



OUTER HOUSE, COURT OF SESSION

[2026] CSOH 17

P392/25

OPINION OF LADY POOLE

in the Petition of

RESTORE NATURE LIMITED

Petitioner

for

Judicial Review of a screening decision dated 23 December 2024 by

SCOTTISH FORESTRY

Respondent

Petitioner: Findlay KC, Glendinning; Balfour+Manson LLP
Respondent: Mure KC, Halliday; Scottish Government Legal Directorate

3 March 2026

Introduction and summary

[1] In this application for judicial review, a decision is challenged which relates to creation of new woodland. A developer (the “applicant”) wishes to carry out a forestry project called Todrig New Woodland Creation (the “Todrig project”). The land affected is near Hawick in the Scottish Borders, and has a current landscape character type of “rolling moorland”. The Todrig project area covers approximately 579 hectares. 243.7 hectares of sitka spruce (a non-native tree introduced to Britain in 1831) are to be planted. Fir, pine and broadleaf species will also be planted elsewhere on the site. According to the decision under

challenge, there will be 399.5 hectares of afforestation. That area includes some open space which will not be planted, so the actual planting proposed is approximately 335 hectares.

[2] Scottish Forestry, the respondent, is a Scottish Government agency which exercises a regulatory role in relation to forestry on behalf of the Scottish Ministers. In 2024, the applicant asked the respondent to decide whether the Todrig project would require an environmental impact assessment (“EIA”). Information was provided to the respondent about the Todrig project, and staff of the respondent made a site visit. On 23 December 2024, the respondent made a decision that the Todrig project did not require EIA consent (the “screening decision”). The effect of the screening decision is that the proposed works on the Todrig project may begin without the need for EIA or EIA consent (although in practice the next stage for many forestry projects is an application for a forestry grant, the payment of which may be subject to conditions). The respondent did not initially publish the screening decision due to oversight.

[3] The petitioner is an environmental campaign group. It found out about the screening decision about three months after it was made, and brought a petition for judicial review challenging it. The petitioner does not agree that the Todrig project is unlikely to have significant effects on the environment. Previous orders of the court have extended the time period for bringing the petition, and granted a protective expenses order.

[4] The screening decision is challenged on the basis that it is irrational, and inadequate reasons are provided for it. There are multiple grounds of challenge, which it is convenient to address under four headings (landscape, sitka spruce, intermediate sensitivity areas, and northern brown argus butterfly), after looking first at the governing legislation and governing legal principles. The outcome is that grounds succeed which concern a Landscape Evaluation by the respondent, and the northern brown argus butterfly, but other

grounds do not. On that basis, the remedies of declarator and reduction sought by the petitioner fall to be granted.

Governing legislation

[5] The Forestry (Environmental Impact Assessment) (Scotland) Regulations 2017 (the “2017 Regulations”) govern EIA relating to forestry projects. The regulations are in implementation of Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment in Scotland (the “Directive”). A broad purpose of the Directive is that effects on the environment should be taken into account at the earliest possible stage of decision-making processes (recital 2). The Directive seeks to protect the environment while not placing a disproportionate burden on developers.

[6] The 2017 Regulations, implementing and in keeping with the Directive, set out a scheme under which not all forestry projects require EIA assessment. Part 2 of the 2017 Regulations is headed “Determining whether EIA is required”. Under regulation 12, an applicant may request the respondent for a screening opinion, which will say whether EIA is necessary. The respondent takes a decision whether or not the project is an “EIA forestry project” which requires EIA and EIA consent from the respondent before it can proceed (regulation 13). If the screening opinion decides a project is not an EIA forestry project, EIA is not required. If a screening opinion decides a project is an EIA forestry project, the next stage is a scoping opinion. A scoping opinion is an opinion of the respondent, after consulting various bodies, as to the scope and level of detail of information to be provided in the EIA report (regulations 2 and 15). After the scoping opinion, the developer carries out EIA, and submits an EIA report to the respondent. The respondent

then decides whether to grant EIA consent or not, and can make any decision granting consent subject to conditions including monitoring and mitigation measures (regulation 24).

[7] Forestry projects affecting areas under thresholds set out in schedule 1 of the 2017 Regulations are automatically exempt from having to obtain EIA consent (regulation 10).

Projects for under 20 hectares, where no part of the land is in a sensitive area, are exempt.

The Todrig project is not in a sensitive area, but considerably exceeds 20 hectares.

Nevertheless, the Todrig project only requires EIA if it meets the definition of “EIA forestry project” contained in regulation 2 of the 2017 Regulations. An EIA forestry project is one which “...is likely to have significant effects on the environment by virtue of factors such as its nature, size or location...”.

[8] In determining whether the Todrig project is likely to have significant effects on the environment, regulation 11(1) of the 2017 Regulations provides (insofar as relevant) that the Scottish Ministers must:

- “(a) in all cases take into account –
 - (i) such of the selection criteria set out in schedule 2 as are relevant to the forestry project proposed;
...; and
 - (b) Where information is provided to them by virtue of regulation 12(2) or (3), base their determination on that information”.

[9] Regulation 11(1)(a)(i) of the 2017 Regulations obliges the respondent to take into account certain criteria in schedule 2. Those criteria are grouped under three headings, with lists of matters underneath them, and summarised as follows. The first heading, characteristics of forestry project, includes factors such as size and design, cumulation with other forestry projects, and the use of natural resources, in particular land, soil, water and biodiversity. The second heading, location of forestry project, suggests consideration of existing land use, regenerative capacity of natural resources (including soil, land, water and

biodiversity) in the area, and the absorption capacity of the natural environment. The third heading, characteristics of the potential impact, states that likely significant effects of the forestry project on the environment must be considered in relation to criteria under the first two headings, with regard to the impact of the forestry project on the factors specified in regulation 5(3) (which include biodiversity, land, soil, material assets and the landscape). Magnitude of impact, nature of impact, cumulation, and the possibility of effectively reducing the impact, are to be taken into account.

[10] Regulation 12(2) lists information that must be provided with a request for a screening opinion. A plan must be provided. Descriptions of the forestry project and aspects of environment likely to be significantly affected by the project are required. So too is a description of likely significant effects on the environment, to the extent of the available information, resulting from matters such as the “use of natural resources, in particular soil, land, water and biodiversity”. These documents are to be compiled taking into account, where relevant, schedule 2 criteria (regulation 12(4)). Information about mitigation measures, to avoid or prevent significant effects on the environment, may also be provided (regulation 12(3)).

[11] A relatively short period is given to the respondent to adopt a screening opinion, of between 28 and 90 days from when it is requested, depending on the circumstances (regulation 13(1) of the 2017 Regulations). (The court was informed that, in practice, adoption is the issuing of the screening decision by the respondent, rather than a separate stage). In reality, the time period from the inception of a woodland project to a screening decision is likely to be significantly longer than the periods specified in regulation 13(1). The clock is stopped on the statutory period if the respondent asks for further information, as it has powers to do (regulation 13(4)), and this may happen multiple times. The period within

which a decision must be adopted is taken to have started from the date on which the last item of information required is received (regulation 13(7)). Affidavits before the court explain that there is ordinarily also a due diligence stage before the request for a screening opinion is submitted, during which the applicant compiles relevant information and engages with stakeholders.

[12] The broad aim of the 2017 Regulations is to ensure adequate consideration of environmental effects before forestry projects proceed. It is not to prevent projects with environmental impacts ever proceeding. In situations where EIA consent is necessary, if granted it may be subject to mandatory conditions and other conditions, which could be conditions about mitigation measures (regulation 7(1) of the 2017 Regulations). That opportunity is lost, as part of the EIA consent procedure, if a screening decision finds that a project is not an EIA forestry project. Enforcement powers under schedule 4 of the 2017 Regulations are not engaged, because they apply to EIA forestry projects. The respondent must have sufficient information before it to be in a position properly to apply the statutory tests governing whether the project is an EIA forestry project or not. At the screening stage, the respondent is deciding whether EIA is required, not carrying out EIA or deciding whether to grant EIA consent.

Governing legal principles

[13] The principles of review by the court of a screening decision are well established. A decision will only be quashed if the court is satisfied it is outwith the respondent's powers, or the respondent has failed to comply with any of the requirements of the 2017 Regulations. A decision will be outwith powers if it improperly exercises the discretion entrusted to the decision maker, or involves an error of law going to the root of the question for

determination. It is also beyond powers if it takes account of an irrelevant consideration, fails to take into account relevant and material considerations, proceeded on a fact for which there is no evidential basis, or is a decision which no reasonable person could have reached. Courts are concerned only with the legality of decisions; they are not concerned with their merits, or the exercise of planning judgment unless it is irrational or perverse (*J29 (Scotland) Ltd v Scottish Ministers* [2025] CSIH 17 paragraphs [37]-[38]).

[14] On review of a screening decision, the court should not impose too high a burden on planning authorities. The screening process is intended to identify the relatively small number of cases in which the development is likely to have significant effects on the environment, and as already noted is not the EIA itself (*Rae v Glasgow City Council* [2025] CSIH 1 paragraph [41]). Screening is not a full assessment of any identifiable environmental effects, but a decision (taken almost inevitably on the basis of less than complete information) of whether an EIA needs to be undertaken at all (*R (Bateman) v South Cambridgeshire DC* [2011] EWCA Civ 157 paragraph 20). A planning authority has to have sufficient information about the project to be able to make an informed decision, but does not have to have all uncertainties resolved. Everything depends on the particular circumstances of the individual case. (*R (Jones) v Mansfield DC* [2004] Env LR 21 paragraphs 17, 38-39, *Younger Homes (Northern) Ltd v First Secretary of State* [2003] EWHC 3058 (Admin) paragraph 60).

[15] A decision about whether a project is likely to have significant effects on the environment is one involving judgment or opinion, not a question of hard fact to which there can only be one possible answer. Different decision makers may legitimately reach different conclusions without it being possible to say any of them has made an error in interpreting or applying the term "significant". The court's role is not to second guess the

screening judgment; review is only on *Wednesbury* grounds. Planning judgment is within the exclusive province of the respondent, particularly if the issue is visual impact and the relevant officer has visited the site and used expertise in assessing it. (*R (Finch) v Surrey County Council* [2024] UKSC 20 paragraph 58, *Hockley v Essex County Council* [2014] Env LR 24 paragraph 102-103, *R (Evans) v Secretary of State for Communities and Local Government* [2013] EWCA Civ 114 paragraph 22).

[16] Reasons must be given for the screening opinion under regulation 11(3) of the 2017 Regulations. A written statement must give:

“with reference to such criteria set out in schedule 2 which are relevant to the forestry project proposed, the main reasons for their conclusion as to whether the forestry project proposed is, or is not, an EIA forestry project”.

As the decision under challenge found the project was not an EIA forestry project, it also had to state features of the project envisaged to avoid or prevent significant adverse effects on the environment (regulation 11(3)(b)). As well as these statutory requirements, the general principle that reasons must be proper and adequate applies. Reasons should deal with the substantial questions in issue in an intelligible way, and leave the informed reader in no real and substantial doubt as to what the reasons for the decision were and what were the material considerations taken into account in reaching it (*Wordie Property Co Ltd v Secretary of State for Scotland* 1984 SLT 345 at p 348). The purpose intended to be served is important when assessing adequacy of reasons, and they do not need to refer to every issue (*Uprichard v Scottish Ministers* [2013] UKSC 21 para [48], *South Bucks DC and another v Porter (No 2)* [2004] 1 WLR 1953 paragraph 36). In the context of a screening opinion, the respondent must provide sufficient information to enable anyone interested in the decision to see that proper consideration has been given to the possible environmental effects of the

development and to understand the reasons for the decision (*R (Bateman) v South Cambridgeshire District Council* [2011] EWCA Civ 157 paragraph 21).

[17] Overall, the principles of review demonstrate considerable caution is required on the part of the courts before interfering with a screening decision. However, there are legal standards which must be met by screening decisions, which the court will enforce. All will depend on the circumstances of the particular case.

Landscape

[18] The petitioner's grounds of challenge in relation to landscape argue that the screening decision is irrational in various different ways, and inadequately reasoned. All grounds are resisted by the respondent.

[19] Before turning to the landscape grounds of challenge, it is helpful to start by considering documents and acronyms involved in these grounds of challenge.

Landscape section of the screening decision

[20] The structure of the screening decision involves a series of headings, with the respondent's conclusions about significant effects on the environment expressed in relation to each heading. Examples of headings are soil, water, biodiversity and landscape. The decision ends by reproducing the final design map for the Todrig project. There are two separate headings of "Landscape" within the screening decision. The conclusion at the end of both Landscape sections is that there are no significant effects on landscape.

[21] The text under the first Landscape heading is:

"The site is classified within Nature Scot's 'Rolling Moorland' Landscape Character Assessment Area characterised by upland heather and grassland. The application area covers an enclosed steep sided valley with low visibility from public roads.

Consultation with Scottish Borders Council Landscape Officer has been carried out and the recommendation was made to perform a combined Landscape Visual Appraisal of Todrig and the neighbouring scheme Whitslaid which is currently unsubmitted and in the early consultation phase. This report outlined the landscape context, and provided a site appraisal with impact analysis and visualisations. The following recommendations were made in regard to informing the design:

- Existing woodland shelterbelts should be integrated into new woodland
- Areas of deep peat should be left unplanted to create open habitat for moorland species
- Open hilltops should be associated with open space especially on more prominent ridges
- Opportunity for species diversification on lower slopes
- Upland areas with significant ridges and lines of force should be retained as open for landscape benefits.
- In the future existing woodlands should be restructured appropriately in order to fit into the overall design

No major landscape constraints or designations have been identified during consultation or within the landscape appraisal. The landscape architect who produced the LVA report confirms the suitability of the woodland creation proposal within the changing landscape. A landscape evaluation of significance was conducted as part of this application assessment. This was determined by considering the sensitivity of the receiving environment and the magnitude of the predicted effect. This evaluation concluded that the landscape change would result in minor effects and that effects predicted are considered manageable and therefore ‘Not Significant’.

[22] This part of the screening decision mentions Landscape Character Assessment Area, and a Landscape Visual Assessment (“LVA”) provided to the respondent. The last five lines indicate that the respondent decided landscape effects were “not significant” on the basis of a landscape evaluation (“Landscape Evaluation”). The discussion leads to a conclusion on landscape in these terms:

“The above issue has been assessed against The Forestry (Environmental Impact Assessment) (Scotland) Regulations 2017 and has been found to have no significant negative environmental impacts on landscape”.

[23] Under the second Landscape heading (in the part of the screening decision about accumulative assessment), the following text appears, which largely repeats factors mentioned under the first landscape heading:

“A risk analysis in relation to landscape has been carried out as part of the accumulative landscape impact assessment within this application. The risk analysis concluded that considering the permanency of the landscape changes and the small percentage of the LCT that will undergo landscape change, the overall magnitude of the effect is considered minor. Due to the single occurrence of this Landscape Character Type in South Scotland, the sensitivity is considered medium. A combined Landscape Visual Appraisal (LVA) that provided a joint site appraisal for Todrig and Whitslaid with impact analysis and visualisations was carried out as part of this application. Providing a landscape assessment that includes both woodland creation schemes has ensured that an appropriate and recommended accumulative landscape assessment has been completed. This accumulative assessment confirmed the suitability of the afforestation proposals of both schemes in the changing landscape. Therefore the mitigation proposed for Todrig is sufficient to ensure there is no significant impact even when assessed cumulatively with adjacent proposals”.

The document now referred to as a risk analysis is the same document as the Landscape Evaluation relied on in the text under the first landscape heading.

Landscape Character Type

[24] Scottish National Heritage, now known as Nature.Scot, is an advisory body to the Scottish Government, established by the Natural Heritage (Scotland) Act 1991. It is responsible for advising the Scottish Ministers on natural heritage including landscapes. It has prepared character types for landscape across Scotland. The Todrig project is in Landscape Character Type (“LCT”) 94, rolling moorland. It is an upland area characterised by large-scale, rolling, heather and grassland covered ground. LCT 94 as a character type occurs in one location only, west of Hawick. Its key characteristics are:

“Large-scale rolling landform with ridges and intervening shallow basins.

Significant areas of grassland, peatland and heather moorland.

Mosaic of grassland, bracken and rushes on lower ground.

Locally-prominent scattered areas of forestry.

Occasional small lochs.

Sparse settlement of scattered steadings and cottages, along minor roads that traverse the area”.

[25] The description of the LCT by Nature.Scot goes on to make other observations, including the existence within the LCT of some single species forests, typically of sitka spruce. It notes the perception of the LCT as a large-scale landscape, open and exposed on the hills.

Landscape Visual Assessment

[26] The screening decision refers to the “LVA report”. This is a document headed “Landscape Appraisal for Shiels Wood and Todrig by Iain Walker”, supplied to the respondent by the applicant. Pages 7-33 of the LVA report contain computer generated panorama visualisations and associated maps. Some of those parts of the LVA contain comments, largely repeating annotations on the plans in the first three pages of the report.

[27] The first three pages of the LVA provide annotated plans; a landscape context plan, a site appraisal plan and a design concept plan. The annotated landscape context plan points out various features of the landscape, for example: the site is within the rolling moorland character type; with nearby forestry, and existing woodland areas within the site; and that Todrig is an enclosed steep sided valley with lower public access and visibility. It suggests poorer soils on the upper slopes are suitable for more productive species, but there is opportunity for species diversification on lower slopes where there are better soils. Next there is a site appraisal plan, for example identifying deep peat areas which should be

maintained as open, areas of poor soils on upper slopes suitable for more productive species, and opportunities for species diversification on lower slopes where there are better soils. Then there is a design concept plan, which again is an annotated map. It has annotations with suggestions, for example “take advantage of site conditions to break up any views of monoculture sitka spruce edges, by establishing broadleaves, mixed conifers and open space on appropriate soils”; or “areas associated with prominent ridges and significant lines of force should be retained as open for conservation and landscape benefits”; or “enhance riparian areas by creating a mixture of open and native broadleaf areas, where these should be focused on the Ale Water and the main tributaries”.

[28] The section of the LVA headed “Impact analysis with orthographic images” contains two pages of images with comments. Comments include that the site is “within the rolling moorland landscape character type”, and is largely barren of woodland. The surrounding land is associated with woodland, much of which has been created since 2000. There is a wind farm to the north of Todrig. The writer of the LVA expresses the view that the “landscape is changing, and as there are no major landscape constraints identified, the site offers a great opportunity for woodland creation”. Another view expressed is that “The design would fulfil a number of landscape, environmental and biodiversity objectives”.

Landscape Evaluation

[29] As already noted, the conclusion that the Todrig project had no significant environmental impacts on landscape in the screening decision follows mention of a Landscape Evaluation carried out by the respondent, which is given an alternative name of “risk analysis” when it is discussed a second time under the second landscape heading. The Landscape Evaluation is an undated internal document of the respondent, entitled “Decision

making process on determining that the Todrig woodland creation scheme would not cause significant environmental impacts in relation to landscape". It explains that "the common methodology used to evaluate the significance of an effect includes determining the sensitivity of the receiving environment and the magnitude of the predicted effect", and footnotes a webpage from the European Commission's website on Environmental Impact Assessment as the source of that methodology.

[30] The Landscape Evaluation reproduces a table as follows:

Magnitude	Sensitivity		
	High	Medium	Low
Major	Major	Major	Moderate
Moderate	Major	Moderate	Minor
Minor	Moderate	Minor	Negligible

In effect, magnitude and sensitivity are measured, and the results combined to produce an outcome of major, moderate, minor and negligible. The Landscape Evaluation records that effects evaluated as moderate and major are classed as "significant", but minor or negligible are "not significant". When assessing significance of impacts, mitigation proposals are taken into account.

[31] For the factor of magnitude of effect, moderate and minor are defined as follows.

"Moderate" is when there is a loss of resource, but not adversely affecting the integrity over a significant area; partial loss of/damage to key characteristics, features or elements.

"Minor" is when there is some measurable change in attributes, quality or vulnerability; minor loss of, or alteration to, one (maybe more) key characteristics, features or elements.

[32] For the Todrig Project, in the Landscape Evaluation the respondent evaluates sensitivity as medium, given that the rolling moorland landscape character type is the single occurrence of this character type in Southern Scotland, but there are no other landscape designations or constraints. The finding of medium sensitivity is not disputed. The Landscape Evaluation then assesses magnitude as minor, a finding that is disputed. The combination of the findings of medium sensitivity and minor magnitude results in an overall outcome of a minor effect on the environment. That in turn results in the effects overall being assessed as “not significant”. Had the magnitude been classified as “moderate”, the combination of medium sensitivity and moderate magnitude would have been “significant”.

[33] The respondent’s reason for the conclusion that magnitude is minor is as follows. It considers the effect as permanent. It then says:

“The total area of landscape change attributed to Todrig woodland creation is 579ha. Approximately 70% of the total land ownership is to be planted. In the context of the wider landscape and total area of the designated Landscape Character Type 94 Rolling Moorland which totals 12,440ha, Todrig represents 4.6% of the LCT area. Taking in account the permanency of the landscape changes and the small percentage of the LCT that will undergo landscape change, the overall magnitude of the effect should be considered minor”.

The Guidelines

[34] “Guidelines for Landscape and Visual Impact Assessment (3rd Ed)” are issued by the Landscape Institute and Institute of Environmental Management & Assessment (the “Guidelines”). There are some later notes updating the Guidelines to 2024. The Guidelines acknowledge sponsorship from three bodies, English Heritage, National Resources Wales, and Scottish Natural Heritage (which as already noted is now Nature.Scot, an advisory body to the Scottish Ministers). Landscape and Visual Impact Assessment

("LVIA") is a tool used to identify and assess the likely significance of the effects of change resulting from development, both on the landscape as an environmental resource in its own right and on people's views and visual amenity. The Guidelines describe themselves as "the industry standard work on LVIA". The respondent has required those Guidelines to be used in connection with EIA of at least one other forestry project, as a scoping opinion from 2025 shows.

[35] The Guidelines indicate that LVIA may be carried out either formally as part of EIA, or informally as a contribution to the appraisal of development proposals and planning applications (paragraph 1.3). The Guidelines say "both are important and the broad principles and the core of the approach is similar in each case"; similar comments are made at paragraph 3.2. The Guidelines further indicate that the principles and processes of LVIA can be used to assist in the appraisal of forms of land use change that fall outside the requirements of the EIA Directive (paragraph 1.11), and the good practice in LVIA applies equally to informal appraisals (paragraph 1.18).

[36] The Guidelines do not provide a detailed or formulaic recipe that can be followed in every situation, and it remains the responsibility of the professional to ensure the approach and methodology are appropriate to the task in hand (introduction, paragraph 1.20). The approach should be proportional to the scale of the project that is being assessed and the nature of its likely effects (summary, chapter 1). The Guidelines mention screening, scoping and assessment.

[37] Chapter 3 of the Guidelines indicates that it is important that professionals providing an opinion as to landscape and visual considerations adopt a structured and systematic approach from the outset (paragraph 3.7). They should record actions taken, information gathered, assumptions made, limitations, opinions offered, together with reasoned

justification. It is indicated that assessment of significance of effects is a key part of the LVIA process, and is an evidence-based process combined with professional judgment. In the summary at the end of chapter 3 it is suggested that in a standalone appraisal the approach is less formal and there is more flexibility, but the essence of the approach applies.

[38] Paragraph 3.3 of the Guidelines introduces table 3.1, headed “Components of the EIA process and the role of LVIA”. The table is directed at more steps than EIA, because it also lists as parts of the “EIA process”, “site selection and consideration of alternatives”, “screening” and “scoping”, as well as later stages. The entries in table 3.1 relating to screening are as follows:

Component of EIA process	Brief description of action in this part of the process	LVIA role in EIA	LVIA role in landscape “appraisal”
Screening	Determines whether an EIA is needed for the proposed development	Required – by competent authority	Not required

[39] Chapter 5 of the Guidelines is headed “Assessment of landscape effects” and chapter 6 “Assessment of visual effects”. Not all of the detail in these chapters is likely to apply to an evaluation at screening stage, but the division into separate chapters underlines that landscape effects and visual effects are not always the same thing. Landscape effects require identification of the components of the landscape likely to be affected by the scheme, often called landscape receptors, and identification of interactions between the landscape receptors and the development. Existing character assessment can assist with this. Significance of effects can be assessed by looking at factors such as sensitivity of landscape receptors having regard to their susceptibility to change with the project and their value. The magnitude of landscape effects can be looked at in terms of scale, geographical area, and

duration and reversibility. Visual effects on the other hand involve the effects of the development on the views available to people and their visual amenity.

Ground of challenge based on the Guidelines and LVA

[40] The petitioner argues that in assessing landscape impact, the respondent erred because the information before it was not sufficient for it properly to be able to make a decision about significant environmental effects. That is because the screening decision relies on a deficient assessment of landscape and visual impacts, in the form of the LVA referred to in the screening decision. It is argued that the LVA was not prepared in accordance with the Guidelines, which had also been misinterpreted by the respondent, and there should have been LVIA. The respondent argues it was entitled to base its decision on the LVA because, in the professional judgment of the respondent's planning advisor, LVIA was not necessary. At the stage of a screening opinion, information of greater detail was not necessary.

[41] The background to this ground of challenge is that in 2023 there was an internal email exchange within the respondent about the type of landscape assessment required for the Todrig project. Initial thinking there should be LVIA by the respondent and Scottish Borders Council had been questioned by the applicant, on the basis that a "lower spec" landscape appraisal would be sufficient. Internal advice within the respondent was that LVA analysis, rather than a full LVIA, was appropriate. The advice was based on the limited design information then available, and desktop analysis. It was suggested that information about landscape character type, a site appraisal plan including visual receptors, and design concept plans should be included in the LVA provided. There is no discussion

about this in the screening decision, which proceeds on an assumption that the LVA was sufficient information upon which to proceed.

[42] The 2017 Regulations do not refer to the Guidelines. Nor do they mandate LVIA when deciding whether something is an EIA Forestry project. Although a body advising the Scottish Government, now Nature.Scot, is acknowledged as providing sponsorship for the Guidelines, the Guidelines are not a document issued by the respondent or the Scottish Ministers. The use of the Guidelines by the respondent in relation to a scoping opinion relating to a different project, which only fell to be issued after it had been found or accepted that a project was an EIA Forestry Project, does not give rise to a legal requirement that LVIA is necessary at the screening stage of a different project. Accordingly, failure to follow the Guidelines did not in itself give rise to an irrational decision, because the Guidelines were not something the respondent had a legal obligation to take into account or follow. Similarly, if not following the Guidelines, that was not something that had to be reasoned in the screening decision, because they are not Guidelines issued by the respondent, nor were they a “main reason” for the decision that EIA consent was not necessary, within the requirement of regulation 11(3) of the 2017 Regulations.

[43] Rather, the question for the court is whether there was sufficient information before the respondent for it to be able to make an informed decision on the likelihood of significant effects on the environment. That question has to be considered against the backdrop that the screening decision being taken was not a full assessment of any identifiable environmental effects; it was a decision about whether EIA needs to be undertaken. (*Bateman* paragraph 20, *Jones* paragraphs 17, 38-39, *Younger Homes* paragraph 60).

[44] The respondent’s decision on landscape (set out above) relies on information it had about the LCT, LVA, and an internal Landscape Evaluation. The LCT gives a general

description of the landscape character type within which Todrig was located, which while characterised by large-scale, rolling, heather and grassland covered ground, had other characteristics which included locally-prominent scattered areas of forestry. The LVA is a more extensive document (also described above). While a large part of the LVA is concerned with visual effects, it also contains information about landscape effects. The LVA looks at features of the landscape and what would happen to them if the Todrig project went ahead. The keys to and the annotations on the landscape context and site appraisal plans show various receptors on the existing landscape. The design concept plan, with its annotations and legend, shows changes planned to the landscape, for example planting of species according to the legend. Annotations on the impact plan acknowledge the existing LCT, but note surrounding land is covered with woodland, a wind farm, that the landscape is changing, and that the design would fit into the landscape. The information from the LCT and the LVA provides a basis to reach a conclusion about whether the Todrig project was likely to give rise to significant effects on the environment, provided the correct legal test is applied to that information. Bearing in mind that this was the screening stage, it was not irrational for the respondent to proceed on the basis of LVA rather than LVIA, even though the LVA did not adopt all methodology suggested in the Guidelines.

[45] Further, even if that is wrong and there was a legal obligation to follow the Guidelines or justify why they were not followed in the screening decision, the court does not accept the petitioner's interpretation of Table 3.1 in the Guidelines as requiring LVIA rather than LVA. The column relating to screening set out above suggests a competent authority should require LVIA at screening, in the column "Role of LVIA in EIA".

However, EIA is only required once a forestry project has been assessed to be an EIA forestry project, and that is not a stage the Todrig project has reached. The Todrig project is

not “in EIA”. At the time of the screening decision, it was in a stage closer to “landscape appraisal”, for which the Guidelines say LVIA is not required. It is accepted that this interpretation places a question mark over whether the entry in the third column for screening can be correct, but it is important to read table 3.1 in the context of the whole Guidelines. They suggest the underlying principles of the Guidelines apply whether something is LVIA or a lesser assessment such as LVA. Matters are unlikely to turn on nomenclature, but whether or not the information before the respondent was sufficient for the task in hand. The screening stage is not intended to require the same level of detail as EIA (*Rae* paragraph [41], *Bateman* paragraph 20). Overall there must be a proportional approach, taking into account amongst other things the scale of the project and the nature of its likely effects.

[46] The petitioner complains that what is lacking is adequate assessment of significance of effects (under reference to tables 3.1 and 3.4 of the Guidelines, and paragraph 3.21). However, as explained above, the LVA provides identification of landscape and visual receptors, in a combination of annotations on plans, and computer generated visualisations of viewpoints. Comparing the design plan with the landscape context and site appraisal plans gives a basis on which impact on landscape and visual receptors might in principle be evaluated, although the respondent was still required to apply the correct legal tests when doing so. Given that this was the screening stage, it cannot be said that the LVA, together with other information before the respondent, provided insufficient information to inform a decision about likelihood of significant effects on the environment. The petitioner’s challenge based on the Guidelines fails.

Grounds of challenge based on magnitude and the Landscape Evaluation

[47] The petitioner next argues that the screening decision is irrational because of the respondent's approach to magnitude of effects on landscape in the Landscape Evaluation, a document relied on by the respondent in the screening decision. The Landscape Evaluation finds the effects of the Todrig project on landscape to be minor rather than moderate. The petitioner argues in summary that: "minor" was not a rational finding for complete transformation of such a large area of a rolling moorland LCT; basing a finding of minor on the basis of the percentage of the whole LCT of the Todrig project was irrational; and there was a failure to take into account other relevant factors such as the geographical extent over which the landscape effects will be felt, the site itself and the perceptible landscape within it. The respondent on the other hand argues that its decision was reasonable and rational, in keeping with accepted methodology and within planning judgment.

[48] Even though the court has found that the respondent was entitled to proceed on the basis of information contained in LVA rather than LVIA in making its decision about environmental effects on landscape, the respondent still had to apply the correct legal tests to the information before it when reaching its decision.

[49] The Landscape Evaluation was a key document leading to the respondent's conclusion that significant effects on the environment were unlikely in relation to landscape. The classifications used in the Landscape Evaluation are set out in the table reproduced above. The classifications of negligible, minor, moderate, major, low, medium mentioned in the Landscape Evaluation are not directly found in the 2017 Regulations the respondent had to apply. What the respondent had to decide, read short, was whether or not the Todrig Project is likely to have significant effects on the environment. The box-led approach in the Landscape Evaluation could only ever be a tool to assist the respondent in answering that

statutory question. (It may also be observed that the finding in the Landscape Evaluation that the LVA considered the effects to be permanent is not obviously in the LVA. But that is of little relevance, because there is no dispute the effects of the Todrig project were correctly treated as permanent).

[50] Focusing on the legal tests the respondent has to apply, the 2017 Regulations require the question of whether a project is likely to have significant effects on the environment to be considered in a particular way. Under regulation 2, significant effects to be considered are “by virtue of factors such as nature, size or location” of “a forestry project”. Under regulation 11, the respondent “must in all cases” take into account relevant schedule 2 criteria. Paragraph 3 requires the likely significant effects of “the forestry project” on the environment to be considered in relation to criteria set out in the paragraphs 1 and in schedule 2, with regard to impact on factors in regulation 5(3) (which include biodiversity, land and the landscape), taking into account magnitude, spatial extent, nature, intensity, and duration of the impact. Magnitude of effect on landscape is therefore a matter which must be taken into account where relevant under the 2017 Regulations. Criteria in paragraph 1 of schedule 2 require the characteristics of “the forestry project” to be taken into account, having regard to size, design, cumulation with other existing forestry projects, and use of natural resources, in particular land and biodiversity. Criteria in paragraph 2 of schedule 2 necessitate consideration of location, and environmental sensitivity of geographical areas likely to be affected by “the forestry project”, having regard amongst other things to existing and approved land use and absorption capacity of the natural environment.

[51] It is clear from the wording of the relevant parts of the 2017 Regulations that consideration of “the forestry project” is necessary when determining significance of environmental effects. Factors of existing land use, cumulation and geographical

considerations may justify taking into account what proportion of an area of an LCT is affected by a particular project; or indeed the extent to which forestry within a particular project may add to the total areas of forestry within a LCT. But there cannot be undue focus on the fact that the Todrig project is just under 5% of the whole LCT in deciding magnitude of impacts. If that general approach is taken to all applications for forestry projects in that particular LCT, the collective outcome may be a fundamental change to the landscape character of rolling moorland. The statutory tests require proper consideration of the impacts on the area of land within the forestry project itself too.

[52] The justification given by the respondent in the Landscape Evaluation for its finding in relation to magnitude of impacts is, in summary, that 70% of 579 hectares in a rolling moorland LCT is to be planted, and “taking into account the permanency of the landscape changes and the small percentage of the LCT that would undergo landscape change, the magnitude of the effect of the Todrig project is considered minor”. Permanency is the only factor which is mentioned in relation to the landscape change within the 579 hectares covered by the Todrig project itself, which would tend to increase magnitude. There is an absence of adequate consideration in the Landscape Evaluation of factors which the 2017 Regulations require to be taken into account. In relation to landscape at the Todrig project itself, those factors might include the use of natural resources such as land, intensity, overall absorption capacity, and existing land use. Although the Guidelines were not binding on the respondent, they are instructive about good practice in considering landscape effects. Good practice involves identifying components of the development, and identifying the landscape receptors which will be affected by them. Effects on particular landscape or visual receptors are to be considered (paragraph 3.21). In considering the magnitude of any of these effects identified, size or scale, geographical extent and duration

may be taken into account (paragraph 5.48 of the Guidelines, but also the terms of the 2017 Regulations (regulations 2, 11, and schedule 2 referring back to regulation 5(3)), as they apply to screening decisions. All of this mandates proper consideration of landscape impacts on Todrig itself.

[53] Against the background of the requirements of the 2017 Regulations, the approach taken by the respondent in the Landscape Evaluation to magnitude is too narrow, and fails properly to reflect the statutory criteria. The percentage of the LCT covered by the Todrig project might be one relevant consideration. But there was no proper weighing in the balance of effects on the site itself, and the effects on the perceptible landscape within it, in the Landscape Evaluation. In the words of the test for “moderate” effects in the respondent’s table reproduced above, there was no proper consideration of whether there is loss of a resource (of rolling moorland) affecting integrity over a significant area within the Todrig project itself, or partial loss of/damage to key characteristics, features or elements within the Todrig project itself.

[54] The Landscape Evaluation is therefore defective because it fails properly to apply the statutory approach mandated by the 2017 Regulations. The respondent clearly attached importance to the Landscape Evaluation, since it referred to it under two different headings in its screening decision. Under the first heading, reference to its findings immediately preceded a conclusion that landscape had been “assessed against” the 2017 Regulations and “found to have no significant negative environmental impacts on landscape”. Under the second heading, the conclusions of the Landscape Evaluation was one of two factors referred to justify a finding there was no significant impact. Given that the conclusions of the Landscape Evaluation that effects were “minor” and “not significant” was based on a flawed application of the governing law for reasons explained above, those findings were

not properly taken into account. Yet they went to the root of the decision being made, whether the Todrig project was likely to have significant effects on the environment. The Landscape Evaluation says in terms that if magnitude was moderate (rather than minor, as found) then effects would be significant.

[55] It is acknowledged that the screening decision mentions other matters which, when weighed in the balance, might point towards a finding that landscape effects are not significant. For example, the screening decision notes that the Todrig project is a valley with low visibility from public roads, and design recommendations, and there was a site visit. However, the court has to review the legality of the screening decision, not its merits. The respondent took into account an immaterial consideration, a flawed Landscape Evaluation. That affected the process of balancing considerations it was required to carry out. As a result, the conclusion that the project was not an EIA project was not lawfully reached (*J29 (Scotland) Ltd* paragraphs [37]-[38]).

[56] The petitioner also challenged the adequacy of the reasons in the screening decision on the basis of the same error. That challenge also succeeds, because reliance on the Landscape Evaluation in the screening decision undermines the reasons in it. The reasons given do not enable persons interested in the screening decision, which include the public with access to the countryside, and environmental campaign groups, to see that proper consideration has been given to the possible environmental effects of the development (*Bateman*).

Scale

[57] The final landscape ground of challenge to be addressed is scale. The petitioner argues that the screening decision fails to have regard to the overall scale of the proposed

scheme. The Todrig project covered an area considerably in excess of the threshold of 20 hectares, involved large areas of tree planting, and if the neighbouring planned project at Whitsnaid went ahead there would be a combined planting area of 1,258 hectares. The petitioner argues that the scale of the project had to be considered as part of criteria in schedule 2 of the 2017 Regulations of size and design, and magnitude and spatial extent of the impact. The respondent contends that it had proper regard to overall scale, because the screening decision referred to the area of trees to be planted, and the extent to which the scheme exceeded the thresholds is not a relevant consideration.

[58] Ultimately, the likelihood of significant environmental effects is a matter for assessment in the particular circumstances of a case, balancing all of the various relevant considerations. Size or scale is one relevant factor, but at the outset of the screening decision the respondent identifies the Todrig project is for 399.5 hectares of afforestation, and under the second landscape heading mentions Whitslaid. It cannot be said to have failed to take these matters into account. While the area involved is significantly above the 20 hectare threshold for automatic exemption from EIA, the 2017 Regulations contain no provision that projects the size of the Todrig project must be subject to EIA. Significant effects on the environment is a project-specific question. The real problem in relation to the respondent's approach to the likelihood of significant effects on the landscape is its having taken into account an immaterial consideration, a flawed Landscape Evaluation.

Sitka spruce

[59] The next ground to be addressed centres on the planting of sitka spruce trees as part of the Todrig project. 243.7 hectares of the site, or 61% of it, are to be planted with sitka spruce. The petitioner argues that biodiversity is a criterion the respondent was obliged to

consider under regulation 11 and schedule 2 of the 2017 Regulations. A failure to take into account the planting of what is described as a “monoculture” of non-native trees, which are problematic because of their propensity to self-seed and become invasive, is argued to be a failure to comply with the 2017 Regulations. The failure to deal with this issue in the screening decision is also argued to give rise to an inadequacy of reasons. The respondent, on the other hand, argues that the respondent was satisfied that the planting of 243.7 hectares of sitka spruce is not likely to have a significant effect on the environment, and that was a decision which was rationally and reasonably open to them.

[60] This ground of challenge focusses on the mix of the planting proposed, rather than its overall extent. It is about the high levels of one particular variety, sitka spruce, within the planting planned for the Todrig site. The decision under challenge does not, in the main text, mention sitka spruce at all. However, it contains the final design map for the project at the end of the decision. That includes a species plan which identifies the blue areas in the design map as sitka spruce, and gives the figure of 61% for sitka spruce. Although that is a relatively high proportion, it is less than the figure of 65% for a single species suggested in the UK Forestry Standards 2023 (standards which describe themselves as being based on sustainable forest management criteria agreed internationally, and a balance of objectives). The final design map in the screening decision also identifies other trees to be planted such as Scots pine and native broadleaves, as well as unplanted areas. The text of the screening decision mentions species diversification on lower slopes, and broadleaf trees. It refers to the LVA which suggested planting of productive species (such as sitka spruce) on poor soil, with broadleaves and conifers on lower valley sites where there are better soils. Accordingly, “monoculture” is not a correct description of the whole Todrig project. The

screening decision also mentions a planting buffer zone for calcareous grasslands classified at CG10 in mitigation, which implies consideration of self-seeding of sitka spruce.

[61] On that basis, reading the decision as a whole, it cannot be said that the respondent gave no consideration to the effect on biodiversity of the applicant's proposals relating to sitka spruce. Planning judgment is involved in determining whether this level of sitka spruce of itself gave a likelihood of significant effect on biodiversity and the environment. The amounts planned were within the UK forestry standard, the design incorporated other trees and habitats, and a buffer zone for some habitats was to be incorporated. It cannot be said that the screening decision, insofar as it did not find that a planting scheme of 61% sitka spruce gives rise to a significant effect on biodiversity, was one no reasonable decision maker could ever come to.

[62] Nor was it necessary for the respondent to give any more specific reasons about "the effect of planting such a large area of sitka spruce trees despite their propensity to become established in sensitive areas and therein adversely impact biodiversity", as the petitioner argues. The "informed reader" has access to documents submitted to the respondent on which the screening decision was based. These include a habitat management plan, which contains a commitment to manage sitka spruce seeding by checking every 5 years and removing self-seeded spruce (paragraph 1.22). The final planting plan set out in the screening decision shows planting of 61% of sitka spruce is planned. A failure to mention sitka spruce expressly in the section of the screening opinion headed biodiversity does not result in an inadequacy of reasons. The grounds of challenge relating to the percentage of sitka spruce in the planting plan do not succeed.

Intermediate sensitivity areas

[63] The petitioner's next ground of challenge is that the respondent could not rationally have concluded the Todrig project would not have a significant effect on biodiversity, given its failure to consider the effect of planting in areas of intermediate sensitivity. This ground focusses on findings about the sensitivity of areas of land within the Todrig project in a Botanical assessment report of Max and Sian Carstairs Ecological Consultants dated November 2022 (the "Carstairs Report"). The Carstairs report at Figure 2 contains a plan which uses a "traffic light" system. It depicts the Todrig site. It adopts its own classification of high, medium and low sensitivity areas. Areas of high sensitivity are coloured red, medium sensitivity amber, and low sensitivity green. When compared against the species planting plan, areas of high sensitivity tend to be excluded from planting, but some areas of intermediate sensitivity are to be planted with trees.

[64] The petitioner argues that the respondent failed to take into account sensitivities in the Carstairs report, or if it took them into account, its conclusion that there would be no significant environmental effects on biodiversity was irrational. The respondent on the other hand argues it took into account the Carstairs plan. It rationally decided that an approach where areas of high sensitivity were not planted, but areas of low sensitivity and some medium sensitivity were, did not result in a likelihood of significant effects on the environment.

[65] The screening decision states under a heading of "habitats":

"As part of this application, an ecological survey assessment was carried out which included a phase 1 habitat survey and [national vegetation classification] survey. A range of habitats were identified including Ground Water Dependent Terrestrial Ecosystems. Habitats of conservation significance within the site boundary include bogs, base rich flushes and calcareously enriched grasslands and mires which are species-rich and highly groundwater dependent".

Under a heading of “acid grasslands”, the screening decision says:

“U4 acid grasslands at Todrig on hill slopes below the 300m line are classified as BAP [Biodiversity Action Plan] Priority habitat. The UK BAP classifies all acid grassland below 300m as Priority Habitat. An ecologist has confirmed it is likely to be appropriate to plant these as the grasslands contained the species poor U4a and U4b sub communities as well as species poor transitional stands with other grassland types”.

Under a heading of “Calcareous Grasslands”, the screening decision states:

“Sheep were present along the roadside track at Todrig during 2022 and had access to the slopes containing a large stand of calcareous grassland CG10. This is one of the larger stands of CG10 in the Hawick area and as such is species-rich. A planting buffer zone has been applied to this habitat which is considered appropriate mitigation”.

The screening decision also notes under a heading “soil”:

“areas of deep peat [are] removed from the planting design...during operations if areas of deep peat are found, operations will be paused. Areas will be fully mapped and remain uncultivated”.

The screening decision concludes that, with the mitigation outlined, the Todrig project is not likely to cause a significant negative environmental effect on soil.

[66] From these entries, it is clear that the respondent took into account the Carstairs report, which included the plan of areas of intermediate sensitivity. It further took into account a planting assessment from the authors of the Carstairs report dated 11 November 2024, expressing the opinion that in Scotland some priority habitats may be planted on, for example species poor Ground Water Dependent Terrestrial Ecosystems (“GWDTE”), peat with a depth of less than 50cm, species-poor U4 acid grassland, and wet heath, some of which were coloured amber. The respondent also considered areas of the site which were sensitive in various ways. It mentions in the screening decision GWDTE and Biodiversity Action Plan (“BAP”) habitat, and particular areas such as deep peat, acid grasslands, heathlands and calcareous grasslands. It also considered a planting plan which when

compared with the sensitivity plan showed that the majority of areas of intermediate sensitivity being planted would be planted with broadleaf trees to create priority habitat. It recognised that areas of high sensitivity would not be planted on, and that there would be buffer zones. The screening decision is based on a discriminate approach to areas of different sensitivity within the site, as shown on the final design map reproduced in the screening decision.

[67] The screening decision, in failing to find there was a likelihood of a significant effect on the environment because there was to be some planting on areas of intermediate sensitivity, may only be struck down if it is one no reasonable decision maker could have made. It is accepted that planting may happen on some areas coloured amber in the plan in the Carstairs report of intermediate sensitivity, including some areas considered of regional importance. However, there is no requirement in the 2017 Regulations that land should be divided into areas of low, intermediate and high sensitivity, or that there be no planting in areas of intermediate sensitivity or, for example, on GWDTEs. It was a question of planning judgment whether the planting proposed gave rise to a likelihood of significant effects on the environment, even though some was on areas suggested to be of intermediate sensitivity, and a question on which reasonable people could reasonably differ (*Finch* paragraph 58, *Hockley* paragraph 103, *Evans* paragraph 22). The decision is not perverse for this reason.

[68] Further, there were sufficient reasons in the screening decision without it directly addressing why planting on some areas of intermediate sensitivity did not result in significant effects on the environment. The screening decision gave reasons in relation to a number of particular areas of the Todrig project, including in relation to habitats, deep peat, calcareous grasslands, and U4 acid grasslands. It was not a legal requirement that the

screening decision cover every issue before the respondent, and it did not have to give express reasons why planting on certain mosaic areas within the Todrig site, and certain areas coloured amber in the Carstairs report, did not give rise to significant environmental impacts. Although the respondent noted in one part of its screening decision that mitigation measures were that priority BAP habitat and highly dependent GWDTE's be excluded from planting, read as a whole the informed reader understands from other parts of the screening decision this was a general principle subject to exceptions in particular areas (eg the reference to planting on U4 grassland which was BAP Priority habitat, and reference to planting M15 wet heath in the context of GWDTE guidance). There is no inconsistency rendering the informed reader unable to understand the reasons for the decision in this regard.

The northern brown argus butterfly

[69] The final ground of challenge to be considered centres on the northern brown argus butterfly. The Scottish Government (of whom the respondent is an executive agency) publishes a Scottish Biodiversity list, a statutory requirement under section 2(4) of the Nature Conservation (Scotland) Act 2004. The Scottish Biodiversity list contains names of species and habitats considered of principal importance for the conservation of biodiversity in Scotland. The northern brown argus butterfly is on that list. (So too are certain birds mentioned in the screening decision, black grouse, curlew, and golden plover). The respondent accepts that it is aware of the location of and risk to the northern brown argus butterfly.

[70] Butterfly Conservation is a British charity devoted to saving butterflies, moths and their habitats throughout the UK. The northern brown argus butterfly is categorised as

vulnerable on Butterfly Conservation's butterfly red list for Great Britain because it is threatened or near threatened, and mentioned in their conservation strategy as a high priority species. A member of staff of Butterfly Conservation has provided an affidavit stating that the northern brown argus butterfly has been found on the site of the Todrig project, as well as common rock rose which the northern brown argus butterfly feeds on, including on U4 grassland within the site. The Scottish Borders is a stronghold for the northern brown argus butterfly, containing about 40% of the whole UK population. The northern brown argus butterfly's habitat is threatened by afforestation and cessation of grazing.

[71] A brief summary of parties' arguments in relation to the ground of challenge based on the northern brown argus butterfly is as follows. The petitioner argues that the screening decision fails to take into account the risk of habitat destruction in relation to the northern brown argus butterfly; as a result it is irrational. In addition, the omission of any mention of the northern brown argus butterfly in the screening decision leaves the informed reader in real and substantial doubt why the Todrig project is not an EIA forestry project. The respondent on the other hand argues that it is not necessary to consider the impact on the northern brown argus butterfly in particular; it is sufficient for it to consider protection of species-rich habitats, and proceed on the information it had before it at the time of the screening decision. The respondent also argues that it complied with the legal duties incumbent on it in respect of reasons.

[72] As set out in the governing legal principles above, the process leading to a screening opinion is not intended as EIA. Screening opinions may in appropriate cases be reached lawfully, although more information could have been provided. However, it remains a legal requirement that the respondent must have sufficient information before it to be able to

make a properly informed decision on the question entrusted to it (*Jones* paragraph 39, *Younger Homes*, paragraph 60). As already noted, the effect of a finding that Todrig is not an EIA Forestry project is that the opportunity under regulation 7(1) to grant EIA consent subject to conditions which mitigate effects, and related enforcement powers under schedule 4, will not arise. Planning judgment is involved in deciding what amounts to sufficient information, but there is also a question of legality. The 2017 Regulations set out a particular question which must be addressed by the respondent (whether a project is likely to have significant effects on the environment by virtue of factors such as nature, size or location (regulations 2 and 11)). The respondent is expressly required when determining that question to take into account relevant schedule 2 selection criteria, and its reasons must be “with reference to such criteria set out in schedule 2 which are relevant” (regulation 11(1) and (3)). It bears repeating that relevant schedule 2 criteria include the use of natural resources, in particular biodiversity (paragraph 1(c)), and relative abundance, availability and regenerative capacity of natural resources (including land and biodiversity) in the area (paragraph 2(b)). Paragraph 3 of schedule 2 contains reference to factors in regulation 5(3), which include biodiversity. Consideration of the maintenance of diversity of species is part of the respondent’s function. The respondent has powers to call for further information (regulation 13(4)), and is required by legislation to consider particular criteria. It should have sufficient information before it to enable it properly to take into account relevant criteria in the 2017 Regulations.

[73] In this particular case, the screening decision attaches importance to “early engagement with stakeholders and consultees”. Part of that engagement was with the RSPB, which gave a response copied to the respondent. The RSPB mentioned species such as black grouse, curlew and waders, which are species on the Scottish biodiversity list, and

which the respondent considered to be aspects of biodiversity appropriate to address expressly in its decision. But there is a further species on the Scottish biodiversity list referred to by the RSPB, the northern brown argus butterfly, which by contrast is not mentioned anywhere in the screening decision. The RSPB noted that there were large areas of priority habitats on site, including various peatland habitats and calcareous grassland “which is likely to support a population of the northern brown argus butterfly, a priority species”. The RSPB recommended liaison with the local council and Butterfly Conservation regarding the calcareous grassland and northern brown argus butterfly.

[74] The respondent also had before it the Carstairs report. Among other things, the Carstairs report identifies that the site includes calcareous grassland (CG10), and acid grassland (U4). (CG10 and U4 are two of many descriptions of particular types of land, and at times are used interchangeably with the land types they describe, calcareous and acid grasslands). The Carstairs report notes that the high botanical diversity of calcareous flushes is also maintained by grazing, and any planting plan should ensure that grazing remains viable in the larger species-rich examples of these grasslands in order to preserve them and their associated fauna (p17). In a Planting plan assessment by the same authors of 11 November 2024 (the “Planting plan assessment”), it was reiterated it is generally recommended livestock grazing is maintained within large strands of CG10, and that deer grazing and thin soils might check some encroaching by grass and trees but that could not be guaranteed. The respondent was also aware that the Carstairs report contained a warning about its limitations in respect of reporting on butterflies, because the Carstairs report said (paragraph 3.1.19):

“Botanical surveying began in early August after the main flight period for most butterfly species. Surveying also took place during a heatwave which may have restricted normal activity of many species due to the risk of dehydration. The short

turf calcareous grasslands on site will likely support a high diversity of invertebrates especially butterflies. The site is highly suitable for the northern brown argus...as there was an abundance of its main food plant...in calcareous grasslands east of the track between Langhope and Todrig farms”.

[75] The northern brown argus butterfly had been expressly identified to the respondent as a species likely to be on the Todrig project site, by the RSPB and the Carstairs report. The respondent accepts it is aware of risks to the northern brown argus butterfly, and that it is on the Scottish Biodiversity list and vulnerable on the butterfly red list. The 2017 Regulations require the respondent to take into account criteria such as the use of, and relative abundance and regenerative capacity of natural resources, including biodiversity, in the area (regulation 11 and schedule 2). The situation of the northern brown argus butterfly is within those statutory criteria. There will no doubt be some situations in which the respondent does not have to consider individual species, where general consideration of species-rich habitats is sufficient. But that approach is not appropriate when a risk to a particular priority species has been identified and brought to the respondent’s attention in information provided to it. The respondent knew that there were limitations in information before it about butterflies, because the Carstairs report said so in terms, and the respondent knew that the RSPB had expressly recommended it to liaise with Butterfly Conservation about the northern brown argus butterfly. However, when the respondent made its decision, no information was before it from Butterfly Conservation, which had not been approached.

[76] The respondent argues it is sufficient that the screening decision, in its consideration of habitats rather than biodiversity, considers calcareous grasslands (CG10), and applies a planting buffer zone as appropriate mitigation. In short, the respondent argues that the species is protected by protecting the habitat. However, the affidavit from a staff member of

Butterfly Conservation indicates that calcareous grassland was not the only habitat within the Todrig project on which the northern brown argus butterfly is typically found. A food source, common rock rose, can grow on U4 acid grassland, and had been found by volunteers on the site along with northern brown argus butterflies. (The screening decision decided in relation to certain areas of U4 acid grassland “it is likely to be appropriate to plant these”). The affidavit further suggests that a buffer does not address other issues of grazing necessary to sustain calcareous grasslands, and is in any event not wide enough for the particular variety of sitka spruce being planted given its propensity to self seed as well as give rise to shade. The planting of trees round the areas of calcareous grassland is likely over time to result in their degradation. As a result, Butterfly Conservation does not consider that the habitats of the northern brown argus butterfly are adequately protected. The initial Carstairs report that was before the respondent contains in its conclusions a recommendation that any planting plan should ensure grazing remains viable in the larger species-rich examples of calcareous grasslands in order to preserve them and their associated fauna. The Planting plan assessment of November 2024 acknowledges that it would generally be recommended that livestock grazing is maintained in calcareous grasslands, and finds that other measures such as deer grazing to keep encroaching grass and trees in check “cannot be guaranteed”.

[77] It is not for the court to adjudicate on whether these matters referred to by Butterfly Conservation would result in the Todrig project being likely to have significant effects on the environment, because that is ultimately a question of planning judgment. They might or they might not. Nevertheless, the law required the respondent to take into account biodiversity. The northern brown argus butterfly and its habitat, and their relative abundance and regenerative capacity, are matters which ought to have been properly

considered, given the terms of the 2017 Regulations. The respondent did not take steps which had been recommended to it, under which it could have been informed of these relevant matters. It had powers to do so under regulation 13(4) of the 2017 Regulations, which it exercised in relation to other matters. The respondent did not put itself in a position in which it could properly determine whether the Todrig project was likely to have significant effects on the environment, without adequately informing itself of the situation in relation to a known at risk species, the northern brown argus butterfly, on biodiversity list of the Scottish Government (for whom it is an executive agency), that it had been told was likely to be on the site. As a result of the respondent having insufficient information in relation to the northern brown argus butterfly, its decision is irrational for having failed to take into account material considerations.

[78] Further, in the screening decision, the reasons were inadequate in relation to the northern brown argus butterfly. Under regulation 11(3) of the 2017 Regulations, the respondent had to provide only the “main reasons” for concluding the Todrig project is not an EIA project, not reasons on everything before it. But under regulation 11(3) the main reasons must be “with reference to such criteria set out in schedule 2 which are relevant to the forestry project proposed”. Criteria relating to biodiversity in schedule 2 paragraphs 1(c) and 2(b) of the 2017 Regulations already referred to are relevant, given the issues raised about the northern brown argus butterfly. In that context, the respondent considered it appropriate in the screening decision to address specifically black grouse, curlew and golden plover, also species on the Scottish biodiversity list and brought to its attention by the RSPB, and some other species. Yet it did not give reasons about the northern brown argus butterfly, despite risks to the species being a matter raised before it. The passage in the screening decision about calcareous grasslands does not refer to the northern brown

argus butterfly, and does not cover issues such as presence in other habitats such as acid grasslands, or degrading of the habitat of calcareous grasslands if not grazed. Given that the situation of the northern brown argus butterfly had been drawn to the respondent's attention, and was on its own biodiversity list, the situation differs from intermediate sensitivity areas. The reasons, to be proper and adequate in explaining why the Todrig project was not likely to have a significant environmental effect, ought directly to have addressed the northern brown argus butterfly. The informed reader is not given sufficient information in the screening decision to see that proper consideration has been given to the possible environmental effects of the development, or properly understand the reasons for the decision (*Bateman* paragraph 21).

[79] Accordingly, the screening decision is unlawful because the respondent did not have before it sufficient information properly to address the questions and criteria it was required to by the 2017 Regulations, despite its powers to obtain this, and as a result failed to take into account material considerations. The respondent also failed to provide adequate reasons for its decision.

Conclusion

Grounds of challenge relating to a Landscape Evaluation and the northern brown argus butterfly succeed. The court declares that the screening decision is unlawful and reduces it. It now falls to the respondent to reconsider the screening decision in the light of this opinion. The respondent may request further information, if it considers that necessary (regulation 13(4) of the 2017 Regulations). The petitioner is entitled to expenses, subject to a cap of £30,000 already set by the court in the protective expenses order.