



THE PLANNING ACT 2008

THE INFRASTRUCTURE PLANNING (EXAMINATION PROCEDURE) RULES

2010

East Anglia TWO Offshore Wind Farm

**Appendix A14b to the Natural England Deadline 7 Submission**

**Natural England's Comments on Legal Submissions Concerning Displacement of RTD  
[REP6-020]**

For:

The construction and operation of East Anglia TWO Offshore Windfarm, a 900MW windfarm which could consist of up to 67 turbines, generators and associated infrastructure, located 37km from Lowestoft and 32km from Southwold.

Planning Inspectorate Reference: EN010078

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4th March 2021



## Natural England's Comments on Legal Submissions Concerning Displacement of RTD [REP6-020]

This document is applicable to both the East Anglia ONE North (EA1N) and East Anglia TWO (EA2) 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

This document provides Natural England's response in relation to the following documents:

- Applicants' Response to Natural England's Legal Submissions Concerning Displacement of Red-Throated Divers In the Outer Thames Estuary Spa [REP6-020]
- Displacement of Red-Throated Divers in the Outer Thames Estuary SPA [REP6-019]
- TRACKED changes version of Displacement of Red-Throated Divers in the Outer Thames Estuary SPA [REP6-019] (submitted as Appendix A18 by NE at Deadline 7)

### Summary

1. This brief note outlines Natural England's reaction to the above documents, submitted by the Applicant at Deadline 5. It welcomes substantial areas of legal common ground, but wishes to flag up a significant change of position that the Applicant's experts have recently made, apparently on the basis of 'further legal review' and which, in other kinds of proceedings, would be subject to cross-examination. Natural England submits that it has not made any errors of law and advises the Examining Authority to consider taking its own legal advice on the respective positions of the Applicant and Natural England

#### 1. **Effective loss of Red-Throated Diver ('RTD') habitat within the Special Protection Area ('SPA')**

2. The Applicant's document "DISPLACEMENT OF RED-THROATED DIVERS IN THE OUTER THAMES ESTUARY SPA" version 01, dated 15<sup>th</sup> December 2020 provides evidence that displacement of RTD by windfarms causes "*effective habitat loss*". This is explicitly stated at its paragraphs 43 and 44, Tables 5, 6, 7 and 8 and paragraphs 77 and 89. It was on the basis of this evidence, and its

own scientific views, that Natural England's Legal Submission of 13<sup>th</sup> January 2021<sup>1</sup> drew the natural conclusion that "*If windfarms deny RTD access to parts of the SPA that would otherwise be suitable for them the effect is to diminish the functional size of the SPA, contrary to conservation objectives.*" Natural England repeats that assertion.

3. Version 02 of the same document, dated 3<sup>rd</sup> February 2021, repeats the version 01 references to "*effective habitat loss*" for RTD, this time at paragraph 59, Tables 6, 7, 8 and 9 and paragraphs 71, 72, 93 and 105<sup>2</sup>.
4. However, version 03 of this document, dated 24<sup>th</sup> February 2021 contains what are described as "*Minor revisions following further legal review*". Natural England has submitted at Deadline 7 Appendix A18 the Applicant's document<sup>3</sup> tracking the changes made by Applicant in the move from version 02 to 03. In Natural England's view, the majority of these revisions are more than minor, because they amount to a fundamental change of scientific opinion from the earlier position that displacement may cause "*effective habitat loss*" to denial that this is the case. See paragraph 59, Tables 6, 7, 8 and 9 and paragraphs 71, 72, 93, 105. It is Natural England's submission that the first two versions of this document are to be relied upon as the scientific conclusions of the Applicant's expert ecologists and that version 03 has been produced, not as a result of improved data or analysis, but as a result of advice explaining the legal consequences of this opinion.
5. The Applicant's legal advisors seek to justify the change from "*effective loss of habitat*" to "*effective area of the SPA subject to displacement*" as a clarification of something that is prone to being misunderstood. This is unconvincing, as the original wording is easily understood and was chosen by the Applicant's experts as correct in multiple places in the first two versions of the report, which is clearly and professionally worded throughout.
6. Whether disturbance of RTD is capable of leading to an effective loss of habitat for them in the SPA is, of course, a matter of scientific evidence rather than law. Natural England submits that the Applicant's experts were right about this concept from the start and that their change of mind is not a result of improved science.
7. The Applicant's legal advisors say, at paragraph 24 of their response to Natural England's Legal Submissions, that there is no evidence for RTD being "*denied access to part of the SPA which would otherwise be suitable for them*". This analysis wrongly equates the word "*denied ...*" with "*being fenced out of ...*" and is at odds with the Applicant's experts' own conclusions that

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<sup>1</sup> Incorrectly dated 2020. Natural England apologises for any confusion this may have caused.

<sup>2</sup> This note does not comment on other differences between versions 01 and 02.

<sup>3</sup> "EA1N EA2 Displacement of red-throated divers in the Outer Thames Estuary SPA D5. D6. Compare. Docx"

displacement causes “*effective habitat loss*”, meaning that while the amount of habitat will not change the amount of benefit that it can yield for RTD is diminished, so that a quantity of its habitat function is lost.

8. The legal consequences of the scientific conclusions of versions 01 and 02 of the Applicant’s document were set out at paragraphs 10 to 13 of Natural England’s Legal Submissions of 13<sup>th</sup> January, which it stands behind. Further, Natural England refers to *Bagmoor Wind Ltd v The Scottish Ministers* [2012]<sup>4</sup>, concerning the displacement of eagles within an SPA by a windfarm. It was there said that “*It was common ground that the eagles would tend to shy away from use of the wind farm and that constructing the wind farm would represent a loss of foraging ground. The area of the wind farm was a modest 5.6 hectares, but once the 500 metre “buffer” zone was included, this figure would be multiplied almost tenfold. The 170 hectares of the tongue would also fall to be classified as lost habitat.*” Emphasis added.

## **2. Conservation objectives**

9. Natural England is in full agreement with the Applicant’s legal advisors when they say that consideration of adverse effect on the integrity of the SPA should start with the conservation objectives for the SPA. Three of those objectives are engaged by issues of effective habitat loss.<sup>5</sup> It is right to say that the test of what amounts to an adverse effect on integrity should be broad and not mechanistic, and that the simple fact of an element of disturbance is not of itself enough to prove adverse effect on site integrity.

## **3. The BEIS review of consents**

10. Natural England does not suggest that paragraph 16.5 of its Legal Submissions of 13<sup>th</sup> January mean that the Examining Authority and the Secretary of State should conduct their own review of consented projects in the area, though of course they should take into account the actual effects of those projects on RTD.

## **4. Favourable conservation status**

11. Natural England agrees that the question of whether or not a site or a species is in favourable conservation status is a matter for the decision-maker at the time when a decision is being made. Such a decision will, of course, be informed by Natural England’s most recent assessment of condition status. Where, as here, no formal condition assessment has been undertaken the duty

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<sup>4</sup> ScotCS CSIH\_93 (7<sup>th</sup> December 2012).

<sup>5</sup> “... 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 ... (e) the distribution of qualifying features within the site.”

on the decision-maker is to reach its own conclusions, based on the evidence available and including views given by Natural England in the course of an individual application.

## **5. Natural England's advice**

12. Natural England's advice, as the appropriate national conservation body, should be accorded "considerable weight", and should only be departed from for "cogent and compelling reasons". *R (Akester and Melanaphy) v Department for Environment, Food and Rural Affairs (1) Wightlink Limited (2) and others* [2010] WEHC 232 (Admin).