

ISH 7 Oral Record and Supplementary Commentary

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Marsh harriers, HRA and IROPI compensation at SZC

Only one specific HRA impact of likely significance has been selected as the trigger for IROPI compensation in the Sizewell SSSI and Minsmere area. This is the removal of a small parcel of SSSI land reported to be used by foraging marsh harriers which breed at Minsmere. It is argued that mitigation is not available, and there is no alternative solution other than providing a substantially larger area of potential foraging north of the construction site. Now that the IROPI trigger has been engaged, the question is whether the foraging compensation is appropriate to HRA requirements.

There is a secondary argument. This is that the substantially excess amount of land over and above the lost SSSI parcel's size will also serve for Biodiversity Net Gain, a planning consideration but not yet a requirement until the Environment Bill receives Assent. This BNG justification can be seen clearly in SZC Community Newsletters (2019, but undated on the website). It states "In the longer term, the site – now being created in the Great Mount Walk Area of 47.8 hectares – will include extra grassland and wetlands which will be better for marsh harriers than the present conditions". We ask here, in passing, why the Newsletter refers to the "Great Mount Walk Area" when the ISH 7 examination referred to Upper Abbey Farm, and note also that another area further north at Westleton might be available - presumably "if needed", while the role of the Pakenham land at great distance remains unclear.

It can be observed, reasonably, that this is a lot of compensatory land for a very small but ecologically and legally important loss of foraging. A key question we explore below is why this provision does not constitute mitigation, as opposed to compensation. The measure is a like-for-like alternative provision.

1 Some Issues

- the question arises why this replacement foraging is not mitigation, rather than IROPI compensation
- the compensation is located very near the north limit of the SZC construction site and while it may supply appropriate foraging terrain, in principle it will suffer impact disturbance. Since the developer

has argued that there will be no significant disturbance at Minsmere – two waders have been assessed as below likely significant impact – there should be no problem for the marsh harriers to find and thrive on the new resource, as argued in the Community Newsletter cited above. If, however, the assessment of Minsmere impacts were to prove faulty, the same result would apply to the foraging compensation site(s). We suggest that the IROPI compensation test (arguably a more stringent appropriate assessment) needs to be applied to Old Mount Walk/Upper Abbey Farm hectares. It would involve other kinds of disturbance to the marsh harriers’ than just lost foraging. If there were breeding consequences in the reedbeds nearby at Minsmere, a very sensitive, small and iconic population of marsh harriers could collapse. Below we present a summary of marsh harrier sensitivities in reports, some case law, and research studies.

- why impact results for only 2 species of wading birds at Minsmere have been used to justify a “no significant impact” result
- the reason for the selection of marsh harriers as the only protected species present deserving HRA compensatory foraging terrains. Here we note that the marsh harrier narrative attracted an opinion from Natural England subsequent to the Rescoping exercise to the effect that the issue was protected site integrity rather than single species impact assessment.
- and related, why there is no focussed assessment specifically on the likely impacts on marsh harrier breeding as a key concern since they breed at Minsmere and this might be regarded as a precautionary duty
- why SCZ construction activities at Sizewell leading to geese changing their flightpaths is assessed as a “no disturbance” impact at Minsmere
- why Aldhurst Farm does not count as compensatory marsh harrier foraging, being close to the lost SSSI land parcel
- how can the supplementary Pakenham facility for marsh harrier foraging be a credible compensation at 30 miles distant for a species known for foraging close to its breeding sites.

2 RIES timing and status

At Pre-Examination, we asked about RIES timetabling and the limited consultation time of 2 weeks. The extension to 3 weeks is welcome to provide time to consider how the recent post Brexit HRA Regulations (2019) will be arranged for consultation. We understand the duty of fully considering the IROPI case and consequent appropriate compensation is to be delegated to the ExA.

3 Legislative Context - Environment Bill and NPS-EN6 Review

We are grateful for the clarification provided about the Examination process being likely to fall into a changed legislative framework with the new Environment Act legislation. Its Biodiversity Net Gain provision is likely to be important for assessing IROPI compensation.

Another consideration is that the completion of the ongoing Review of NPS EN 6, flagged for y/e 2021, will embody relevant enhancements of some EIA issues (already approved after due consultation). It will most likely make provisions for EN6 to be “freestanding” of EN1. This would impact the developer’s dependency on the 2011 EN1 and EN6 specifications, the assertion of “no changed circumstances” since then and the consequent “tilted balance” planning argument.

4 Foraging birds - baselines and some authorities

We have been researching marsh harrier protection literature, with particular interest in peer-reviewed literature of recent date, having noted the comments in the Cleve Hill Solar Park case (DCO Ref. EN 010085) September 2019 from Natural England. This states that the evidence about construction site impacts on marsh harriers is “neither way” and that further research showed a weak research background. NE uncovered a study by Aves et al of 2014 on a Spanish development case which they described as the “best available”. We are seeking more up-to-date work, and will forward any results. Another case reference is the 2015 Hyder Report for the SoGC of National Grid Gas and the RSPB (otherwise undated) showing a mitigation plan for a short term and minor disturbance of marsh harriers.

An important study goes back to early Sizewell C days. By ENTEC and commissioned by the British Energy Group before the EDF acquisition, it was published in September 2009, with a subsequent overall Sizewell Bird Report (February 2008). The marsh harrier special study concludes from exhaustive field surveys that

“The most likely effect of nuclear new build at Sizewell on marsh harriers is disturbance during the construction process.” (para 2.2, p5)

We are researching foraging distances during the breeding season. For the assessment criteria required by the originating EU Directive(s) we have examined the Spain, Santana Case (August 2, 1993) for its citation of the principles of conservation of wild birds requiring “Member States to preserve, maintain and re-establish the habitats of said birds as such, because of their ecological value”. HRA Directive Article 6 further specifies “deterioration of natural habitats” and “disturbance of designated species”. Brexit has not (yet) changed these fundamental requirements.

Further, we have looked at some case law about foraging birds, namely about red kites in mid Wales – Mynydd y Gwynt - in respect of foraging around a proposed wind farm, and its codification, on appeal, of IROPI by Jackson LJ , and the hen harrier protection questions and mitigation hierarchy in the Irish “People Over The Wind” cases (respectively February 22, 2018, EWCA Civ 231 and July 25, 2018, C-164/17).

5 Modelling disturbance and foraging

Population data about marsh harriers in the UK suggest that the species – and maybe other foraging species – are extremely sensitive to disturbance which would include removal of a proportion of customary foraging terrain. The proximity of breeding and foraging is a prominent question.

The rather dated ENTEC Report and other common sources show that marsh harriers have a 6 year life cycle, have 5 eggs and an average chick survival rate of under half of the eggs. The population reduced in the UK to only one pair at Minsmere in 1971, and it took 25 years for the population to recover. The current British population is a mere 400, increasing from between 205 and 233 breeding pairs in 2003. Minsmere reports 10 pairs currently. An acute sensitivity to disturbance is indicated with such a slow recovery rate, while the post millennial recovery is attributed to migration from Holland where the species is stronger. The ENTEC Report conducted extensive flight path surveys as its data collecting methodology. The resident/migrant balance seems to have been changing in favour of residence. The RSPB conducted a repeat of its 1995 survey in 2005 reporting an estimated 360 breeding females in Britain.

6 Regulatory requirements

Cumulative impacts, longevity of impacts - most evidently a precautionary consideration - and combined impacts need to be considered. This cluster might be seen as practical expressions of thematic sustainability.

Cumulative Are there other species present as residents/migrants equally dependent on foraging in the food chain and equally vulnerable to change and other kinds of disturbance? Our favourite candidate is the nightjar, which featured in the ENTECH Report, and early Environment Reports by the developer.

Longevity With a 6 year life cycle, the marsh harrier risks impact from the SZC project for two to three generations, a period we suggest should be measured against the developer's time scale of "long term enhancement" and "better conditions".

Combination At a minimum, this involves the interdependence of the SSSI and Minsmere, and the overlapping zones of habitation between and around them. These zones may differ in area, but there is a formal question of relevance about whether a mitigation or compensation which is located too far away for natural discovery by the marsh harriers might count as managed transmigration. Study data about managed migration would be valuable.

The question of distance also involves Aldhurst Farm. Might it not be considered as a ready and waiting mitigation and/or compensation site with its wetland and other terrain suitable for the marsh harrier to forage in? If it is claimed to be available to other protected SSSI inhabitants. If the developer reasoned against this option - disturbance in the proximity - it would suggest an inconsistency of reasoning and assessment, perhaps resulting from a lack of a cumulative and combined assessment of the Natura 2000 sites and their associated zones.

7 Compensation Criteria

Issues arising are clear:

(1) IROPI, if granted, would confront the question of the suitability of the proposed compensation site(s) with the tests of proportionality, practicability and sustainability - incorporating a precautionary test within the latter requirement.

To understand how this might work out, we have looked at the Wylfa Horizon DCO documentation. The case for IROPI, was on grounds, as we understand it, of disturbance to a sea bird population not being mitigatable and an umbrella of

poor design, drawn from the sustainable development criterion of the 2008 Act. The Wylfa document, (PINS Ref ENO10007) Wylfa IROPI, 12.2.2019 establishes that “the appropriate authority must secure that any necessary compensation measures are taken to ensure that the overall coherence of Natura 2000 is protected”. This requirement was, however, not pursued. The document simply re-asserts a “policy and need” argument based on an unchanged interpretation of NPS EN1 and 6, an approach being followed by the SZC developer.

(2) there is natural question about the Resilience Fund being explored for Minsmere and whether it has any basis as compensation, since the developer’s case is that there is no sufficiently likely and substantial impact on this protected site. It appeared from ISH 7 that such a fund would be based on visitor footfall. Questions arise at this stage about whether any final agreement from the SoGC might relate in any meaningful way to HRA requirements. What, in any case, might “resilience” mean in an HRA setting ? How it might address a fundamental question of RSPB members and Minsmere visitor amenity ? To put a fine point on this consideration, might not a devotee of the geese present at Minsmere regard an avoidance flightpath of geese disturbed by the SZC project as a deterioration of the visitors’ amenity ?

Amenity should be considered as a substantial dimension of negative impact. Should the SZC project go ahead with a deterioration of the protected species populations at Minsmere, the Environmental Damage (Prevention and Remediation) Regulations 2015 might provide some recourse, with its incorporation of the amenities doctrine for protected sites in Schedule 1. In passing, we note that the tourism impact assessments examined so far do not seem to take account of locally based tourism, i.e. Suffolk resident’s amenity, as distinct from overnighting and staycationing.

Environmental damage legislation was in its infancy at the time of the Layfield Inquiry into Sizewell B and much else has changed, contrary to EDF’s repeated assertions in its Application documents. But the Inquiry’s conclusion remains relevant: “Only proven national interest and lack of alternative sites can justify the construction of Sizewell B” (para 108.26, Official Summary, December 5, 1986).

A final consideration is that EDF may have been influenced in choosing the modest foraging loss at the SSSI to trigger IROPI habitat compensation by its subsequent need for land adjacent to the main development site and which it owns as a part of the EDF estate. If the SSSI’s integrity has been changed, a precedent would be being established. We note that DCO re-determinations are

now numerous. It has already acquired extra necessary development space at Coronation Wood, has proposed encroachment on to the Sizewell dunes and faces a site size issue if the NPS EN6 review enacts the restrictive requirement – approximate hectares per reactor – on which Government has already consulted. We have already raised the question of adequate space for nuclear waste storage for the project's life expectancy of 60 to 80 years.

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