



**SCOTTISHPOWER  
RENEWABLES**

# **East Anglia TWO and East Anglia ONE North Offshore Windfarms**

## **Applicants' Response to Natural England's Legal Submissions Concerning Displacement of Red-Throated Divers in the Outer Thames Estuary SPA**

Applicant: East Anglia TWO Limited and East Anglia ONE North Limited  
Document Reference: ExA.AS-11.D6.V1  
SPR Reference: EA1N\_EA2-DWF-ENV-REP-IBR-001242

Date: 24<sup>th</sup> February 2021

Revision: Version 01

Author: Gregory Jones QC, Andrew Fraser-Urquhart QC and Conor Fegan of Francis Taylor Building, instructed by Shepherd and Wedderburn LLP

**Applicable to East Anglia TWO and East Anglia ONE North**

# Applicants' Response to Natural England's Legal Submissions Concerning Displacement of Red-Throated Divers in the Outer Thames Estuary SPA

## Introduction and Background

1. One of the issues that has arisen between the Applicants and Natural England during the Examination is whether or not East Anglia ONE North (“**EA1N**”) and / or East Anglia TWO (“**EA2**”) (together the “**Projects**”) would “adversely affect the integrity” of the Outer Thames Estuary Special Protection Area (the “**Outer Thames Estuary SPA**”).
2. Concern has centred on the impact that the Projects would have on Red-Throated Divers (“**RTDs**”), a species of bird that is protected under Annex I of Directive 2009/147/EC of the Conservation of Wild Birds (the “**Wild Birds Directive**”). The Outer Thames Estuary SPA was designated in August 2010 because of the large population of non-breeding, wintering RTDs that it supports through its habitat. The main concern is that the Projects will cause “disturbance” or a “displacement effect” to RTDs in the Outer Thames Estuary SPA.
3. There is no dispute that the Projects will cause *some* degree of “disturbance” and “displacement”.
4. There is, however, a dispute about:
  - (i) the precise *extent* of the “disturbance” or “displacement” that would occur (i.e. how great would the effect be). The parties have submitted evidence on that issue which is not repeated in these legal submissions;

- (ii) whether the “disturbance” or “displacement” that would occur would “adversely affect the integrity” of the Outer Thames Estuary SPA.
- 5. That second point (i.e. is there an adverse effect on the integrity of the Outer Thames Estuary SPA) is a legal question that needs to be considered under Regulation 28(5) of the Conservation of Offshore Marine Habitats and Species Regulations 2017 (the “**Offshore Habitats Regulations**”).
- 6. Following extensive discussions with Natural England and internal work, the Applicants submitted a report on the displacement effects on RTDs [REP3-049]. That report reviewed the most up to date ecological evidence, and concluded that the Projects would not “adversely affect the integrity” of the Outer Thames Estuary SPA [REP3-049] (the “**RTD Displacement Report**”).
- 7. Following that, Natural England submitted “Legal Submissions Concerning Displacement of Red-Throated Divers in the Outer Thames Estuary SPA” at Deadline 4, in which it argued that the assessment undertaken by the Applicants in the RTD Displacement Report contains “errors of law” [REP4-089] (“**Natural England Legal Submissions**”). It said that the Examining Authority and the Secretary of State should conclude that the Projects “would adversely affect” the integrity of the Outer Thames Estuary SPA (at paragraphs 10 – 13). The Applicants do not agree with that assertion. The approach set out in the Natural England Legal Submissions is wrong in law.
- 8. In these submissions, the Applicants will respond to the main arguments made in the Natural England Legal Submissions and will explain, for the assistance of both the Examining Authority and the Secretary of State, the correct approach to take in law when considering

whether the Projects would “adversely affect the integrity” of the Outer Thames Estuary SPA.

9. There are two other brief points that need to be made by way of background.
10. First, the law as set out here takes account of the United Kingdom’s departure from the European Union. The effect of European Union law in domestic law is now governed by the European Union (Withdrawal) Act 2018. The Applicants, like Natural England, do not intend to set out the legal provisions relating to the United Kingdom’s departure from the European Union in any detail here, but reserves the right to do so if an issue about the applicability or scope of retained European Union law arises during the Examination.
11. Second, alongside these submissions the Applicants have submitted an update to the RTD Displacement Report [document reference ExA.AS-10.D6.V3]. The purpose of that update is to clarify some of the language used in the RTD Displacement Report in order to make it clear that, contrary to what is said by Natural England, there will not be any habitat “loss” within the Outer Thames Estuary SPA as a result of the proposed turbines. This is a disturbance case, not a “habitat loss” case. This is discussed in more detail below.
12. Unless otherwise stated, references to paragraph numbers in brackets below should be read as references to paragraph numbers in the Natural England Legal Submissions.

### **The Legal Framework**

13. It is helpful to set out the legal framework.

14. Regulation 28 of the Offshore Habitat Regulations sets out the familiar two stage approach that needs to be followed when considering whether a project will affect a designated European site.
15. First, the project needs to be screened to determine if it is “likely to have a significant effect” on a designated site, and if it does then there must be an “appropriate assessment”. Regulation 28(1) – (2) says:
  - (1) Before deciding to undertake, or give any consent, permission or other authorisation for, a relevant plan or project, a competent authority must make an appropriate assessment of the implications of the plan or project for the site in view of that site’s conservation objectives.
  - (2) In paragraph (1), a “relevant plan or project” is a plan or project which —
    - (a) is to be carried out on or in any part of the waters or on or in any part of the seabed or subsoil comprising the offshore marine area, or on or in relation to an offshore marine installation;
    - (b) is likely to have a significant effect on a European offshore marine site or a European site (either alone or in combination with other plans or projects);
    - (c) is not directly connected with or necessary to the management of that site.
16. Footnote 2 of the Natural England Legal Submissions records the common ground with the Applicants that there is “agreement that EA1N and EA2 each cross the ‘screening threshold’ of significance in relation to their effects on the Outer Thames Estuary SPA and must be subject to an appropriate assessment.”
17. Second, after conducting the “appropriate assessment of the implications of the plan or project for the site in view of that site’s conservation objectives” (Regulation 28(1)), the competent authority then needs to ask itself whether the project would “adversely affect the

integrity of” the site in question. If it would, then unless the conditions in Regulation 29 are satisfied (e.g. IROPI etc.) consent must be refused. Regulation 28(5) puts it in these terms:

(5) In the light of the conclusions of the assessment, and subject to Regulation 29, the competent authority may agree to the plan or project only if it has ascertained that it will not adversely affect the integrity of the European offshore marine site or European site (as the case may be).

18. Finally, it must be remembered that the Offshore Habitats Regulations were brought into effect in order to transpose into domestic law the requirements of the Birds Directive and Council Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora (the “**Habitats Directive**”). In particular, the text set out above (i.e. Regulation 28 of the Offshore Habitats Regulations) is intended to transpose into domestic law the requirements of Article 6(3) of the Habitats Directive. And under Article 7 of the Habitats Directive, the obligations contained in Articles 6(2) – (4) of the Habitats Directive replace the obligations in Article 4(4) of the Birds Directive. In short, that means the obligations under Article 6(2) – (4) of the Habitats Directive apply to SPAs.
19. Although the United Kingdom has left the European Union, when interpreting the Offshore Habitats Regulations, it is relevant to look at the Habitats Directive and the Birds Directive, as well as the case law of the Court of Justice of the European Union on those Directives (European Union (Withdrawal) Act 2018, ss. 2 – 7). However, as the high court has recently reaffirmed in *Crest Nicholson Operations Limited, Hallam Land Management Limited, Wilson Enterprises Limited- and -West Berkshire District Council- and -AWE Plc, The Secretary of State for Defence, Public Health England, Office for Nuclear Regulation* [2021] EWHC 289 (Admin), the starting point should be the domestic transposing regulations (underlining added):

“122. Even before the UK ceased to be an EU Member State, the starting point for any legal analysis was the domestic implementing legislation. In the vast majority of cases that would provide the answer. Only exceptionally in cases where the law was unclear or failed properly to implement the underlying EU instrument was it necessary to look to the latter. The legal developments consequent upon the UK ceasing to be an EU Member State on 31 January 2020 make it even more important that any legal question involving rights or obligations said to be derived from EU law should now be approached in the first instance through the lens of domestic law (Polakowski & Ors v Westminster Magistrates Court & Ors [2021] EWHC Civ 53 at paragraphs §17 & §18).”

20. Two broad concerns have been raised by Natural England:
  - (i) the approach to “adverse effects on integrity” in light of the Conservation Objectives;
  - (ii) the use of a “baseline” and the “in-combination assessment” that has been undertaken.
21. There are also a number of other minor issues raised by Natural England.
22. The Applicants propose to deal with the two broad issues identified above in turn, before then dealing with the remaining minor issues.

### **Approach to Adverse Effects on Integrity**

23. Natural England asserts that if RTDs are denied access to part of the Outer Thames Estuary SPA as a result of “displacement” or

“disturbance” then the effect of that would be to “diminish the functional size of the SPA”, giving rise to an adverse effect on integrity (paragraph 10):

“All [of the Conservation Objectives] are relevant and must be kept in view in an appropriate assessment. Numbers of RTD are clearly relevant, but so is their distribution within the SPA and their ability to use all suitable habitat contained in the SPA. If RTD are denied access to part of the SPA which would otherwise be suitable for them the effect is to diminish the functional size of the SPA, contrary to the conservation objectives.”

24. That argument is based on a false premise: although there will be “disturbance” in this case, it is not right to say that RTDs will be “denied access to part of the SPA which would otherwise be suitable for them” (paragraph 10). The RTD Displacement Report, which reflects the “best scientific knowledge in the field” (*Holohan v An Bord Pleanála* (Case C-461/17) [2019] PTSR 1054 at paragraph 33), does not say that RTDs will be “denied access to part of the SPA which would otherwise be suitable for them” (paragraph 10). There is no evidence of that.
25. There is a distinction between “disturbance” and “loss of habitat”. This is a case of “disturbance”, not “loss of habitat.” The extent of the habitat available for the RTDs will not change as a result of the Projects. All that will happen is that there will be a small amount of “disturbance”, giving rise to dynamic “redistribution” in the Outer Thames Estuary SPA. This is clear from the RTD Displacement Report.
26. Version 2 of the RTD Displacement Report did refer to an “*effective* loss of habitat” (italics in original). But it is apparent this phrase has been apt to mislead. The updated RTD Displacement Report that has been submitted alongside these representations has clarified matters by



replacing that phrase with “*effective* area of the SPA subject to displacement”. That is because the phrase “*effective* loss of habitat” was prone to misunderstanding, as the Natural England Legal Submissions show. However, the evidence has not changed.

27. To be clear, as concluded in the updated RTD Displacement Report in Table 11, the “extent [ ... ] of the habitats of the qualifying features”, will be “unaffected”. There will be no change to the extent of it.
28. Given that the premise of the argument made by Natural England in their Legal Submissions (i.e. that there will be a functional loss of habitat) is wrong, the rest of the argument that follows on is also wrong (paragraphs 10 – 12).
29. In particular, the two cases relied on by Natural England are not on point.
30. *Sweetman v An Bord Pleanála* (Case C–258/11) [2014] PTSR 1092 was not the same as this case. That case concerned the Lough Corrib SCI. As the Court of Justice of the European Union explained at paragraph 45, Lough Corrib was “designated as a site hosting a priority habitat type because, in particular, of the presence in that site of limestone pavement, a natural resource which, once destroyed, cannot be replaced”. “Limestone pavements” were specifically listed for protection in Annex I of the Habitats Directive. The development in question in that case was the N6 Galway City Outer Bypass Road Scheme. It was accepted that the road would remove 1.5 hectares of the limestone pavement within the Lough Corrib SCI. In other words, the proposed development would lead to (a) the complete destruction; of (b) a protected habitat which was the very reason for designating Lough Corrib in the first place.

31. In the present case, there is no destruction of a habitat that is protected under Annex I of the Habitats Directive. All that will happen is “disturbance” of the RTDs, with a knock on “redistribution effect” of the RTDs in a limited part of the Outer Thames Estuary SPA.
32. *Grace and Sweetman v An Bord Pleanála* (Case C-164/17) [2019] PTSR 266 was also a case about the “loss of habitat” as opposed to “disturbance”. That case concerned the Slieve Felim to Silvermines Mountains SPA the conservation objective of which was to maintain or restore the favourable conservation condition of the hen harrier. The proposed development was a wind farm and it was determined that it would lead to a “permanent and direct loss” of part of the foraging habitat, as well as a “temporary loss of part” of another part (at paragraph 42). This was considered to be an adverse effect on integrity (Article 6(3)).
33. Again, this case is not comparable because there is neither a permanent nor a temporary loss of supporting habitat for the RTDs. This is a “disturbance” and “redistribution” case, not a “habitat destruction” case.
34. That is the basis on which the Examining Authority and the Secretary of State must approach the question of whether or not the Projects would “adversely affect the integrity” of the Outer Thames Estuary SPA.
35. When considering whether the “disturbance” and “distribution effect” on the RTDs would “adversely affect the integrity” of the Outer Thames Estuary SPA, the Examining Authority and the Secretary of State should start with the Conservation Objectives for the SPA. This is because Regulation 28(1) requires the “appropriate assessment” to be undertaken “in view of that site’s” [underlining added] conservation objectives; and then Regulation 28(5) requires them to consider whether the Project would “adversely affect the integrity” of the Outer Thames Estuary SPA “in light of the conclusions of the [appropriate] assessment”.

36. The Conservation Objectives for the Outer Thames Estuary SPA are:

“to ensure that, subject to natural change, the integrity of the site is maintained or restored as appropriate, and that the site contributes to achieving the aims of the Wild Birds Directive, by maintaining or restoring:

- (a) the extent and distribution of the habitats of the qualifying features;
- (b) the structure and function of the habitats of the qualifying features;
- (c) the supporting processes on which the habitats of the qualifying features rely;
- (d) the populations of each of the qualifying features;
- (e) the distribution of qualifying features within the site.”

37. There are four points to make here.

38. First, Natural England is right to say at paragraph 10 of its Legal Submissions that there is, in effect, a “primary objective of maintaining or restoring overall site integrity”, which is then comprised of “5 elements, set out at (a) to (e)”. There is case law on the meaning of “integrity”. In *Sweetman*, the Court of Justice of the European Union said (paragraph 39) (underlining added):

“It should be inferred that in order for the integrity of a site as a natural habitat not to be adversely affected for the purposes of the second sentence of Article 6(3) of the Habitats Directive the site needs to be preserved at a favourable conservation status; this entails, as the Advocate General has observed in points 54 to 56 of her Opinion, the lasting preservation of the constitutive characteristics of the site concerned that are connected with the presence of a natural habitat type whose preservation was the objective justifying the designation of that site in the list of SCIs, in accordance with the Directive.”

In *Grace*, the Court of Justice of the European Union put it like this (paragraph 35) (underlining added):

“The designation of a territory as an SPA for the conservation of species entails the lasting preservation of the constitutive characteristics of the habitat in that area, the survival of the species in question and its reproduction being the objective justifying the designation of that area.”

In short, as the Applicants will return to below, the concept of “integrity” is broad: it requires the decision-maker to consider the ecological impact of the proposed development and to consider if that impact will have an adverse effect on the “constitutive characteristics of the habitat in that area”, the “survival of the species in question” or its “reproduction”.

39. Second, the Conservation Objective quoted above also refers to ensuring that the Outer Thames Estuary SPA “contributes to achieving the aims of the Wild Birds Directive”. Those aims are principally to be found in Articles 2 – 4 of the Birds Directive and Article 2(2) of the Habitats Directive (which applies because of Article 7):

*Article 2 of the Birds Directive*

Member states shall take the requisite measures to maintain the population of the species referred to in Article 1 at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level.

*Article 3 of the Birds Directive*

1. In light of the requirements referred to in Article 2, Member States shall take the requisite measures to preserve, maintain

or re-establish a sufficient diversity and area of habitats for all the species of birds referred to in Article 1.

2. The preservation, maintenance and re-establishment of biotopes and habitats shall include primarily the following measures:
  - (a) the creation of protected areas;
  - (b) upkeep and management in accordance with the ecological needs of habitats inside and outside the protected areas;
  - (c) re-establishment of destroyed biotopes;
  - (d) creation of biotopes.

*Article 4 of the Birds Directive*

1. The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution.

In this connection, account shall be taken of:

- (a) species in danger of extinction;
- (b) species vulnerable to specific changes in their habitat;
- (c) species considered rare because of small populations or restricted local distribution;
- (d) other species requiring particular attention for reasons of the specific nature of their habitat.

Trends and variations in population levels shall be taken into account as a background for evaluations.

Member states shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species in the geographical sea and land area where this Directive applies.

2. [ ... ]

3. Member states shall send the Commission all relevant information so that it may take appropriate initiatives with a view to the coordination necessary to ensure that the areas provided for in paragraphs 1 and 2 form a coherent whole which meets the protection requirements of these species in the geographical sea and the land area where this Directive applies.
4. In respect of the protection areas referred to in paragraphs 1 and 2, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article. Outside these protection areas, Member states shall also strive to avoid pollution or deterioration of habitats.

*Article 2 of the Habitats Directive*

2. Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of community interest.

What all of these objectives have in common, in so far as species are concerned, is that the focus is on ensuring that the state takes the necessary steps to ensure that the ecological conditions are in place in order to protect the species, ensure their survival, and encourage their reproduction.

40. Before moving on, we pause to observe why Article 2(2) of the Habitats Directive is relevant when considering the “aims of the Wild Birds Directive”. The starting point is the text of the two Directives: by Article 7 of the Habitats Directive the obligations in Articles 6(2) – (4) “replace” any obligations arising under the first sentence of Article 4(4) of the Birds Directive; those obligations need to be read and understood in the context of the objectives that they seek to deliver under the Habitats Directive. Additionally, under Article 3(1) of the Habitats Directive, SPAs are included in the Natura 2000 network. Finally, the

Court of Justice of the European Union has also read the two Directives and their aims alongside each other (e.g. *Grave*).

41. Third, drawing these strands together, in all cases the conservation objectives will be a consideration of significant importance when determining whether or not a project would adversely affect the integrity of a site: but they are not, and must not be viewed as being, ends in and of themselves. They are there in order to protect “integrity”. They need to be read and applied with that firmly in mind.
42. Fourth, applying those points to the facts of this particular case, the mere fact, for example, that a project would “disturb” a species or cause a “displacement effect” does not mean that as a matter of law the decision-maker must conclude that the project would adversely affect the integrity of a site; nor, for example, is it the case that if a project causes disturbance contrary to a requirement in a conservation objective to avoid or reduce disturbance, a decision-maker must conclude that the project would adversely affect the integrity of a site. That is far too mechanistic an approach which distorts the correct test to be applied. It is certainly not how the Court of Justice of the European Union has interpreted it. What matters, is the ecological consequences of the disturbance: just because there is a disturbance effect does not mean that a conclusion of “adverse impact on integrity” must follow, because in some cases the disturbance will be of no ecological significance, with the result that there will not be an impact on “integrity”.
43. If it were otherwise (i.e. that if there was even the slightest bit of disturbance, a conclusion of adverse impact on integrity would have to follow), then it would be virtually impossible for any development to take place on or near a protected site. When commenting in the context of screening — which is an even lower threshold than adverse impact on integrity — Advocate General Sharpton put the point like this in *Sweetman* (paragraph 48) (*italics in original*):

“If all plans or projects capable of having *any* effect whatsoever on the site were caught by Article 6(3), activities on or near the site would risk being impossible by reason of legislative overkill.”

And given that the Habitats Directive and the Birds Directive are ultimately aimed at protecting listed habitats and species, an interpretation which said that projects that cause any disturbance, even if that disturbance did not have any adverse ecological consequences, were not lawful would not be consistent with those Directives.

44. Although in this case some “disturbance” would be created by the development, that is not the end of the matter. The Examining Authority and the Secretary of State must go on to consider the ecological consequences of the “disturbance” and “displacement”, in light of the conservation objectives, and to determine if there would be an “adverse impact on the integrity” of the Outer Thames Estuary SPA. Ultimately, subject to the normal principles of law governing decision making by public bodies that will be a matter of judgement for the Examining Authority and the Secretary of State on the evidence. The Applicants rely upon the expert evidence and advice that demonstrates and concludes that there would not be an adverse impact on integrity. In particular, the evidence is that there would not be any material, long-term ecological consequences on the population of the RTDs as a result of the Projects. The expert evidence is mainly set out in the RTD Displacement Report.

### **The Use of a Baseline and the Approach to In-Combination Assessment**

45. Natural England says that the Applicants have wrongly treated the Gunfleet Sands, Kentish Flats and London Array projects as part of the



baseline (paragraph 8). It says that the effects of these projects should be considered “in combination” with the Projects (paragraphs 15 – 16).

46. This point is, however, now academic because the Applicants included the Gunfleet Sands, Kentish Flats and London Array projects in their in-combination assessment in the RTD Displacement Report, and concluded that in combination there would not be any adverse effect on integrity. It did so in the interests of overcoming this objection and strictly on a without prejudice basis. On any view, the Examining Authority and the Secretary of State, therefore, have all of the necessary information before them to conduct an in-combination assessment if they wish to do so and the conclusion on integrity would be the same if they did (i.e. no adverse impact on integrity).
47. However, the Applicants would take this opportunity to clarify three matters.
48. First, the Applicants do not accept that the concept of a baseline has no role in the context of assessments under the Offshore Habitats Regulations. Baseline surveys that collect data on the state of the environment are a critical first step in a robust appropriate assessment process — the information in such surveys helps inform the decision on “integrity”.
49. Second, whether the effects of the other windfarms are assessed in-combination or as part of the baseline makes no material difference: what matters is that the cumulative disturbance and displacement effects are considered. That can take place through an in-combination assessment of the proposed project with all other proposed and consented projects; or, it could take place with the baseline disturbance effect being added to the proposed effect from the Projects. What matters is that the current disturbance is added, and considered in combination with, proposed disturbance. The Applicants have always

recognised the importance of this; the terminology it has used might be different from the terminology used by Natural England, but the end result has been the same.

50. Third, for the avoidance of any doubt, to the extent that at paragraph 16 — and, in particular, at paragraph 16.5 — of its Legal Submissions Natural England is suggesting that there is some obligation on the Examining Authority or the Secretary of State during the Examination to conduct a full-scale review of all consented projects in the area, that is not accepted by the Applicants. A review is being undertaken by the Department for Business, Energy and Industrial Strategy. That review is the means by which the state has chosen to discharge its obligations under the Offshore Habitats Regulations. The Examining Authority and the Secretary of State should take the conclusions of any such review into account, but they do not need to conduct a mini-review in the context of this Examination when a review is already ongoing. That being said, the Examining Authority and the Secretary of State should be open to receiving evidence about the effects of those projects, which is precisely what the baseline surveys do.

## **Other Issues**

### ***Favourable Conservation Status***

51. Natural England does not accept that RTDs enjoy “favourable conservation status”. The meaning of “favourable conservation status” is set out in Article 1(i) of the Habitats Directive (underlining added) (italics in original):

*Conservation status of a species* means the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within the territory referred to in Article 2

The *conservation status* will be taken as ‘favourable’ when:

- population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and
- the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and
- there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis.

52. Natural England seems to suggest that because there has not been a “formalised condition assessment” of the Outer Thames Estuary SPA recently, it is not possible to determine whether the RTDs are in “favourable conservation status” (paragraph 14). That approach is wrong.

53. The question of whether or not a site or a species is in “favourable conservation status” is a matter of judgement for the decision-maker at the time when the decision is made, in light of the “best scientific knowledge in the field” (*Holohan v An Bord Pleanála* (Case C-461/17) [2019] PTSR 1054 at paragraph 33). Of course, formalised condition assessments by Natural England and other statutory bodies are important, but they are not determinative of the question and that is for good reason: otherwise, even if the evidence had changed since the last formalised assessment, a decision-maker would be bound to accept the conclusions of the formalised assessment, even if the evidence pointed the other way.

54. In this case, it is ultimately for the Secretary of State to reach a view on whether or not the conservation status of the RTDs is favourable, taking into account the evidence. As set out by the Applicants in the RTD Displacement Report, this evidence demonstrates that the RTDs are in a “favourable conservation status”, not least, due to the

recorded increase in population. Natural England disagrees. But produces no evidence in support of its position: (See e.g. *Natural England v Boggis* [2009] EWCA Civ 1061) It is not enough to simply say that a formal assessment has not been undertaken as that is of no use to the Examining Authority or the Secretary of State who ultimately have to grapple with this question in the context of this Examination and the subsequent decision.

55. Additionally, to the extent that Natural England is suggesting at paragraph 14 of its legal representations that because there is an objective in the Supplementary Advice on Conservation Objectives to reduce disturbance, any increase in disturbance, no matter how small, means that the site or the species cannot be said to be in “favourable conservation status” that is wrong in law. The test for whether or not a species is in “favourable conservation status” is set out in Article 1(i) of the Habitats Directive. That is the test to be applied, not some other test that seeks to isolate individual parts of the Supplementary Guidance and elevate those parts to freestanding assessments of favourability.

### ***Applicability of Regulation 26 of the Offshore Habitats Regulations***

56. Natural England says that the Applicants have fallen into an “error of law” concerning the applicability of Regulation 26 of the Offshore Habitats Regulations to the decision (paragraphs 17 – 19). That is a misreading of what the Applicants said in the RTD Displacement Report; and, in any event, it is of no consequence as the correct legal position has now been set out in detail above.
57. But, in short, the response to what Natural England has said on this point is as follows.
58. First, the Applicants recognise, and acknowledge above, that the key test in so far as the Examination is concerned is set out in Regulation 28

— not Regulation 26 — of the Offshore Habitats Regulations (paragraphs 17 – 19).

59. Second, the Applicants also agree that Regulation 26 is a more general obligation that is intended to transpose into domestic law Article 6(2) of the Habitats Directive (although it pauses to note that Regulation 26 is not the only part of the Offshore Habitats Regulations that could be said to implement the Article 6(2) duty). Where a decision-maker is deciding whether to grant consent for a new “plan or project”, the Applicants accept that Regulation 28 is key.
  
60. Third, the reason why, despite all of the above, the Applicants referred to the significant disturbance test that is found in Article 6(2) and in Regulation 26, is that it gives some assistance in understanding what level of disturbance would need to be proven before a decision-maker may conclude under Regulation 28 that there was an “adverse effect on integrity”. The point can be put like this: as Natural England accepts at footnote 15 of its Legal Submissions, the Court of Justice of the European Union has repeatedly said that the obligations in Articles 6(1) – (4) need to be read as a “coherent whole”, and that the level of protection afforded under Article 6(3) is — to use the words of Natural England — “equal” to the level of protection afforded under Article 6(2); that being so and noting that under Article 6(2) the focus is on disturbance that is “significant in relation to the objectives of the Directive”, it must follow that when assessing whether there is an impact on “integrity” under Article 6(3) by way of “disturbance”, the decision-maker should ask whether that disturbance is “significant”. Otherwise, if mere disturbance was enough under Article 6(3) but “significant disturbance” was needed under Article 6(2), the level of protection afforded would not be “equal” and the Article would not be a “coherent whole”. Nothing really turns on that argument, because the Applicants consider that it is correct on integrity even without relying on this argument. But it is explained here in more detail in order to respond to

the erroneous suggestion that the Applicants do not understand the interaction between the different parts of the Habitats Directive or the Offshore Habitats Regulations. It does.

61. Fourth, the phrase “significant disturbance” also appears in the Outer Thames Estuary SPA Supplementary Advice Note (September 2019) under the “attribute” of “disturbance caused by human activity”. Reference is made to the Agreement on the Conservation of African–Eurasian Migratory Waterbirds (AEWA) which gives a definition of “significant disturbance”. Natural England relies on this document in some of their submissions. The definition of “significant disturbance” in that international agreement relies on there being “impacts on (water)birds in such a way as to be likely to cause impacts on populations of a species”, before then going on to list three ways in which those impacts can come about. But the ecological evidence here shows that there will not be a material impact on the population of the RTDs as a result of the Projects. As such, there will not be any “significant disturbance” as defined by that agreement. This is relevant to the question of “integrity”.
62. Finally, the Applicants agree that “adverse effect on integrity” needs to be assessed on a site-specific basis, in line with the conservation objectives (paragraph 21). That is self-evident from Regulation 28. The Applicants have not tried to argue to the contrary in the RTD Displacement Report. In fact, a fair reading of that report shows that the assessment of integrity is closely tied to the site-specific conservation objectives (see, e.g. Table 11).

## **Conclusion**

63. The Applicants do not consider that its analysis contains “errors of law” as asserted by Natural England. The correct legal approach has been set out above, which confirms that both the Examining Authority and the Secretary of State can lawfully conclude that the Projects would not “adversely affect the integrity” of the Outer Thames Estuary SPA through “disturbance” or “displacement effects” on RTDs.

**GREGORY JONES QC**

**ANDREW FRASER-URQUHART QC**

**CONOR FEGAN**

**Francis Taylor Building  
Temple**