



The Sizewell C Project

Note on Marsh Harrier Habitat

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1 MARSH HARRIER HABITAT IMPROVEMENT AREAS

1.1 Introduction

1.1.1 This note addresses:

- the condition in section 122(2) of the Planning Act 2008 ("PA08) that must be met before powers of compulsory acquisition can be granted over land (Section 1.2);
- SZC Co.'s position on whether the section 122(2) condition has been met (Section 1.3);
- Interested Parties' position on whether the section 122(2) condition has been met (Section 1.4); and
- what the Secretary of State should have regard to in deciding whether habitat within the EDF Energy Estate constitutes sufficient compensation without the need for additional land at Westleton (Section 1.5).

1.2 Compulsory Acquisition: Conditions to be met

1.2.1 As explained in Section 7.2 of the **Statement of Reasons** [\[APP-062\]](#), section 122 of the PA08 provides that a development consent order ("DCO") may include provision authorising the compulsory acquisition of land only if the Secretary of State is satisfied that certain conditions have been met.

1.2.2 The condition in section 122(2) PA08 is that the land is:

- (a) required for the development to which the DCO relates;
- (b) required to facilitate or is incidental to that development; or
- (c) is replacement land which is to be given in exchange for the Order land under section 131 or 132 PA08.

1.2.3 Guidance (Ref. 1.1) states that:

"For this to be met, the applicant should be able to demonstrate to the satisfaction of the Secretary of State that the land in question is needed for the development for which consent is sought. The Secretary of State will need to be satisfied that the land to be acquired is no more than is reasonably required for the purposes of the development."

1.3 The Applicant's position on the requirement for the land

1.3.1 Sections 4 and 7.3 of the **Statement of Reasons** [APP-062], as updated by the **Statement of Reasons Addendum** [AS-149], explain why SZC Co. considers that this condition has been satisfied in respect of the land to be acquired for the Project and details on a site by site basis why that land is needed for the development.

1.3.2 With regard specifically to the Marsh Harrier habitat improvement area at Westleton, footnote 3 at page 23 of the **Statement of Reasons** [APP-062] states:

"The conclusion of the main DCO Shadow Habitats Regulation Assessment Report (Doc Ref. 5.10) and the DCO Shadow Habitats Regulation Assessment Volume 4 – Compensatory Measures Report (Doc Ref. 5.10) is that the permanent habitat improvement area of 47.8ha that has been established, but is being further improved, at the northern edge of the EDF Energy Estate (UK grid reference: TM 46318 65222) would provide sufficient foraging to be regarded as appropriate compensation for the predicted 'loss of foraging' over the Sizewell Marshes SSSI, arising as a result of a barrier effect created by the temporary construction area. This effect is assessed within Chapter 14 of Volume 2 of the ES and also in the DCO Shadow Habitats Regulation Assessment Report. However, if it is determined by the Secretary of State that additional marsh harrier habitats are required, then the marsh harrier habitat improvement area (Westleton) would be temporarily used to provide this."

1.3.3 More detail on this was provided in **Appendix 7F to the Response to the Examining Authority's First Written Questions, Bio.1.48** [REP2-110], at paragraphs 1.2.37 to 1.2.48. In summary:

- SZC Co.'s position is that whilst an adverse effect on the integrity of the Minsmere-Walberswick Special Protection Area ("SPA") cannot be excluded (see Section 1.5 below), the 48.7ha of permanent foraging habitat within the EDF Energy Estate constitutes sufficient and appropriate compensatory measures, and on that basis the additional land at Westleton would not be required.
- Should the Secretary of State agree with SZC Co., SZC Co. would expect the Secretary of State to omit Work No. 8 (Marsh Harrier Habitat, Westleton) from the DCO, and not to include powers for the compulsory acquisition of that land.
- However, if – notwithstanding the assessment provided by SZC Co. - the Secretary of State finds, as suggested by some Interested Parties (see Section 1.4 below), that the 48.7ha of permanent foraging habitat

within the EDF Energy Estate does not constitute sufficient compensation, the inclusion of the additional land at Westleton would ensure that the DCO provides adequate compensatory habitat provision.

- Provisions are included in the **Draft Deed of Obligation** [[REP5-082](#)] to secure the delivery of the additional compensatory habitat at Westleton which are conditional on a conclusion by the Secretary of State that the land is required.
- Paragraphs 1.2.47 and 1.2.48 of **Appendix 7F** [[REP2-110](#)] explain in detail why, in circumstances in which the Secretary of State does conclude that this land is necessary, SZC Co. considers that the inclusion of compulsory acquisition over this land within the DCO would be justified on a without prejudice basis and would satisfy the condition in section 122(2) PA08.
- This approach allows the opportunity for full and proper consideration of the question of whether sufficient compensatory habitat is provided within the EDF Energy Estate, and ensures that the delivery of additional compensatory habitat will be secured if it is judged to be required.

1.4 Interested Parties' position on the requirement for the land

1.4.1 It is the contention of the RSPB/SWT and others that the on-site provision of 48.7ha of habitat creation on the EDF Energy Estate, immediately adjacent to the Minsmere South Levels, is not sufficient to offset the predicted 'loss' of the Sizewell Marshes. For example, at paragraph 3.478 of the RSPB/SWT written representations, it is stated: "*Based on the above, we do not agree at this stage that the compensation measures are sufficient to protect the overall coherence of the National Sites Network (formerly known as the Natura 2000 Network of European sites within the UK) for breeding marsh harriers.*" Also at paragraph 3.483 it is stated: "*Whilst we agree that the proximity of the compensation area to Minsmere is beneficial, we do not agree that 48.7ha of dry habitats are adequate to compensate for the foraging provided by 100ha of wet habitats due to the differences in habitat extent and type and the likely effects on prey provisioning levels. We also are concerned that loss of access to arable habitats is not compensated.*" As SZC Co. understands the position of the RSPB/SWT, it is that further compensation in the form of additional land (or habitat of higher quality) for foraging needs to be provided.

1.4.2 The position of Natural England, as detailed in their **Summary of Oral Representations made at Issue Specific Hearing 7: Biodiversity and Ecology on 15 and 16 July 2021** [[REP5-160](#)], is that "*the offer of additional*

compensatory habitat at Westleton will minimise residual concerns that the displacement of marsh harriers could result in an impact” subject to:

- *‘reassurance that the wetland creation element of the compensation area is feasible given their previous justification for not including it in initial proposals; and*
- *confirmation that the wetland element of habitat creation will be in place prior to construction (should consent be granted).’*

1.4.3 Notwithstanding the point that the Westleton site is not included within the application as an ‘offer’ (rather as a contingency, see paragraph 1.3.2 above), the above comments are taken to mean that Natural England believe that the Westleton site is required, in addition to the onsite proposals (as enhanced by the wetlands introduced in the January 2021 change application).

1.4.4 It is the position of N Bacon and their agents (soon to become landowners of the Westleton land, pending completion) that there is an alternative to the land included within the proposed Order limits at Westleton. The location of this alternative land, in the vicinity of Middleton, was shared with SZC Co. on Monday 9 August 2021, just prior to the start of the August 2021 Compulsory Acquisition Hearings (“CAH”). The suitability of this land as an alternative is being investigated but it should be noted that the land is under an Environmental Stewardship scheme which lasts until late 2023 and had previously been screened out in identifying appropriate land parcels. SZC Co.’s position as to the approach that should be taken when considering an alternative such as this, which is advanced by an objector only at a late stage, is summarised in the **Written Summaries of Oral Submissions made at the CAH 1 Parts 2 to 4 (18 August 2021)** (Doc Ref. 9.75).

1.5 **What should the Secretary of State have regard to in deciding whether the EDF Energy Estate provision is sufficient?**

1.5.1 In reaching a decision on whether to include the additional land at Westleton within the DCO and to grant compulsory acquisition powers over it, the Secretary of State must first decide whether the 48.7ha of permanent foraging habitat to be provided within the EDF Energy Estate would be adequate compensatory habitat provision, or whether additional foraging habitat is needed.

1.5.2 The conclusion of Stages 1 (screening) and 2 (appropriate assessment) of SZC Co.’s **Shadow Habitats Regulations Assessment Report, Volume 1** [[APP-145](#)] for the Project is that an adverse effect on the integrity of the Minsmere-Walberswick SPA and Ramsar site cannot be discounted. This

conclusion is reached due to the potential effect of noise and visual disturbance from construction activities on the breeding marsh harrier *Circus aeruginosus* population.

1.5.3 In accordance with the Conservation of Habitats and Species Regulations 2017, SZC Co. has proposed measures required to deliver appropriate compensatory habitat to offset potential adverse effects on the breeding marsh harrier population of the SPA and Ramsar site.

1.5.4 Section 2 of the **Shadow Habitats Regulations Assessment Report, Volume 4** [[APP-152](#)] describes the investigations that have been carried out over a number of years to establish the feasibility and design of the proposed habitat enhancement measures. It explains the principles that must be taken into account. In particular, paragraph A.7.5 of Annex A to the National Policy Statement for Nuclear Power Generation (EN-6) states that:

"Where site level assessments identify that compensation is required it must meet the following criteria and be:

- appropriate for the area and the loss caused by the project;*
- capable of protecting the overall coherence of the Natura 2000 network;*
- capable of implementation;*
- capable of ensuring that the Natura 2000 site is not irreversibly affected by the project before the compensation is in place;*
- directed in measurable proportions to the habitats and species negatively affected;*
- related to the same biogeographical region (within the UK);*
- serves functions that are comparable to those that motivated the original area's submission for designation; and*
- clearly defined, with implementation goals and managed so that the compensatory measures can achieve the goal of maintaining or improving the overall coherence of the Natura 2000 network."*

1.5.5 As explained at the CAH on 18 August 2021, the application of those criteria inevitably involves the exercise of judgment based on expert evidence.

1.5.6 The **Marsh Harrier Habitat Report** [[REP2-119](#)] describes in detail the proposed compensatory habitat within the EDF Energy Estate as updated with a new wetland component introduced in January 2021.

1.5.7 Section 3 of the **Shadow Habitats Regulations Assessment Report, Volume 4** [[APP-152](#)] sets out the suitability of the proposed compensatory habitat within the EDF Energy Estate and explains how the extent has been calculated and the location has been established. Table 1.3 assesses the proposed compensatory habitat within the EDF Energy Estate against each of the relevant principles set out above. This report states, at paragraph 3.4.9, that:

"If the habitat management undertaken on the compensation land can deliver prey abundance and availability (via suitable vegetation structure) comparable to that on the Sizewell Marshes, then the proximity of the compensation land to the nesting area should enable it to deliver the necessary function (i.e. equivalent to the flight activity from the wetland habitat assumed to be lost at Sizewell Marshes and elsewhere) and represent sufficient compensatory measures."

1.5.8 In response to various matters raised at Issue Specific Hearing 7, a paper describing the sufficiency of compensatory measures for marsh harrier was submitted at Deadline 6 (refer to **Appendix B of Written Submissions Responding to Actions Arising from ISH7: Biodiversity and Ecology Parts 1 and 2** [[REP6-002](#)]), including information on:

- Sufficiency of the compensatory habitat, comprising comments on:
 - Range of habitat types.
 - Predicted use of compensatory habitat by marsh harrier and the importance of proximity.
 - Prey resource for marsh harrier.
 - Timing of compensatory habitat provision.
- Monitoring proposals
- Land at Westleton, comprising:
 - Role of the land at Westleton
 - Selection of the land at Westleton

1.5.9 Section 4 of Appendix B of [REP6-002](#) explains why the Westleton site is considered to be an appropriate additional site having regard to the relevant criteria for identifying such sites, so that nesting marsh harriers are likely to locate and use the compensatory habitat. Sub-section 4.3 summarises how the habitat would be enhanced so as to fulfil its intended role, with more detail to be found in [REP3-053](#).

1.5.10 Section 5 of Appendix B of [REP6-002](#) provides the details of the relevant tests for compensatory measures and explains how the compensatory habitat provision meets the tests. Paragraphs 5.1.1 to 5.1.2 replicate relevant extracts from the EC Guidance on Article 6 of the Habitats Directive on compensatory measures. Table 5.1 reproduces Table 1.3 from the

Shadow Habitats Regulations Assessment Report, Volume 4 [[APP-152](#)] on the principles set out in the National Policy Statement for Nuclear Power Generation (EN-6). Paragraphs 5.1.9 to 5.1.10 refer to Defra guidance published in February 2021 (Ref. 1.2) and identify the factors within that guidance that are relevant to compensatory measures, being:

- How technically feasible and effective the measures will be - based on scientific evidence and previous examples.
- How financially viable the measures are - the proposer must have enough funds to cover costs.
- How the compensation would be carried out, including how it will be managed and monitored over the time that it is needed, and how it has been secured.
- Distance from the affected site - compensation closer to the site is generally preferred, unless measures further away will benefit the network of European sites as a whole.
- How long the compensatory measures will take to reach the required quality and amount of habitat

What if the Secretary of State concludes that it would not be adequate compensatory habitat provision?

1.5.11 If the Secretary of State decides that the 48.7ha of permanent foraging habitat to be provided within the EDF Energy Estate would not be adequate compensatory habitat provision, the Secretary of State must then decide:

- if the additional land at Westleton would meet any deficit considered to exist; and if so
- whether there is a compelling case for the compulsory acquisition of that additional land.

1.5.12 With regard to the adequacy of the additional land at Westleton, as mentioned above, Appendix B of [REP6-002](#) provides details of the proposed Westleton provision, its suitability to fulfil the intended compensatory function, how this site was selected using appropriate criteria, and the sufficiency of the habitat in this location. The **Marsh Harrier Compensatory Habitat Report** [[REP3-053](#)] also details the proposed approach to marsh harrier habitat provision on this additional land at Westleton. For the reasons identified in those documents, if additional compensatory habitat is required, the Westleton site would be both suitable and adequate to meet any potential deficit.

1.5.13 SZC Co.'s position with regard to whether there is a compelling case for the compulsory acquisition of the Westleton land in those circumstances is set

out in paragraphs 1.2.37 to 1.2.48 of **Appendix 7F to the Responses to the Examining Authority's First Written Questions, Bio.1.48 [REP2-110]**. In particular, sub-paragraphs (a) to (f) of paragraph 1.2.47 identify the reasons that “*demonstrate the additional compensation land at Westleton is required to facilitate the Sizewell C Project and there is a compelling case in the public interest for the land to be acquired compulsorily*”.

1.6 CONCLUSION

1.6.1 For the reasons explained in Section 1.2 of this note, SZC Co. considers that the Secretary of State should be satisfied that the condition in section 122(2) PA08 is met in respect of all of the land to be compulsorily acquired for the Project. This is because, as explained below, the DCO (if granted) would only authorise the compulsory acquisition of land that the Secretary of State is satisfied is required for the development.

1.6.2 This applies to the Marsh Harrier habitat improvement area at Westleton because there are two alternative scenarios which would ensure the satisfaction of the condition in section 122(2) PA08, being:

- **Scenario 1:** The Secretary of State agrees with SZC Co. that the additional land at Westleton would not be required and so omits Work No. 8 (Marsh Harrier Habitat, Westleton) from the DCO and does not include compulsory acquisition powers for that land; or
- **Scenario 2:** The Secretary of State disagrees with SZC Co. and concludes that the additional land at Westleton would be required, in which case the Westleton land would have been found to be required in order adequately to compensate for the effects of the proposed development, and it would be appropriate to include Work No. 8 (Marsh Harrier Habitat, Westleton) in the DCO and grant compulsory acquisition powers for that land to ensure the compensation habitat is provided.

1.6.3 Section 1.5 above sets out the criteria that must be met for any such compensation and explains how the proposed compensatory habitat provision meets these tests.

REFERENCES

1.1 Department for Communities and Local Government, 'Planning Act 2008: Guidance related to procedures for the compulsory acquisition of land', September 2013, paragraph 11.

1.2 'Habitats regulations assessments: protecting a European site Guidance', February 2021.