



Written Submission
for the
Royal Society for the Protection of Birds

Secretary of State's post-examination consultation

30 November 2021

Planning Act 2008 (as amended)

In the matter of:

Application by Scottish Power Renewables for an
Order Granting Development Consent for the
East Anglia ONE North/East Anglia TWO Offshore Windfarms

Planning Inspectorate Ref: EN010077/EN010078

Registration Identification Ref: 20024733/20024734

1 Introduction

- 1.1 This representation applies jointly to the development consent order applications by Scottish Power Renewables (the Applicant) for the East Anglia ONE North (EA1N) and East Anglia TWO (EA2) offshore windfarms (collectively “the applications”).
- 1.2 The RSPB is grateful for the opportunity to make submissions in response to the Secretary of State for Business, Energy and Industrial Strategy’s post-examination consultation requesting comments on the current Offshore Ornithology Cumulative and In Combination Collision Risk and Displacement Update (REP13-019)¹ submitted at the end of the examinations into the applications.

¹ <https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010077/EN010077-005586-ExA.AS-12.D13.V1%20EA1N&EA2%20D13%20Offshore%20Ornithology%20Cumulative%20and%20In-Combination%20Collision%20Risk%20and%20Displacement%20Update.pdf>

2 The RSPB's response to current Offshore Ornithology Cumulative and In Combination Collision Risk and Displacement Update (REP13-019)

Introduction

2.1 We have set out the RSPB's response to the current information under the following headings:

- Summary of the RSPB's position on adverse effect on integrity arising from EA1N and EA2 at the end of the examinations;
- The RSPB's updated position on adverse effect on integrity arising from EA1N and EA2 following review of REP13-019;
- In-combination effects and compensation for other schemes.

Summary of the RSPB's position on adverse effect on integrity arising from EA1N and EA2 at the end of the examinations

2.2 The RSPB's position on adverse effect on site integrity was set out in its submission at Deadline 8 (REP8-171)² to the EA1N and EA2 examinations. The RSPB's position on adverse effect on integrity was as follows:

Flamborough and Filey Coast Special Protection Area (SPA)

- **Gannet:** in-combination effects due to collision risk
- **Kittiwake:** in-combination effects due to collision risk
- **Guillemot:** in-combination effects due to displacement
- **Razorbill:** in-combination effects due to displacement
- **Seabird assemblage:** in-combination effects due to the combined effects of collision risk and displacement on the above species.

Alde-Ore Estuary SPA

- **Lesser black-backed gull:** in-combination effects due to collision risk.

² See: <https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010077/EN010077-004459-DL8%20-%20RSPB.pdf>

Outer Thames Estuary SPA

- **Red-throated diver:**
 - Adverse effect on integrity cannot be ruled out due to displacement from EA1N alone; and
 - Adverse effect on integrity cannot be ruled out due to displacement from EA1N and EA2 in-combination with existing plans and projects.

[The RSPB's updated position on adverse effect on integrity arising from EA1N and EA2 following review of REP13-019](#)

- 2.3 The RSPB has now reviewed REP13-019 in respect of EA1N and EA2. The RSPB welcomes the includes of the Hornsea Project Three cumulative and in-combination collision risk information for kittiwake in Table 3.2, albeit in parentheses.
- 2.4 The RSPB's position is essentially unchanged, with the exception of adding in the issue of displacement as an exacerbating factor in respect of impacts on gannet.
- 2.5 For the avoidance of doubt, we have set out our revised position on adverse effect on integrity below:

Flamborough and Filey Coast Special Protection Area (SPA)

- **Gannet:** in-combination effects due to collision risk exacerbated by displacement
- **Kittiwake:** in-combination effects due to collision risk
- **Guillemot:** in-combination effects due to displacement (when mortality from Hornsea Three and Four are included)
- **Razorbill:** in-combination effects due to displacement (when mortality from Hornsea Three and Four are included)
- **Seabird assemblage:** in-combination effects due to the combined effects of collision risk and displacement on the above species.

Alde-Ore Estuary SPA

- **Lesser black-backed gull:** in-combination effects due to collision risk.

Outer Thames Estuary SPA

- **Red-throated diver:**

- Adverse effect on integrity cannot be ruled out due to displacement from EA1N alone; and
- Adverse effect on integrity cannot be ruled out due to displacement from EA1N and EA2 in-combination with existing plans and projects.

In-combination effects and compensation for other schemes

- 2.6 In our examination submission at Deadline 8 (REP8-171) the RSPB noted that in REP4-042 (and referred to in REP6-045 at para 35 in Appendix 1 (Kittiwake)), the Applicant had removed Hornsea Three in respect of kittiwake collision risk on the basis that it is compensated for. The RSPB disagreed with that approach for the reasons set out in that submission.
- 2.7 We now have the following additional comments on this matter.
- 2.8 Compensatory measures only enter the equation when it has been determined that there will be adverse effects on the integrity of the site (under regulation 63) or lack of certainty as to the absence of adverse effects and the need for the competent authority to decide whether consent should be granted under regulation 64.
- 2.9 It therefore follows that if compensation measures have been required for a project that that project has been identified as giving rise to adverse impacts on the integrity of a protected site (or lack of certainty as to the absence of adverse effects) and therefore also relevant when considering whether a later project is likely to have a significant effect on a designated site, whether on its own or in combination with other plans and projects whether the competent authority can be satisfied that there will not be adverse effects on the integrity of the designated site whether taken alone or in combination with other projects.
- 2.10 It is difficult to see on what basis the fact that compensation has been provided for the adverse effects of the first scheme should mean that the effects of that scheme should be removed from the equation when carrying out the assessments required by regulation 63 for a later scheme, although it may well be relevant when considering whether consent should be granted under regulation 64 for the second scheme and/or what compensation measures should be required at that stage. There are two points we would stress in that context:

- Firstly, the admonition of AG Sharpston in C-258/11 *Sweetman v An Bord Pleanála* [2013] CMLR 16 (“Sweetman No 1”) at AG47. To exclude the adverse effects of scheme one when considering whether a later scheme would be likely to have significant effects / would not have an adverse effect on the integrity of a protected site in combination with other projects would seem to risk perpetuating the “death by a thousand cuts” phenomenon discussed in that case;³ and
- Secondly, the uncertainty as to the effectiveness of measures that are designed to compensate for (for example) loss of habitat rather than to mitigate the harm which might otherwise be caused: see C-164/17 *Grace v Sweetman* at 52-3.

2.11 Such an approach would also seem inconsistent with the clear ruling of the CJEU in C-164/17 *Grace v Sweetman* that *compensatory* measures should not be taken into account at the Article 6(3) stage when carrying out an appropriate assessment for a particular project. It is difficult to see why the compensatory measures associated with an earlier scheme could, therefore, be taken into account (by effectively removing the adverse effects of scheme 1 from consideration) where the competent authority is deciding on a later scheme whether it was likely to have significant effects or would / would not have adverse effects on the integrity of the site in combination with other projects. We set out the material passages from that decision out below for ease of reference:

“50 In that regard, the Court has previously ruled that the measures provided for in a project which are aimed at compensating for the negative effects of the project cannot be taken into account in the assessment of the implications of the project provided for in Article 6(3) of the Habitats Directive...⁴.

51 It is only when it is sufficiently certain that a measure will make an effective contribution to avoiding harm, guaranteeing beyond all reasonable doubt that the project will not adversely affect the integrity of the area, that such a measure may be taken into consideration when the appropriate assessment is carried out⁵.

52 As a general rule, any positive effects of the future creation of a new habitat, which is aimed at compensating for the loss of area and quality of that habitat type in a protected area, are highly difficult to forecast with any degree of certainty or will be visible only in the future⁶.

53 It is not the fact that the habitat concerned in the main proceedings is in constant flux and that that area requires ‘dynamic’ management that is the cause of uncertainty. In fact, such

³ For the avoidance of doubt, we would stress that the starting point would always need to be the scheme itself – and there would need to be some effect from the scheme which when combined with effects from the earlier scheme could give rise to likely significant effects / outcome.

⁴ *Judgments of 15 May 2014, Briels and Others, C-521/12, EU:C:2014:330, paragraph 29, and of 21 July 2016, Orleans and Others, C-387/15 and C-388/15, EU:C:2016:583, paragraph 48*

⁵ *See, to that effect, judgment of 26 April 2017, Commission v Germany, C-142/16, EU:C:2017:301, paragraph 38*

⁶ *See, to that effect, judgment of 21 July 2016, Orleans and Others, C-387/15 and C-388/15, EU:C:2016:583, paragraphs 52 and 56 and the case-law cited*

uncertainty is the result of the identification of adverse effects, certain or potential, on the integrity of the area concerned as a habitat and foraging area and, therefore, on one of the constitutive characteristics of that area, and of the inclusion in the assessment of the implications of future benefits to be derived from the adoption of measures which, at the time that assessment is made, are only potential, as the measures have not yet been implemented. Accordingly, and subject to verifications to be carried out by the referring court, it was not possible for those benefits to be foreseen with the requisite degree of certainty when the authorities approved the contested development.

54 The foregoing considerations are confirmed by the fact that Article 6(3) of the Habitats Directive integrates the precautionary principle and makes it possible to prevent in an effective manner adverse effects on the integrity of protected areas as a result of the plans or projects being considered⁷.”

RSPB

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⁷ See, to that effect, judgment of 15 May 2014, *Briels and Others*, C-521/12, EU:C:2014:330, paragraph 26 and the case-law cited