she did not know how often vehicles were used on the site and by whom, and she did not know whether other animals (such as the sheep) received supplemental feeding so that their manure might also enrich the soil. In relation to her description of the ground in her witness statement, she confirmed that the inventory she had referred to described unit 20 as heathland but that she had seen no heather there. She described standing with her back to the pen and looking out but she had no measurements or GPS data to show exactly where she had been standing and she did not know where she was in relation to the boundary of the unit.

64. Cross examined about her reliance on the Bicknell report**,** Dr Alonso thought it appropriate to extrapolate from it in reaching her conclusions about risk. She said that she agreed with some of Dr Draycott's observations about it, but not all of them. She said that it had been referred to in subsequent papers, which had been peer-reviewed. Her view was that the risk to the vegetation from game birds was "likely" but that it was difficult to quantify it without a specific study. She accepted that she is not an expert on game birds and did not know their expected patterns of behaviour when released from the pens. She accepted that the risk of predation by pheasants was based on an unpublished study, but said that the study contained a photogaph of a pheasant with a grass snake in its beak. She said that reptiles are an important feature of the site so although this might be a rare event it still represented a risk to the SSSI. She thought that a proper study needed to be carried out to assess that risk.

65. Mr Lakin is Natural England's Specialist Ornithologist. His evidence was that he had visited the SSSI with which I am concerned for the purpose of preparing his witness statement in April 2018. He states that his statement is *"based on presenting a case of risk of harm to the environment and crucially whether this is significant or serious or not".*

66. Mr Lakin describes the conservation value of the area with which I am concerned as "*outstanding".* He lists the bird species which form part of the notified features of the SSSI, including Nightjar and Woodlark, which he goes on to discuss in more detail. He describes studies of the recovery of the Nightjar population as linked to the restoration of heathland habitats. In relation to the Woodlark, he describes it as nesting in bracken or grass. He acknowledges that there is a paucity of evidence on the effects of commercial shoots on wild bird populations so has relied on relatable research including Bicknell, which concluded that negative environmental impacts are likely to occur where there is high density game bird release in the absence of good habitat management. He concludes that he has no direct unequivocal evidence of effects, whether positive or negative, on the site's population of any bird species. However, his impression is that human activities increasingly unbalance the semi-natural environment with an increasing impact on wildlife. Mr Lakin presented a biomass calculation of 1.306 tonnes of adult wild birds in the SSSI, with the biomass of the game birds at 3.5 to 4.4 times that figure. He concluded that this represents an additional burden on the environment from which it is reasonable to assume an impact will occur. The negative impact of this would include nutrient enrichment, veterinary product and lead shot contamination, habitat degradation and disease transmission. His opinion was that the Appellant's activities represent a significant risk of serious harm to the environment based on these factors.

67. In cross examination, Mr Lakin accepted that there was a big evidence gap in relation to the impact of game shooting on breeding birds. He accepted that effective predator control can balance the risk from human intrusion but described a complex interaction between the two, for example, because Nightjar eggs are brightly coloured, it was easier for a predator to locate them if a bird left the nest because of human disturbance. He did not suggest that predation of wild birds was higher than expected on this site.

68. Mr Lakin accepted that the substantial visitor numbers to the site represented a challenge and that their impact could be disastrous if not well-managed. He said that the Woodlark is reasonably tolerant of disturbance and that there is data available about this although he had not referred to it in his evidence. The Woodlark population had varied in his estimation, but he accepted that his sample was too small to produce a meaningful result. He accepted that the figures he had looked at (exhibited to Mr Burrows' witness statement) did not show a uniformly downward trend in singing males. He said that the natural world is not linear and that you had to take account of a number of variable factors, such as cold winters. Mr Lakin said he had created a scatter diagram showing the distance of these birds from the pheasant pens but he had not produced it for the Tribunal. In answer to a question from the Tribunal he said he was not sure if he had relied on his scatter diagram when producing the analysis contained in his witness statement. He said he had established that the highest number of nightingales recorded corresponded with the lowest pheasant release figure, but that it was a rough analysis only and not a statistically significant sample.

69. Mr Lakin confirmed that he could not say for certain that there was a direct link between a decline in water fowl numbers and the presence of the shoot. He accepted that the risk of poisoning would be eliminated if 100% of the shot used on the SSSI was non-toxic. He thought that an avocet chick had died of lead poisoning on the estate many years ago before the use of lead shot was regulated but he agreed this was not a significant risk. In relation to the risk of soil enrichment, he said it was not his area of expertise but that when he had visited the site in April he had made similar observations to those of Dr Alonso. He accepted that the risk he had identified of pen construction in nest territory was merely academic and not an issue in this case.

70. Mr Kokelaar put to Mr Lakin that his oral evidence had been different to his written evidence. Mr Lakin accepted that the witness statement had been a bit "bullish" but said that he had concerns and fears which, while not based on unequivocal findings, could not be dismissed. He said that his concerns related to the release of unsustainable numbers of game birds.

F: Submissions

71. Mr Sheridan handed up a written note and also made some brief oral submissions on behalf of the trustees at the close of the evidence. He told the Tribunal that he was not making submissions in support of either party but wanted to raise some key issues, as follows. He thanked the Tribunal for allowing the trustees to make representations.

72. Firstly, he said supported Mr Kokelaar's submission that the Tribunal had power to declare the Stop Notice void and suggested that any comment to the contrary by the

Upper Tribunal in the *Forager* case should be regarded as having been made *per incuriam* in view of the Court of Appeal authority on the issue to which the Upper Tribunal had not been referred. Secondly, he said he supported Mr Kokelaar's submission that the steps required in the Stop Notice could not be reasonable where they reduced the availability of obtaining a completion certificate. He added that a Stop Notice which contained steps which could not be achieved independently brought one back to the question of nullity. Thirdly, as to the scope of the steps required, the trustees had raised a number of queries with Natural England because it had not been clear whether they were also bound by its terms. The trustees were concerned that the terms of the Stop Notice appeared to prevent Mr Warren from undertaking predator control, which was a lawful activity so beyond the legitimate scope of a Stop Notice. Fourthly, he reminded the Tribunal of its power to remit these issues to Natural England. It was agreed that the Appellant would provide the trustees with a copy of the Tribunal's Decision when received.

73. Mr Kokelaar's closing submissions were as follows. Firstly, he submitted that Dr Draycott should be viewed as the only expert witness in this case and that the opinion evidence of Natural England's employees should be given less weight given their lack of independence.

74. He did not agree with Mr May-Smith that the Tribunal itself was bound by the Habitat Regulations in making its Decision, as this was the statutory duty of the original decision maker and could not bind a judicial body. Mr Kokellar suggested some alternative drafting for Tribunal to substitute as the "steps" in the Stop Notice and reminded the Tribunal of its power to remit any matter to Natural England.

75. In making his submissions as to the validity of the Stop Notice, he submitted that, following *Miller-Mead v Minister of Housing and Local Government* [1963] 196, a Notice which is ambiguous is null and void. He submitted further that the "steps" which required the Appellant to obtain Natural England's consent were inconsistent with his statutory right to a Completion Certificate if the grounds for obtaining one were met.

76. In assessing the evidence, Mr Kokelaar's submission was that there was no evidence that the Appellant's activities either had caused harm or presented a significant risk of serious harm to the SSSI and that the risks identified by Natural England were speculative.

77. Mr May-Smith reminded the Tribunal of the value of the SSSI site with which it was concerned. He described this as one of the most valuable sites in the country and in Europe. He submitted that the weight of evidence showed that the Appellant's activities posed a significant risk of serious harm to the notified features of the site and to the wider environment. He submitted that, if the Appellant's activities continued as currently, then they would lead to the commission of criminal offences.

78. The Respondent's position was that the Stop Notice was not nullity and so the issue for the Tribunal was whether it was reasonable. In considering this issue, he submitted that the Tribunal itself is to be regarded as the competent authority for the purposes of the Habitat Regulations when taking a fresh decision on the appeal and that it was therefore bound by the relevant statutory considerations. He submitted that the Tribunal should give considerable weight to the views of Natural England's witnesses notwithstanding the fact that they were not presented as expert witnesses in a technical sense.

79. Mr May-Smith submitted that the Tribunal was not in a position to resolve the factual dispute about the historic level of permitted shooting and game bird release, but that this did not matter as the Appellant accepted that his activities had increased beyond the historic levels. If the Tribunal were minded to vary the Stop Notice by specifying different steps to be taken, Mr May-Smith included with his written submissions some suggested permutations.

80. In responding to Dr Draycott's expert evidence, Mr May-Smith's submission was that, although he had given evidence in favour of an increased density of game birds than the historic levels, this had been conditional upon a changed management regime and that his evidence had not been in favour of the Tribunal permitting increased use of the site at present.

81. In his Reply to Mr Kokelaar's submissions, Mr May-Smith produced the scatter diagram which had eluded Mr Lakin. I take the view that it would be unfair to admit this document into evidence now, when Mr Warren and his expert have not had the opportunity to comment on it. In any event, Mr Larkin told me he was unsure if he had relied on it when preparing his witness statement. I have accordingly not taken that document into account in reaching my conclusions.

G: Conclusions

82. I deal first with the submissions of Mr Kokelaar to the effect that I should find the Stop Notice null and void. I note here that the First-tier Tribunal has no inherent jurisdiction – see *HMRC v Abdul Noor* [2013] UKUT 071 (TCC)[12]. The Tribunal's statutory authority is derived from s. 3 of the Tribunals, Courts and Enforcement Act 2007 which provides that the First-tier Tribunal exercises the functions conferred on it by that Act or any other Act. I note that there is no express power for the First-tier Tribunal to make a declaration of nullity under the 2007 Act. The First-tier Tribunal's Rules are made under s. 22 of the 2007 Act. The contents of those Rules are as described in part 1 of schedule 5 to the Act. They do not refer to the First-tier Tribunal having such a power and no relevant rules for the exercise of such a power have been made by the Tribunal Procedure Committee.

83. The Upper Tribunal in F*orager* concluded that a deficient Stop Notice could be cured by the Tribunal amending it on a re-hearing. I am not persuaded that the Upper Tribunal's Decision was made *per incuriam.* I note that the line of authority to which I was referred may readily be distinguished on the basis that the judgments were given by courts able to rely on their inherent jurisdiction. By contrast, the Tribunal is a creature of statute and may not do that which Parliament has not given it an express power to do. For these reasons, I am not persuaded that it is open to me to rule the Stop Notice null and void when determining this appeal.

84. Turning to Mr Kokelaar's criticisms of the drafting of the Stop Notice, it is trite law that a person should be able to understand the case against them, especially where that person's liberty and livelihood are involved. I accept the thrust of Mr Kokelaar's submissions about the Stop Notice on this point and the case law on which he relies. I also consider

[12] http://taxandchancery_ut.decisions.tribunals.gov.uk/Documents/decisions/HMRC_v_Abdul_Noor.pdf

here some case law which he did not refer me to in his submissions but which I think confirms the correctness of his approach to this ground of appeal.

85. There is in my view some similarity to be found between a Stop Notice and the type of Notice served under Health and Safety legislation in *BT Fleet Ltd v McKenna* [2005] EWHC 387 (Admin)[13]. In that case, Mr Justice Evans-Lombe considered that recipients of such notices were entitled to know what was wrong, why it was wrong, and that the notice itself had to be clear and easy to understand. Further, he concluded that where a statute provided an option for the statutory authority to prescribe how a recipient could comply with the notice, any directions given as to compliance formed an integral part of the notice and, if confusing, could serve to make the notice invalid.

86. I also note that in *R (Johnson) v Professional Conduct Committee of the Nursing and Midwifery Council* [2008] EWHC 885 (Admin), Mr Justice Beatson considered that Article 6 ECHR required that allegations of professional misconduct must be particularised sufficiently to enable the person charged to know, with reasonable clarity, the case they have to meet in order to prepare their defence. That seems to me to be an analogous situation to the service of the Stop Notice on Mr Warren.

87. I consider that the same basic principles of fairness should be applied to the drafting of a Stop Notice. Applying that standard, I find that the Stop Notice in this case was insufficiently precisely drafted to meet the test of clarity set out in the case law to which I have referred. In reaching that conclusion, I note the disparity between the details of the Respondent's case as to "*significant risk of serious harm*" given in the Stop Notice itself and that given in its pleadings to the Tribunal. I consider that the latter contains the appropriate degree of detail to meet the test of fair notice to the Appellant but that the former does not meet that test. It seems to me that a schedule should have been attached to the Stop Notice which made the Respondent's grounds for serving it sufficiently clear for the Appellant to understand the case he had to meet. I do not consider that it is sufficient to suggest that he knew about Natural England's the concerns from previous correspondence. I conclude that the Stop Notice served in this case was unreasonable in failing to specify sufficiently clearly the basis on which it was served.

88. I am also concerned about the drafting of the "steps" in this Stop Notice. I accept the basic thrust of Mr Kokelaar's submissions as to the unfairness of the drafting but I express the concern slightly differently. If the Appellant makes a formal application for consent to his activities, then Natural England must determine it, directing itself appropriately as the relevant statutory body. It will be open to Natural England to accept or reject the application for consent, but if it is rejected, then Mr Warren can exercise his right of appeal to the Secretary of State. That is the process established by Parliament. However, if the requirement is for Mr Warren "*to obtain Natural England's consent*" to his proposed activities, then a process entirely lacking in procedural formality is set in train. Imposing such a "*step*" in a formal notice, whilst perhaps well meaning, could place the Appellant in the Kafka-esque position of endlessly trying to obtain consent without being able to trigger Natural England's statutory duty to determine his application and so to engage his route of appeal to the Secretary of State. I do not regard the "steps"

[13] https://lexisweb.co.uk/cases/2005/march/bt-fleet-ltd-v-mckenna

in this Stop Notice as reasonable because they have the effect of depriving Mr Warren of due process and of his formal rights.

89. Having concluded that the drafting of the Stop Notice is deficient in both these respects, I have considered the approach of the Upper Tribunal in *Forager* and the Respondent's argument that the Tribunal should "*cure*" any drafting irregularities by invoking its power to amend the Stop Notice itself. It seems to me that there must be limitations to this approach and that, in a case where the Appellant was so poorly served by the contents of the Stop Notice that it would simply be unfair to uphold it, the Tribunal should regard itself as at liberty to cancel the Stop Notice and require the Respondent to start the process again. Whilst I do not consider that the Stop Notice in this case meets the required standard, I am satisfied that it would be fair for the Tribunal to amend it in the circumstances of this case because, whatever it says in the Notice, the Appellant is aware that Natural England has consented only to a certain level of activity and that he must obtain Natural England's formal consent to increase the level of activity on the SSSI beyond that limit. If he does not do so, he is likely to commit a criminal offence. That was his legal position before the Stop Notice was served and it remains his legal position whether I cancel the Notice or amend it. It makes no difference whether the intensification of activity was ten years ago or two years ago so long as he remains without consent.

90. I turn now to consider whether I am satisfied that there is a serious risk of significant harm arising from the Appellant's activities on the SSSI. I remind myself that the UT in *Forager* approved the First-tier Tribunal's approach to the statutory threshold as follows:

> "*We consider that the expression "serious harm" falls to be given its ordinary meaning. In deciding whether there is present a significant risk of serious harm it is plainly relevant to have regard to the nature of the object which is contended would be so harmed. The greater the importance of the object (as recognised by both domestic and international legislative criteria) the greater will be the scope for applying the "precautionary principle" in determining whether activities should be regarded as posing a material or significant risk of serious harm …"*

91. In considering whether that test is met, I also remind myself that the Respondent's Response states that the historic levels of activity within the SSSI are acceptable to the Respondent as representing no risk of harm. I have considered whether it was lawful and/or reasonable for Natural England to serve a Stop Notice on a person in respect of activities which it acknowledges do not present a significant risk of serious harm to the SSSI. I note that Natural England took the view that it was necessary to prohibit all of the Appellant's activities on the SSSI in view of its concerns about is ability to monitor the situation and to enforce Mr Warren's compliance. I understand those concerns, but they do not in my view overcome the difficulty that there is a statutory threshold for serving a Stop Notice which is not, on the Respondent's own case, met in relation to the permitted historic levels of activity. I conclude that, in making a fresh decision on this appeal, there is no evidence upon which I could decide to prohibit activities which do not meet that statutory threshold. The Appellant's appeal must therefore succeed in relation to those activities to which Natural England has consented. The risk of non-compliance falls to be addressed by other means.

92. Unfortunately, there was a lack of agreement between the parties as to precisely what level of activity the historic informal agreement permitted. I have seen correspondence which refers to the activities undertaken at the time of the SSSI notification in 1993 being acceptable to Natural England. These activities were not well-documented but were said by the Respondent to constitute the release of 3060 pheasants and 24 shooting days. The Management Plan adopted for the nature reserve land leased in 1997 refers to the continued use of the land for shooting "*at similar intensity*" to previously, but without specifying the figures. During the hearing, the game bag statistics for the estate were produced for the 1993/4 and 1996/7 seasons which suggested a lower intensity. Mr May-Smith asked for the Tribunal to admit these as evidence under the "best evidence" rule. Mr Kokelaar did not object but submitted that little weight could be placed on figures which Mr Warren had not himself produced and which were not accepted to be correct.

93. It does not seem to me that I can reach a firm conclusion on this issue. It may be that the figures of 3060 birds and 24 shooting days are properly recorded somewhere, but if so I have not seen them. It may be that they are part of Natural England's "institutional folklore" and were never properly recorded. In any event, the significance of those figures lies, in my view, not in their historical accuracy but in the fact that Natural England consents to that specified level of activity and no more. As noted above, the Appellant needs to obtain Natural England's consent to all activities on the SSSI to which they have not yet consented.

94. In considering whether there is a significant risk of serious harm in this case, I have considered all the evidence relating to activities over and above the historic levels agreed to by Natural England. I found the approach of Natural England's witnesses in many respects unsatisfactory. They did not apparently obtain the advice of their experts until after the Stop Notice had been served. The risks they described contained, in most respects, insufficient analysis of the conservation gains available as a result of the Appellant's activities. They repeatedly failed to differentiate the full range of possible contributing factors where a risk was identified, for example in relation to visitor numbers generally rather than only those associated with the shoot. They did not appear to have approached their calculations taking into account the factors which Dr Draycott identified as essential at paragraph [34] above.

95. In reviewing the weight of evidence, I also found it unhelpful that Natural England's witnesses frequently did not address themselves in their witness statements to the statutory threshold for serving a Stop Notice. Their assessments of the risk of harm were often put into colloquial terms which it is difficult to correlate to the statutory test, as follows: "*we suspect that…"* (Hay)*; "…potentially adversely affecting…"* (Hay); *"may ultimately affect the viability…"* (Burrows); *"may also be a contributory factor…"*(Burrows); *"I remain concerned that …is having an effect"*(Burrrows); *"I postulate that…"* (Lakin); *"on balance, a detrimental impact…"*(Lakin). I was concerned that Ms Hay appeared to be applying a reverse burden of proof at paragraph [54] above.

96. I am grateful to Dr Alonso for addressing so directly the statutory test in her evidence repeated at paragraphs [60] to [62] above. She very fairly acknowledged that there is a paucity of scientific studies directly concerned with the risk factors she had considered and that it had been necessary for her to reach her conclusions by extrapolating from studies which were designed to investigate different issues. Nevertheless, I found her

opinion as the only heathland specialist to give evidence in this case cogent and compelling as to a significant risk of serious harm arising from the changes to the habitat brought about by disturbance and soil enrichment. She was able to supplement her evidence of the theoretical risk in these respects with first-hand evidence of the "*greening*" effect she had observed to be taking place in unit 20 outside of a pheasant pen and her own research into the "*critical load*" at the site. She also gave first-hand evidence of vehicle disturbance. I take into account the importance that she attributed to preserving the heathland, both for its intrinsic value as a primary reason for the notification of the site and also as a habitat for the species she identified. I also take into account here Mr Lakin's evidence about the importance of heathland as a habitat for the Nightjar and Woodlark populations. I note Dr Alonso's evidence was that the degradation of heathland may take time to become apparent and I am grateful to Mr Kokelaar for referring me to Case C-282/15 *Queisser Pharma GmbH & Co KG vBundesrepublik Deutschland,* in which the ECJ approved the taking of protective measures in accordance with the precautionary principle without having to wait until the reality and seriousness of those risks were fully demonstrated, so long as the assessment of the risk was not based on purely hypothetical considerations. I consider that Dr Alonso's evidence of the risk of greening is consistent with this approach.

97. I note that Dr Draycott is not a specialist in heathlands. However, he did not disagree that the risks of disturbance and soil enrichment were present, although he said he could not assess their seriousness. In all other respects I prefer his evidence about the level of risk arising to the SSSI from the Appellant's activities to the evidence of Natural England's witnesses. I accept that there are risks, but, apart from Dr Alonso's evidence about the heathland, I am not persuaded that any of the risks identified by Natural England passed the statutory threshold for serving a Stop Notice. I conclude that the part of the Respondent's case which related to the risk of "*harm to vegetation, invertebrates and other features of the heath and acid grassland habitats through impacts including (a) physical disturbance by birds and vehicles (b) soil enrichment by bird manure*" is proven to the civil standard by Dr Alonso's evidence.

98. This conclusion leads me to the position of confirming the Stop Notice in one respect only, and varying it. In so doing, I consider that the *"precautionary principle"* is met in relation to this important and sensitive site. I am not persuaded that the Tribunal itself is bound by the Habitat Regulations. It seems to me that the *Hope and Glory* approach to appeals provides the answer to that issue in that I must give due respect to the decision of a primary decision-taker which is itself bound to consider those principles.

99. In considering how I should vary the Stop Notice, I have adopted the approach of making clear to the Appellant what the risk of harm is, what he must stop doing as a result, and how he can put things right. I have also adopted what I regard as a proportionate approach in allowing the Appellant access to the site for the purposes of game bird welfare (feeding, watering, medical attention) and predator control activities. I do not regard a blanket ban as reasonable where it is acknowledged that there is a conservation benefit in these activities continuing.

100. All parties agreed that significant further assessment of the site and the impact of the game shoot was required, and I express the hope that both parties will now turn their minds to that work. I have no doubt that Dr Draycott could play an important role in taking matters forward.

101. For these reasons, the Appellant's appeal now succeeds in part. The Stop Notice is varied as set out above.

(Signed)

ALISON MCKENNA **DATE: 13 July 2018**

CHAMBER PRESIDENT