



THE PLANNING ACT 2008

THE INFRASTRUCTURE PLANNING (EXAMINATION PROCEDURE) RULES

2010

East Anglia TWO Offshore Wind Farm

Appendix A14c to the Natural England Deadline 9 Submission

Natural England's Response to The Applicant's Legal Submissions at ISH 14 [REP8-099]

For:

The construction and operation of East Anglia TWO Offshore Wind Farm, a 900MW wind farm which could consist of up to 75 turbines, generators and associated infrastructure, located 37km from Lowestoft and 32km from Southwold.

Planning Inspectorate Reference: EN010078

15th April 2021



Natural England's Response to The Applicant's Legal Submissions at ISH 14 [REP8-099]

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

1. Natural England has waited until Deadline 9 to deliver its response to legal issues raised at ISH14 so that it can respond to both the recorded oral submissions from that hearing and to the written summary that the Applicant has provided at Deadline 8, entitled "*ISH14 – Red-Throated Diver of the Outer Thames Estuary SPA: Concluding Legal Submissions*". It is hoped that this is helpful.
2. Natural England stands by and repeats the legal submissions that it made at Deadlines 4 [REP4-089] and 7 [REP7-070].

"Effective Habitat Loss"

3. Dr Trinder, the Applicant's principal ornithology witness, said (at minute 46 of the recording of ISHs14):

"... the point here is that the birds are if they are avoiding the turbines by whatever the distance might be whether it's ours or Natural England's version they are ... excluded for want of a better word from that location as long as they don't like being close to turbines ..."

4. This statement is entirely consistent with Natural England's opinion that if red-throated divers 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. This statement also highlights the relevance of the *Bagmoor Wind* case, cited by Natural England at Deadline 7, in which the issue was the exclusion of golden eagles from suitable habitat due to their aversion to wind turbines. It is accepted that exclusion effects exist on a continuum of severity and that *Bagmoor Wind* appears to have been a severe case.



5. In versions 01 and 02 of the Applicant's red-throated diver displacement report this position was acknowledged by use of the clear words "*effective habitat loss*". The assertion that these words were removed as part of a tidying-up exercise, rather than on the basis of legal advice as to the effect of this admission, is unconvincing when it can be seen that version 03 of this document describes these changes as "*Minor revisions following further legal review*". It is not accepted that these revisions are minor.

Conservation objectives

6. At paragraph 41 of the Applicant's legal submissions of 24th February 2021 it is said that:

"..., 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."

7. However, the Applicant now submits that one of the five conservation objectives for this site, concerning population size (objective d.), should be treated as being more important than the others – as if it were an end in and of itself. This overlooks the legal reality, which is that the law applies to protect the integrity of the site, rather than just numbers of an individual species. As the case law that the Applicant cites explains, the concept of integrity is a broad one relating to the "*lasting preservation of the constitutive characteristics of the habitat in that area, the survival of the species in question*". This reflects the simple reality that a species cannot derive the maximum amount of benefit that a protected site could allow it if it is effectively excluded from a quantity of suitable habitat on a lasting basis.
8. The leading authority on the interpretation of conservation objectives is the judgment of Lord Justice Sullivan in *RSPB v The Secretary of State for Environment Food and Rural Affairs and others*¹, which concerned an SPA with essentially identical conservation objectives. It was held that:

21. ... conservation objectives are not enactments, and should not be construed as such. However, it was common ground that they mean what they say, and do not mean what the

¹ [2015] EWCA Civ 227.



Secretary of State, or for that matter, Natural England or the RSPB, might wish that they had said. The conservation objectives must be read in a common sense way, and in context.

They are conservation objectives for an area that has been classified as being of European significance under the Wild Birds Directive.

9. In Natural England's submission the conservation objectives for this SPA should be construed in that way – in the round, with regard to all of the objectives, and in the context of the legal requirement to protect a classified area. The five conservation objectives are all to be taken into account, without any one of them necessarily dominating the others. Turning to the words of Mr Fraser Urquart QC at minute 59 of the recording of ISHs14:

“... just to reemphasise really that the consideration is the effect on population in view of those matters so these are very much sub-matters for the ultimate question that you have to determine...”

10. In Natural England's submission it is wrong to treat conservation objectives that relate to habitat extent, distribution, structure and function as being “sub-matters” that rank below the population of red-throated divers in significance. There is no correct legal basis for this and it is inconsistent with the wording of the conservation objectives themselves. Natural England advises that the correct way to approach the conservation objectives for the Outer Thames Estuary SPA is to appreciate that the goal is to protect the site and its habitats, so that the site can provide as much support to red-throated divers as it is naturally capable of. All five conservation objectives are relevant to this, and the decision-maker's task is to weigh them together, on the basis of the evidence.