



THE PLANNING ACT 2008

THE INFRASTRUCTURE PLANNING (EXAMINATION PROCEDURE) RULES
2010

East Anglia TWO Offshore Wind Farm

Appendix A14 to the Natural England Deadline 4 Submission

**Natural England's Legal Submission Concerning Displacement of Red-
Throated Divers in the Outer Thames Estuary SPA [REP3-049]**

For:

The construction and operation of East Anglia Two Offshore Windfarm, a 900MW windfarm which could consist of up to 75 turbines, generators and associated infrastructure, located 37km from Lowestoft and 32km from Southwold.

Planning Inspectorate Reference: EN010078

13th January 2020



Natural England's Legal Submission Concerning Displacement of Red-Throated Divers in the Outer Thames Estuary SPA [REP3-049]

This document is applicable to both the East Anglia ONE North and East Anglia TWO applications, and therefore is endorsed with the yellow and blue icon used to identify materially identical documentation in accordance with the Examining Authority's (ExA) procedural decisions on document management of 23rd December 2019. Whilst for completeness of the record this document has been submitted to both Examinations, if it is read for one project submission there is no need to read it again for the other project.

Introduction

1. This note reviews legal assertions made by the Applicant in REP3-049 (henceforth 'THE RTD DISPLACEMENT REPORT') and sets out Natural England's views and advice to the Examining Authority as to what in our view is the correct legal approach. Natural England's scientific advice about the content of THE RTD DISPLACEMENT REPORT are explained in Appendix A13.
2. The law is explained on a post-EU exit basis, though a full explanation of the legal transition effected on 31st December 2020 is, for brevity, not set out. Natural England reserves the right to expand upon these submissions if necessary.
3. It is recognised that the legal view provided in this document is also relevant to other projects considering ongoing/lasting anthropogenic impacts, which are hindering the conservation objectives of a designated site

Summary

4. It is Natural England's view that Section 4.2 of the RTD DISPLACEMENT REPORT contains errors of law. The reference to a 'baseline' for assessment of the effects of a proposed plan or project is not found in the Habitats Directive or either of the two domestic statutory instruments¹ which transpose that Directive into English law and leads to incorrect conclusions. This error is also found in section 5.3 of the RTD DISPLACEMENT REPORT.
5. Section 4.3 of the RTD DISPLACEMENT REPORT contains errors of law and mistaken inferences about the condition status of the non-breeding population of red-throated diver ('RTD') in the Outer Thames Estuary Special Protection Area ('OTE SPA'). The use of the term 'significance of disturbance' at para 69, and the suggestion that it should be considered by reference to the 'objectives for the whole region or an EU Member State' shows a misunderstanding of the workings of the legal regime. The reference to 'acknowledged favourable status' of RTD is incorrect.

¹ The Conservation of Habitats and Species Regulations 2017 ('the Habitats Regulations') and the Conservation of Offshore Marine Habitats and Species Regulations 2017 ('the Offshore Habitats Regulations') (both as amended, in particular by the Conservation of Habitats and Species (Amendment)(EU Exit) Regulations 2019).



6. Section 5.3 of the RTD DISPLACEMENT REPORT reaches conclusions on the basis of an inadequate understanding of the conservation objectives for the OTA SPA.

Natural England's Submissions

7. The core statutory position is set out in Reg. 63 of the Habitats Regs. and Reg. 28 of the Offshore Habitats Regulations. The wordings of these parallel provisions are not identical, but their effects and meanings are the same, as they transpose the provisions of the same Directive. By reference to Reg. 28 of the Offshore Habitats Regulations:

(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), and*
- c. is not directly connected with or necessary to the management of that site.*

(3) ...

(4) ...

(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 the European site (as the case may be).

(6) In considering whether a plan or project will adversely affect the integrity of a site, the competent authority must have regard to the manner in which it is proposed to be carried out and to any conditions or restrictions subject to which the competent authority proposes that the consent, permission or other authorisation should be given.

8. Once, therefore, it has been determined that a plan or project is likely to have a significant effect on an SPA² the process of 'appropriate assessment' must follow and that

² Natural England and the Applicant appear to be in agreement that EA1N and EA2 each cross the 'screening' threshold of significance in relation to their effects on the OTE SPA and must be subject to appropriate



assessment must be of the implications of the plan or project on the SPA in view of that SPA's '*conservation objectives*' and with the aim of ascertaining whether or not the plan or project will adversely affect the integrity of the SPA. This is by no means the same as saying that the implications of a plan or project must be viewed in light of any particular baseline. Whilst an appropriate assessment must of course look at the state of the SPA (including effects on it from other plans and projects) the tests to be applied relate only to the conservation objectives for the site and overall effects of a plan or project on site integrity.

Conservation objectives

9. The conservation objectives for the OTE SPA are:³

... 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.*

10. Thus, for RTD in the OTE the conservation objectives are multiple: there is the primary objective of maintaining or restoring overall site integrity, which is made up of 5 elements, set out at a. to e. All 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 conservation objectives. As regards the functional loss of site area, *Sweetman and Others v An Bord Pleanála*^{4 5}, at para 46 of the judgment, establishes that:

... if, after an appropriate assessment of a plan or project's implications for a site, carried out on the basis of the first sentence of Article 6(3) of the Habitats Directive,

assessment. However, Natural England reserves the right to make submissions of law on this issue, if necessary.

³<https://designatedsites.naturalengland.org.uk/Marine/MarineSiteDetail.aspx?SiteCode=UK9020309&Ha&HasCA=1&NumMarineSeasonality=3&SiteNameDisplay=Outer%20Thames%20Estuary%20SPA#hlco>

⁴ CJEU case C-258/11

⁵ Termed 'retained EU case law' post-Brexit and binding unless departed from by the Supreme Court or the Courts of Appeal in England and Wales.



the competent national authority concludes that that plan or project will lead to the lasting and irreparable loss of the whole or part of a priority natural habitat type whose conservation was the objective that justified the designation of the site concerned as an SCI, the view should be taken that such a plan or project will adversely affect the integrity of that site.

11. *Sweetman* concerned the potential loss of an area of priority natural habitat within an SAC rather than, as here, potential effects on a bird species for which an SPA was classified. However, SACs and SPAs enjoy equal legal protection and in Natural England's submission the diminution of RTD habitat within the OTE SPA is, as regards effect on the integrity of the site, comparable to the loss of part of a qualifying habitat type from an SAC.
12. The (separate) CJEU case of *Grace and Sweetman v An Bord Pleanála*⁶, concerning an SPA, is also relevant. It was held that

[Article 6 of the Habitats Directive] must be interpreted as meaning that, where it is intended to carry out a project on a site designated for the protection and conservation of certain species, of which the area suitable for providing for the needs of a protected species fluctuates over time, and the temporary or permanent effect of that project will be that some parts of the site will no longer be able to provide a suitable habitat for the species in question, the fact that the project includes measures to ensure that, after an appropriate assessment of the implications of the project has been carried out and throughout the lifetime of the project, the part of the site that is in fact likely to provide a suitable habitat will not be reduced and indeed may be enhanced may not be taken into account for the purpose of the assessment that must be carried out in accordance with Article 6(3) of the directive to ensure that the project in question will not adversely affect the integrity of the site concerned; that fact falls to be considered, if need be, under Article 6(4) of the directive.

13. Natural England also wishes to stress that ornithological impacts of wind farms continue for as long as windfarm infrastructure remains in place and visible. Impacts are not confined to the period of construction, and the term 'residual impacts', when used to describe post-construction impacts arising from the active life a wind farm, is not necessarily helpful because it can be wrongly interpreted as describing a low impact 'baseline' status quo that need not be fully brought into account when assessing in-combination effects and new projects. The actual ongoing impacts of specific wind farms on specific bird species must be looked at on both a case-by-case and an in-combination basis.

Conservation status of RTD in the OTE SPA

14. Contrary to the assertion at paras 64 and 72 of the RTD DISPLACEMENT REPORT, it is not acknowledged that RTD enjoy favourable status in the OTE SPA. Marine SPAs have not (yet) been subject to formalised condition assessment and neither Natural England nor JNCC can therefore say whether the site as a whole, or features within it, are in favourable condition or not. However, the Supplementary Advice on Conservation Objectives for the

⁶ CJEU case C-164/17



OTE SPA,⁷ referred to by the Applicant at para 70 of the RTD DISPLACEMENT REPORT, is relevant. As well as containing a target to maintain RTD numbers at or above current levels, there is a separate target to reduce the disturbance of RTD. This latter target relates specifically to conservation objective e. – to maintain or restore the distribution of RTD within the SPA by ensuring that they can use as much of the SPA as is suitable for them.

In-combination assessment

15. Paras 65 and 86 of the RTD DISPLACEMENT REPORT: Natural England is grateful for the inclusion of the wind farms within the OTE SPA that received consent prior to the existence of the SPA⁸ as part of the in-combination assessment of EA1N and EA2. However, Natural England insists that these existing windfarms (and those that became operational before the current RTD population figures were established) should be included as a matter of law and not ‘for illustrative purposes’ only.
16. The basis for this assertion stems from the wording of the UK statute, CJEU caselaw and the objectives of the Habitats Directive:
 - 16.1. Reg. 28 (2)(b)’s reference to in-combination effects is not in any way qualified to limit consideration to plans or projects that post-date classification of an SPA.
 - 16.2. The CJEU case of *Grüne Liga Sachsen*^{9 10} concerned a plan or project (a bridge) that received consent shortly before the area in which it stood was designated as an SAC. It was held that the implications of the bridge did not form the part of the baseline status quo of the subsequent SAC, but that they must be reviewed (under Article 6.2 of the Habitats Directive) and that the standard of review should be equivalent to the standard that would be applied (under Article 6.3) if consent for the bridge were requested after SAC designation. Thus, in the absence of (or pending) such a review it is not to be assumed that a completed plan or project is not having, or able to contribute to, adverse effect on the site, either alone or in combination with other plans or projects.
 - 16.3. The purpose of the Habitats Directive is to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora and that measures taken pursuant to it shall be designed to maintain or restore, at favourable conservation status, the natural habitats and species that it specifies.¹¹ Together, the Birds and Habitats Directives achieve this, in part, by ensuring the designation of SPAs and SACs and providing mechanisms for protecting them and their particular features. The requirement is to ‘maintain or restore’ and inherent in this

⁷<https://designatedsites.naturalengland.org.uk/Marine/SupAdvice.aspx?SiteCode=UK9020309&SiteName=outer+thames&SiteNameDisplay=Outer+Thames+Estuary+SPA&countyCode=&responsiblePerson=&SeaArea=&IFCAArea=&NumMarineSeasonality=3>

⁸ Kentish Flats, Gunfleet Sands I and II and London Array.

⁹ Case C-399/14, *Grüne Liga Sachsen eV and Others v Freistaat Sachsen and Others*.

¹⁰ Following the principle established in Case C-226/08, *Stadt Papenburg v Bundesrepublik Deutschland*.

¹¹ Article 2 of the Directive.



wording, and as mentioned in the Recitals to the Directive, is the reality that important habitats or species may be degraded or disturbed at the time when they are given site-based protection. It is not to be assumed that when an SPA such as the OTE is classified it is already in favourable condition and that it need only be maintained at the baseline of its status at the date of classification. Were that a correct reading of the law there would be no need for a requirement to 'restore' the condition of an SPA or SAC, since all that would be needed would be a requirement to maintain the status quo.

16.4. The Offshore Habitats Regulations make it very clear that the Secretary of State's duty in relation to sites of this sort is to exercise his functions so as to secure the requirements of the Habitats Directive and the Wild Birds Directive¹², to maintain or restore relevant habitats and species to favourable conservation status¹³ and to review decisions and consents that were made before the site in question received protection¹⁴. These obligations are not consistent with the proposition that whatever adverse features exist within an SPA before it is classified form a 'baseline' for future assessment.

16.5. In this connection it is noted that BEIS is in the course of considering a review of consents for major infrastructure projects in SPAs. Plainly, in order to be compliant with Reg. 33 of the Offshore Habitats Regulations, this review must look at wind farms affecting SPA interest features that received consent before the affected SPAs were classified. In Natural England's submissions to BEIS attention was also drawn to changes in scientific understandings that have taken place after the classification of certain SPAs (of which the OTE SPA is one). In light of this, Natural England submits that in addition to the Reg. 33 review (of pre-SPA consents) it is appropriate to undertake a review of the ongoing effects of those post-SPA consents that were assessed on the basis of now-superseded science and data. The duty to carry out this kind of review arises from Regs 6, 18A and 26 of the Offshore Habitats Regulations. There is a pressing need to consider this body of evidence in relation to these SPAs prior to the authorisation of subsequent projects that might affect them further. This is required to ensure that all forthcoming plans and projects are appropriately assessed with respect to their contribution to cumulative impacts.

Section 4.3 of the RTD Displacement Report

17. Paras 69 to 71: the error of law here involves a misunderstanding of the applicability of Regs. 26 and 28 of the Offshore Habitats Regulations.

18. Reg. 26 (which transposes Article 6.2 of the Habitats Directive) gives a general duty to competent authorities when exercising their functions to do so in ways that avoid disturbance of species or the deterioration of habitats in SACs and SPAs. This duty applies

¹² Reg. 6.

¹³ Reg. 18A, inserted by the Brexit (Amendment) Regulations.

¹⁴ Reg. 31.



at all times and to such general functions that a competent authority may exercise that are capable of affecting species and habitats in SACS and SPAs.

19. Reg. 28 (which is set out above and which transposes Article 6.3 of the Habitats Directive) is a specific duty that only applies when a competent authority is exercising a consenting function in an SAC/SPA. It is therefore the Reg. 28 duty that applies in this case. The correct test is therefore whether it can be ascertained that EA1N and EA 2 (individually and in combination with other plans or projects) will not have an adverse effect on the integrity of the OTE SPA, in view of the site's conservation objectives. The discussion of 'significance of disturbance' that is given at section 4.3 of the RTD DISPLACEMENT REPORT is only of relevance when considering the general (Article 6.2) duty to protect habitats or species from deterioration or disturbance and has no place when considering the specific (Article 6.3) duty to ensure in the consenting process that new plans or projects do not harm the integrity of an SPA.¹⁵
20. The EC's guidance "*Managing Natura 2000 sites: The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC (2018)*"¹⁶ discusses the concept of 'the integrity of the site' at its section 3.6.4, which is here set out in full:

It is clear from the context and from the purpose of the Directive that the 'integrity of a site' relates to the site's conservation objectives (see point 4.6.3 above). For example, it is possible that a plan or project will adversely affect the site only in a visual sense or only affect habitat types or species other than those listed in Annex I or Annex II for which the site has been designated. In such cases, the effects do not amount to an adverse effect for purposes of Article 6(3).

In other words, if none of the habitat types or species for which the site has been designated is significantly affected then the site's integrity cannot be considered to be adversely affected. However, if just one of them is significantly affected, taking into account the site's conservation objectives, then the site integrity is necessarily adversely affected.

This is supported by the Court in its ruling in case C-258/11, paragraph 48: 'Article 6(3) of the Habitats Directive must be interpreted as meaning that a plan or project not directly connected with or necessary to the management of a site will adversely affect the integrity of that site if it is liable to prevent the lasting preservation of the constitutive characteristics of the site that are connected to the presence of a priority natural habitat whose conservation was the objective justifying the designation of the site in the list of SCIs, in accordance with the directive. The precautionary principle should be applied for the purposes of that appraisal.' The logic of such an

¹⁵ It is clear from CJEU case law (see for instance *Grüne Liga Sachsen*, *ibid*) that the strength of protection afforded by Articles 6.2 and 6.3 are equal. However, the wordings of the transposing provisions (Regs 26 and 28) are very different, and it is therefore important to correctly identify which of the two wordings applies in this case.

¹⁶ To which a UK court may still have regard, post-Brexit.



interpretation would also be relevant to non-priority habitat types and to habitats of species.

The expression 'integrity of the site' shows that the focus is here on the specific site. Thus, it is not allowed to destroy a site or part of it on the basis that the conservation status of the habitat types and species it hosts will anyway remain favourable within the European territory of the Member State.

As regards the connotation or meaning of 'integrity', this clearly relates to ecological integrity. This can be considered as a quality or condition of being whole or complete. In a dynamic ecological context, it can also be considered as having the sense of resilience and ability to evolve in ways that are favourable to conservation.

The 'integrity of the site' can be usefully defined as the coherent sum of the site's ecological structure, function and ecological processes, across its whole area, which enables it to sustain the habitats, complex of habitats and/or populations of species for which the site is designated.¹⁷

A site can be described as having a high degree of integrity where the inherent potential for meeting site conservation objectives is realised, the capacity for self-repair and self-renewal under dynamic conditions is maintained, and a minimum of external management support is required.

When looking at the 'integrity of the site', it is therefore important to take into account a range of factors, including the possibility of effects materialising in the short, medium and long-term.

The integrity of the site involves its constitutive characteristics and ecological functions. The decision as to whether it is adversely affected should focus on and be limited to the habitats and species for which the site has been designated and the site's conservation objectives.

21. Thus, following UK statute and EC and English guidance (see footnote 17), it is the integrity of the OTE SPA itself that must be considered, and that means the status and habitat of RTD in that specific site. It is wrong to suggest, as the Applicant does at para. 69 of its RTD DISPLACEMENT REPORT, that the status of RTD should be considered at the scale of 'the whole region or an EU Member State'. Any inference that the protection afforded to RTD in the OTE SPA should be in any way qualified because of their status elsewhere in the region would be entirely wrong.

Matthew Boyer
Solicitor for Natural England
January 2020

¹⁷ A similar wording can be found in Govt. Circular: Biological and Geological Conservation – statutory obligations and their impact within the planning system. ODPM Circular 06/2005, Defra Circular 01/2005. Para. 20.