From:	Jacqui Miller
To:	norfolkvanguard@pins.gsi.gov.uk
Subject:	RSPB submissions for Deadline 8
Date:	30 May 2019 14:05:13
Attachments:	RSPB response to Rule 17 request and RIES Norfolk Vanguard Deadline 8.pdf RSPB response to Applicants D7.5 submissions Norfolk Vanguard Deadline 8.pdf

Dear Sir/Madam

Please find attached the RSPB's submissions for Deadline 8.

I would be grateful if you could confirm receipt of these submissions.

Kind regards

Jacqui Miller
Conservation Officer
RSPB Eastern England

Planning Inspectorate Ref: EN010079

Registration Identification Ref: 20012785

Re: Application by Norfolk Vanguard Limited for an Order Granting Development Consent for the Norfolk Vanguard Offshore Wind Farm

RSPB response to the Examining Authority's Rule 17 requests for further information, incorporating comments on the Report on the Implications for European Sites (RIES) Submitted for Deadline 8: 30th May 2019

FQ 1.8 Please comment on the areas that contain question marks, ie where there is not agreement between the Interested Parties and the Applicant that LSE and/or an AEOI can be excluded, as set out in Annexes 2 and 3 of the Report on the Implications for European Sites (RIES) [PD-016].

Our comments here relate to the offshore ornithology features on which we have previously commented, where question marks in the RIES matrices indicate that the existence of LSE and/or AEOI has not been agreed. We also note our outstanding areas of disagreement with the relevant assessments. In relation to offshore impacts, the RSPB considers that the RIES has captured our concerns and that the information presented gives an accurate picture of the discussions to date.

Annex 2 (LSE matrices)

No comments

Annex 3 (AEOI matrices)

1) Alde-Ore Estuary SPA

Lesser black-backed gull (breeding) – project alone and in-combination collision mortality

- We consider that **AEOI will not result** from the project **alone** (following the proposal to raise draught height)
- We consider that **AEOI exists** arising from collision mortality from this project **in-combination** with other projects.

As the assessment notes, our disagreement with apportioning for Norfolk Vanguard in the breeding season remains. The project's own contribution is still assessed on the basis of a breeding season apportionment of 3-17%. We recommend that a doubling of this to 34% would be appropriate. We also agree with Natural England's point that apportioning for other projects in the in-combination assessment should use the apportionment rates for those individual windfarms, rather than a generic 30%.

2) Flamborough and Filey Coast SPA

Black-legged kittiwake (breeding) – in-combination collision mortality

- We consider that **AEOI exists** arising from collision mortality from this project **in-combination** with other projects.

The RSPB maintains its position that the breeding season apportionment is too low and recommends that at a minimum a doubling of the Applicant's 26.1% apportionment would be appropriate, but also supports Natural England's use of 86% based on the SNH apportionment tool to provide an indication of the potential range of uncertainty.

We also maintain our disagreement with the exclusion of Norfolk Vanguard East during the breeding season as tracking data indicates that it is within the foraging range of breeding birds from FFC SPA.

Gannet (breeding) – in-combination collision mortality

- We consider that **AEOI exists** arising from collision mortality from this project **in-combination** with other projects.

We maintain our preference for a 98% avoidance rate to be used for gannet during the breeding season.

FQ 1.9 Having regard to the Applicant's comments on 'over precaution' in section 2 of the Offshore Ornithology Cumulative and In-combination Collision Risk Assessment (Update) [AS-048] and the 'Waddenzee judgment', please comment on the precautionary nature of the information that has been submitted.

The RSPB considers that it is entirely correct to apply precaution where there are such high levels of uncertainty. We have commented in detail on the specific examples of precaution referred to by the Applicant in our previous submissions[1] and it is necessary to point out that these instances of precaution are far from proven. *Waddenzee* confirmed that the competent authority, "taking account of the conclusions of the appropriate assessment of the implications…for the site concerned, in the light of the conservation objectives, are to authorise such activity only if they have made certain that it will not adversely affect the integrity of the site. That is the case where no reasonable scientific doubt remains as to the absence of such effects"[2]. Therefore, we are keen to see the advancement of the underpinning science for windfarm assessments, particularly advances in the modelling of likely impacts and the data underpinning them. However, these must be supported by robust, peer-reviewed evidence in order to meet the standards of scientific rigour required for appropriate assessment. This is exemplified by the discussions around the use of the Marine Scotland Science stochastic collision risk model and the Furness *et al.* (2018) nocturnal activity factors for gannet – in both these cases we support the use of these new, peer-reviewed methods if the site-specific data available meet the requirements for their use. However, in many of the other instances of precaution referred to by the Applicant, the proposed methodologies are not underpinned by robust and peer-reviewed science and hence cannot be accepted for the purposes of appropriate assessment. This issue highlights the importance of effective post-consent monitoring which can help address and reduce uncertainties for future deployment of offshore renewables and is needed to validate the conclusions reached by the various assessments that have been undertaken.

[1] See our Deadline 7 response (REP7-083) points on as-built vs consented windfarm designs, avoidance rates, nocturnal activity factors, apportioning and breeding season definitions; at Deadline 2 we commented on displacement assessment methodologies; and our Written Representations at Deadline 1 include comments on density independence in PVA, as well as other issues also covered above

[2] CJEU Case-127/02; [2004] ECR-7405 [59], our emphasis.

Planning Inspectorate Ref: EN010079

Registration Identification Ref: 20012785

Re: Application by Norfolk Vanguard Limited for an Order Granting Development Consent for the Norfolk Vanguard Offshore Wind Farm

RSPB Response to Applicant's Deadline 7.5 Additional Submissions Submitted for Deadline 8: 30th May 2019

Comments on the mitigation proposed

The RSPB welcome the proposal to mitigate potential collision impacts from the project by raising the draught height of the turbines across the site from 22m to 27m (Cumulative and In-combination Collision Risk Update submitted by the Applicant at Deadline 7.5, doc. ref. AS-049). We agree that this, when combined with the previous proposals to change the worst-case scenario turbine layout and minimum size, results in a significant reduction in collision risk to species of concern. However, we continue to recommend that consideration should be given to a range of draught heights, up to 35m.

Comments on the assessments for key species

Kittiwake of Flamborough and Filey Coast SPA

We highlight our continued concern around the apportioning of kittiwake mortality to the Flamborough and Filey Coast SPA in the breeding season. Firstly, we do not consider it appropriate to apportion 0% of collisions in Norfolk Vanguard East to the SPA, given that tracking data clearly demonstrate that both Norfolk Vanguard East and West are within foraging range of kittiwake from the Flamborough and Filey Coast SPA colonies. Secondly, we support Natural England's request for consideration of a greater range of values for breeding season apportioning in the context of the considerable uncertainty associated with apportioning birds to colonies, and again argue that doubling the 26.1% breeding season apportioning value as a minimum or using the 86% apportioning derived from the SNH tool would be reasonable and appropriate.

While the RSPB welcome the presentation of the results of the SNH apportioning method, we do not agree with the subsequent adjustment of the result by 26.1%, the previous apportioning method, to account for the number of adults in this value. Both methods are very broad-brush estimates with considerable uncertainty involved in estimation. This uncertainty is additive as the estimation methods are combined, and therefore cannot be used as an indication of precaution as the level of precaution should be proportionate to the degree of uncertainty. However, we acknowledge that this adjusted figure was not taken forward to the conclusions.

The RSPB is still concerned about the description of the conservation status of kittiwakes at the Flamborough and Filey Coast SPA, as described most recently in para. 97 of the Cumulative and In-combination Collision Risk Update. The recently published draft Supplementary Advice on Conservation

Objectives (SACO)[1] for this SPA states that the population has undergone a significant decline since 1987 along with a decline in productivity between 2009 and 2015. Due to this, the target for breeding population abundance has been set to restore the population to a level above 83,700 breeding pairs (rather than to maintain the population at current levels, as indicated by the Applicant). As the population in 2017 was 51,535 pairs (as cited in the SACO), we consider that the population cannot be regarded to be at favourable conservation status, as argued by the Applicant. Given the target for restoration of the population, we do not agree with the Applicant's assertion that the level of in-combination collisions predicted will not affect the status of the population.

Gannet of Flamborough and Filey Coast SPA
We maintain our request for presentation of a range of avoidance rates, including 98% for gannet in the breeding season, as noted in our response at Deadline 7.

Lesser black-backed gull of the Alde-Ore Estuary SPA
As above for kittiwake, we maintain our support for Natural England's position that a range of apportioning values for the breeding season should be considered, including at least a doubling of the Applicant's apportioning of 17%. We also note again our disagreement with the apportioning out of juveniles. Our full position on this was set out in our response at Deadline 7 (doc. ref. REP7-083).

Conclusions regarding AEOI from the project alone

As a result of the mitigation proposed (and despite our methodological concerns above), we agree that the project alone will not result in adverse effects on the integrity of the Flamborough and Filey Coast SPA or the Alde-Ore Estuary SPA.

Conclusions regarding AEOI from the project in-combination with others

The RSPB consider that the in-combination collision mortality has the potential to cause significant declines in SPA populations. Using the Applicant's own Counterfactuals of Population Size (Tables 7, 13 and 21 of the Cumulative and In-combination Collision Risk Update submitted by the Applicant at Deadline 7.5) the reduction after 30 years will be 33% for gannet (based on combined displacement and collision mortality) and 15% for kittiwake of Flamborough and Filey Coast SPA and 31% for lesser black-backed gull of the Alde-Ore Estuary SPA. We therefore consider that adverse effects on the integrity of these sites and features exist as a result of predicted collision mortality from this project in-combination with other plans and projects:

- The kittiwake population of the Flamborough and Filey Coast SPA;
- The gannet population of the Flamborough and Filey Coast SPA;
- The lesser black-backed gull population of the Alde-Ore Estuary SPA.

As stated in our response at Deadline 7, the project can only be granted consent if the Secretary of State is convinced that it will not have an adverse effect on the integrity of the European sites and their species concerned, having applied the precautionary principle and taken account of the conservation

[1] https://designatedsites.naturalengland.org.uk/Marine/SupAdvice.aspx?SiteCode=UK9006101&SiteName=flamb&SiteNameDisplay=Flamborough+and+Filey+Coast+SPA&countyCode=&responsiblePerson=&SeaArea=&IFCAArea=

objectives for those sites and their habitats and species. *Waddenzee* confirmed that where doubt remains as to the absence of adverse effects on the integrity of the site, approval should be refused[2], subject to the considerations of alternative solutions, imperative reasons of overriding public interest and the provision of compensatory measures as set out in regulations 64 and 68 of the Conservation of Habitats and Species Regulations 2017. We set out our position in full on this process at Deadline 10 of the examination of Hornsea Project Three. We have included this submission in full in the annex to this document for reference.

[2] CJEU Case-127/02; [2004] ECR-7405 at [56]-[57].

Annex: RSPB submission at Deadline 10 of the Hornsea Project Three Examination

The consideration of absence of alternatives, imperative reasons of overriding public interest and compensation

The Royal Society for the Protection of Birds

1 April 2019

Planning Act 2008 (as amended)

In the matter of:

Application by Ørsted Hornsea Project Three (UK) Ltd for an Order Granting Development Consent for the

Hornsea Project Three Offshore Wind Farm

Planning Inspectorate Ref: EN010080
Registration Identification Ref: 20010702

rspb giving nature a home

The consideration of absence of alternatives, imperative reasons of overriding public interest and compensation

Executive summary

The RSPB has a number of concerns with the responses provided to the Examining Authority by the Applicant in its answers to the Second Written Questions on the topic of alternative solutions, imperative reasons of overriding public interest (IROPI), and compensation. At the outset, the RSPB accepts that there is a clear public interest in producing renewable energy to reduce carbon emissions to meet the UK's climate change obligations. For this reason, the RSPB is a strong supporter of increasing renewable energy production and doing so in harmony with nature. Our concern here is ensuring this is done in a way that does not cause unnecessary harm to biodiversity, which is why the Article 6(4) tests are so important. In this context, they are critical in ensuring offshore wind farm schemes predicted to cause damage to Natura 2000 sites are only consented in the exceptional circumstances when all of those tests are met.

The concerns can be summarised as follows:

i. Alternative solutions, IROPI, and compensation are legal tests which are applied when it is not possible to exclude the risk of an adverse effect on the integrity of one or more Natura 2000 sites designated under the Birds or Habitats Directives.

ii. These legal tests are required to be applied in a specific sequence ordained by the Habitats Directive: first the consideration of alternative solutions, then IROPI, and finally the consideration of compensation. In its answers the Applicant has applied the tests in the wrong order.

iii. **Approach to defining the public interest:** to frame the analysis on alternative solutions and IROPI required under Article 6(4), it is vital that the public interest(s) served by the plan or project are clearly and precisely described and the contribution of the plan or project to those public interests also described as precisely as possible. In setting out a broad description of the public interest(s) that Hornsea Three is claimed to serve, the Applicant has failed to set out the role and contribution of the project in meeting the claimed public interest(s).

iv. **Alternative solutions:** the RSPB considers that the legal test of alternative solutions must be given a wide interpretation, and should be focused on the ***ends*** that the plan or project seeks to achieve (in this case low carbon electricity) and not, as the Applicant contends, the means by which that end is achieved. The RSPB consider that a key role for the competent authority is to identify the alternative solutions that can meet the public interest(s) which the plan or project serves and whether there are other, less damaging means available. To do this will require a clear view of what the relevant public interest objectives are, the contribution of the project to <u>each</u> of those public interests, and whether there are other ways the public need can be delivered without damaging Natura 2000 sites. We do not consider the Applicant has provided the necessary information to carry out such an analysis.

v. **IROPI:** if the Secretary of State considers there are no alternative solutions to meet the public interest objectives, they can only approve the project if the IROPI outweighs its impact on the conservation objective. It is for the Applicant to demonstrate that the contribution Hornsea Three makes to its claimed public interests outweigh the public interest of conserving the relevant features of, for example, the Flamborough and Filey Coast SPA. The RSPB considers the Applicant has not made this case out. The Applicant's case emphasises "human health, public safety and

beneficial consequences of primary importance are central planks of the case for Hornsea Three", with particular reference to combating climate change, energy security and the economic benefits deriving from those. However, at no point in its submission does the Applicant make anything more than general statements regarding how the Hornsea Three project itself contributes to each of these public interests. Therefore, the RSPB considers this case is not made out.

vi. **Compensatory measures:** The Applicant states clearly that it has not identified any relevant compensation. The RSPB notes that securing such measures is the responsibility of the Applicant. If the Examining Authority and/or Secretary of State conclude that an adverse effect on the integrity of one or more of the sites highlighted cannot be excluded the Applicant's failure to secure such measures would jeopardise the ability of the Secretary of State to consent the scheme as the SoS would not have any confidence the compensatory measures required under Article 6(4) had been secured. Therefore, in line with *Managing Natura 2000*, consent could not be granted. In addition to this overarching problem, the RSPB is concerned about the approach that the Applicant has adopted in terms of the selection of compensation, its quantum, the evidence base required to demonstrate its likelihood of success, its location, timing and the role of Natural England in selection of compensation.

vii. Based on the Applicant's submission, the RSPB considers that the Examining Authority and Secretary of State have not been provided with the necessary information to consent the Hornsea Three project on the basis of no alternative solutions, IROPI and securing of necessary compensatory measures. Therefore, based on the information presented to the Examination, the RSPB considers consent cannot be granted.

Introduction

1. This document represents the RSPB's response to points raised by the Applicant in its answers to the Examining Authority's Questions 2.2.7 and 2.2.44 set out in Appendix 63 at Deadline 4 and *Applicant's Comments on Interested Parties' Responses to the ExA's Second Written Questions submitted at Deadline 4* for Deadline 5. Due to the importance of these issues we have produced this document to publicly set out where our views on these issues differ from those of the Applicant.

2. In approaching the Applicant's responses the RSPB notes paragraph 3.1 the Answers to the ExA's questions states: "The Applicant's primary case is that Article 6(4) is not engaged in relation to the FFC SPA, the NNSSR SAC or the WNNC SAC as a result of Hornsea Three (either alone or in combination)." The RSPB has not made representations about either the North Norfolk Sandbanks and Saturn Reef SAC or the Wash and North Norfolk Coast SAC, and will not repeat our representations about our concerns with the Flamborough and Filey Coast SPA (FFC SPA) here. The focus of this document is solely upon the steps which will need to be taken if the Examining Authority and/or the Secretary of State are unable to conclude that Hornsea Project Three will avoid an adverse effect on the integrity of one or more Natura 2000 sites.

3. The RSPB expressed concerns about the potential impacts of offshore wind farms upon the Flamborough Head and Bempton Cliffs SPA and FFC SPA (which now subsumes the former designation) (the FFC SPA) throughout the Hornsea One and Hornsea Two examinations. Both schemes are significantly closer to the FFC SPA than Hornsea Three and are likely ***individually*****,** to be significantly more harmful to the FFC SPA than Hornsea Three. We argued at the Hornsea Two Examination that other schemes should be consented in preference to Hornsea Two[3]. However, both schemes were consented and are now under construction. If it is not possible to exclude the risk of an adverse effect on the integrity of the Flamborough and Filey Coast SPA it will be because of the impacts of Hornsea Three in combination with Hornsea One and Hornsea Two. If this is the case it is regrettable that the potentially least damaging of the four Hornsea schemes, due to it being the furthest from the FFC SPA, is the one which has reached this threshold.

4. The RSPB consider that the invocation of the approach set out in Article 6(4) of the Habitats Directive (92/43/EEC)[4] should not be approached lightly. The very limited number of cases where it has been deemed appropriate to use this approach gives a clear indication of the high thresholds that have to be passed in order to do so.

Identification of adverse effect on integrity

5. The RSPB note the statement in paragraph 3.7 of the Applicant's Answers, that "NE's conclusion appears to be based on founded principally on uncertainty (which the Applicant does not accept)", coupled with the request for NE to set out its reasoning "and evidence regarding the extent of harm it identifies in respect of the integrity". This approach has the requirements of the test backwards -

[3] Initially in our Written Representations (15 July 2015) and then in our *Final submission on alternative solutions under the Habitats Regulations* (10 December 2015).

[4] This provision is transposed into domestic legislation via regulation 64 of The Conservation of Habitats and Species Regulations 2017 (SI 1012) and regulation 29 of The Conservation of Offshore Marine Habitats and Species Regulations 2017 (SI 1013). For ease of reference in this document we refer to Article 6(4), but that should be understood to include reference to these provisions where appropriate.

it is for the Applicant to satisfy the Examining Authority that an adverse effect on integrity upon Natura 2000 sites can be ***excluded***.

6. The RSPB note the Applicant's statement:

> There are two potential categories of adverse effect conclusion as a result of the *Waddenzee*[5] case:
>
> (a) A positive conclusion of adverse effect, typically as a result of construction works within the Natura 2000 site as a result of e.g. a port, which is known in advance and can be the subject of advance consideration in terms of appropriate compensation inside and outside (e.g. by way of replacement habitat) the affected site and detailed discussion with the relevant SNCB to agree a deliverable and funded set of proposals; and
>
> (b) A conclusion based on uncertainty of effect due to an absence of evidence or issues of interpretation of the available evidence, such that, in applying the precautionary principle as required by *Waddenzee* an adverse effect cannot be ruled out.[6]

7. The Applicant then continued:

> The present case would seem to fall into the second category. It is submitted that, in various respects, a conclusion based on uncertainty and precaution must necessarily be approached differently to one based on clear, positive evidence of a demonstrable adverse effect on integrity.[7]

8. The RSPB disagrees with this assertion. The Habitats Directive is focused on conservation and sets out one requirement, which is to ensure on the basis of robust science that the integrity of Natura 2000 sites is maintained. To this end it makes no difference whether a scheme is required to proceed to consideration of alternative solutions, imperative reasons of overriding public interest and compensation because it is definitely causing harm or because there is insufficient certainty that harm will not be caused. – the key issue is to ensure that if the scheme goes ahead that there will be no long-term harm to the integrity of the wider Natura 2000 network.

9. *Managing Natura 2000* addresses this point:

> According to the Court **the appropriate assessment should contain *complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt*** as to the effects of the works proposed on the site concerned (C-304/05 paragraph 69).[8]

Managing Natura 2000 further states:

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[5] C-127/02, *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Naturrbeheer en Visserij*.
[6] Ørsted's *Detailed response to the ExA Q2.2.7 and Q2.2.44*, paragraph 7.7.2.
[7] Ørsted's *Detailed response to the ExA Q2.2.7 and Q2.2.44*, paragraph 7.7.3.
[8] *Managing Natura 2000 sites – The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC* (21/11/18) C(2018) 7621 final, section 3.6.1.

Where doubt remains as to the absence of adverse effect on the integrity of the site linked to the plan or project being considered, the competent authority will have to refuse authorisation (C-127/02 paragraph 57).[9]

Evaluating alternative solutions, imperative reasons of overriding public interest, and compensation

10. The RSPB considers that it is essential that renewable energy, like all other development, is delivered through the least environmentally damaging schemes. The purpose of the alternative solutions and IROPI tests is to decide where the balance lies between the public interest in conserving our biodiversity and the public interest(s) which may be provided by the scheme.

11. Article 6(4) takes as its starting point that it has not been possible to avoid an adverse effect on the public interest of conserving the biodiversity protected by the impacted Natura 2000 sites, which in turn defines the loss to the public interests protected by the EU Birds and Habitats Directives. In order to carry out the critical exercise set out in Article 6(4) it is vital that:

    i) The public interest(s) served by the plan or project are clearly and precisely described; and

    ii) The contribution of the plan or project to those public interests is described as precisely as possible.

    These are critical preliminary steps to tackling the Article 6(4) tests as they enable the decision-maker to determine:

    a) Whether there are less damaging, feasible alternative solutions by which the plan or project's contribution to the defined public interest(s) could be met; and if not

    b) Whether the plan or project's contribution to the public interest(s) outweighs the damage it will cause to the public interests served by the impacted Natura 2000 sites.

    It is not enough to couch Article 6(4) arguments in generalities of meeting broadly described public interests: the role of the specific plan or project in meeting the claimed public interest(s) must be precisely described. At this stage we simply note that the Applicant's statement lacks the necessary precision with regard to the contribution of its project to the claimed public interest(s). Therefore, it will be incumbent on the Examining Authority and Secretary of State to carry out this analysis.

12. At the outset, the RSPB accepts that there is a clear public interest in producing renewable energy to reduce carbon emissions to meet the UK's climate change obligations. For this reason, the RSPB is a strong supporter of increasing renewable energy production and doing so in harmony with nature. Our concern here is ensuring this is done in a way that does not cause unnecessary harm to biodiversity, which is why the Article 6(4) tests are so important. As we go on to argue, we do not consider the Applicant has set out a robust case justifying the Hornsea Three project itself in this context.

[9] *Managing Natura 2000*, section 3.7.3.

13. Without going in to detail at this stage, it is worth summarising the key planks of the Applicant's public interest objective arguments.[10] They draw on the contribution of offshore wind in general to the Government's legal and policy objectives (primarily at a UK level) to:

    a) Increase renewable energy to reduce carbon emissions to combat climate change;

    b) Increase security of energy supply; and

    c) Economic benefits deriving from (a) and (b).

14. The Applicant then seeks to categorise these primarily under the Article 6(4) heading of public interest tests, primarily the headings of:

    - Human health
    - Public safety
    - Beneficial consequences of primary importance to the environment.

15. However, it is important to note that at no point in its submission does the Applicant make anything more than general statements regarding how the Hornsea Three project itself contributes to each of these public interests i.e. taking each of the claimed benefits (increased renewable energy, improved energy security, economic benefits):

    i) How do each of these elements contribute to human health, public safety and beneficial consequences of primary importance to the environment and precisely which aspects of these broad categories will benefit?

    ii) What part of the UK population/economy will benefit from these public interests; and in turn

    iii) What contribution will the project itself make to each public interest claimed?

    This is essential analysis to provide the framework necessary to carry out the alternative solutions and IROPI tests. At present, this case is not made out.

Adverse effects on site integrity

16. The RSPB note the statement in the Applicant's Answers (at paragraph 3.8) that the consideration of alternative solutions, IROPI and compensatory measures "can only be done if the precise nature and quantified extent of any contended adverse effect on integrity is identified". The RSPB respectfully contends that the potential levels of harm <u>can</u> be derived from the modelled outputs of the likely impacts, with the Population Viability Analysis model giving a strong indication of the likely scale of the impact over the lifetime of the offshore wind farm, and using that to quantify the level of harm, and thus compensation, that may be required. It is the RSPB's view that the outputs of this analysis are sufficient to demonstrate reasonable scientific doubt as to the absence of adverse effects on the integrity of the FFC SPA. As per the Applicant's request the RSPB is willing to have further

[10] Ørsted's *Detailed response to the ExA Q2.2.7 and Q2.2.44*, paragraph 5.6.1

discussions to consider the position further. We make this offer without prejudice to the Applicant's position that Article 6(4) of the Habitats Directive is not engaged.

17. The Applicant notes that "Hornsea Three is not in or near to the FFC SPA, which is some 149 km (approximately) from Hornsea Three".[11] This is not relevant to considerations of impacts of the offshore array area on the FFC SPA – it is the effect that the scheme might have upon the FFC SPA which is the sole consideration.

18. Throughout its response the Applicant places significant emphasis on DEFRA's document *Habitats and Wild Birds Directives: guidance on the application of article 6(4) – Alternative solutions, imperative reasons of overriding public interest (IROPI) and compensatory* measures. The RSPB note that this is a statement of the UK Government's policy interpretation of the law, and therefore cannot be considered to be legally definitive. The RSPB highlights the Explanatory note at the start of the guidance that: "This guidance is issued as a stand-alone document on an interim basis." (contents page). We also note that the document is now more than six years old and that there has been a significant body of recent European Court of Justice decisions which may impact upon it. These judgments have been reflected in the European Commission's revised version of the *Managing Natura 2000* sites guidance.[12] We make reference to this revised guidance in our response. To the extent that there is disagreement between the 2012 DEFRA guidance and the 2018 European Commission guidance we consider that the latter must be preferred.

19. It is important to note that the tests set out in paragraph 4.5 of the Applicant's Answers are presented in the wrong order, with imperative reasons of overriding public interest (IROPI) being considered before the absence of alternative solutions. The three elements are sequential legal tests and consequently they must be approached in the correct sequence. *Managing Natura 2000* is clear:

    > The **absence of alternatives must be demonstrated**, before proceeding with the examination of whether the plan or project is necessary for imperative reasons of public interest (Court ruling in Castro Verde case C-239/04, paragraphs 36 – 39).[13]

20. Similarly, IROPI must be established before the issue of compensation can be considered. All three tests must be satisfied in order for a scheme to be consented under this regime.

21. However, we note that in terms of discussion between parties during the examination process, it is appropriate to discuss such matters in parallel in order to inform the Examination fully. However, there has been no serious discussion of compensatory measures to date.

Alternative solutions

22. Given the statement from *Managing Natura 2000* in paragraph 19 above it is clear that the absence of alternative solutions is the most important question to address. *Managing Natura 2000* is clear:

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[11] Ørsted's *Detailed response to the ExA Q2.2.7 and Q2.2.44*, paragraph 2.2.
[12] *Managing Natura 2000 sites – The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC* (21/11/18) C(2018) 7621 final.
[13] *Managing Natura 2000* (section 3.7.4, page 57).

The decision to go ahead with a plan or project must meet the conditions and requirements of Article 6(4). In particular, it must be documented that:

1. the alternative put forward for approval is the least damaging for habitats, for species and for the integrity of the Natura 2000 site(s), regardless of economic considerations, and that ***no other feasible alternative exists*** that would not adversely affect the integrity of the site(s);[14] (our emphasis)

It is within the context of feasibility that the question of alternative solutions must be considered.

Is "need" unconstrained?

23. Before considering feasibility, the RSPB notes the contention made by the Applicant that "UK renewable energy targets are therefore essentially unconstrained. This is highly relevant to the consideration of alternatives to Hornsea Three and other offshore wind farms."[15]

24. Similar arguments were advanced by SMartWind (now owned by Ørsted) at the Hornsea Two examination. In Appendix J to its Deadline II response it stated:

> The Applicant would make a very general point, however, that it considers the question of alternatives to be a false premise in the context of the Project.
>
> The concept of alternatives must be seen and gauged against the purpose and nature of the individual project subject to the assessment. In the case of the Project, as noted in Section 8 of the Statement of Reasons, the Project is principally designed to deliver renewable energy generating capacity for the UK to address the need for such in accordance with the UK's legal obligations.
>
> Regulation 3 of The Promotion of the Use of Energy from Renewable Sources Regulations 2011 (2011/243) places a duty on the Secretary of State to ensure that at least 15% of energy consumption in the UK is from renewable sources by 2020. Crucially, this key target is unconstrained. It is not a fixed percentage or a cap and, accordingly, the Applicant would submit that there can be no ruling out of projects meeting an unconstrained need on the basis of alternative solutions.
>
> The central objective of the current UK Government energy policy is to ensure the security of energy supply whilst responding to the challenge of climate change by reducing carbon emissions. To meet these objectives, it is recognised that more energy infrastructure is needed with an increased emphasis on energy generation from renewable and low carbon sources. The need for this infrastructure is fully recognised in many areas of Government policy and the need to reduce carbon emissions is further enshrined in European law and international obligations, which has been transposed into a range of UK legislation. The Project will accord with these

[14] *Managing Natura 2000*, section 5.2, page 56.
[15] Ørsted's *Detailed response to the ExA Q2.2.7 and Q2.2.44*, paragraph 5.6.16.

policies and help compliance with the relevant legislation and so will assist the Government in meeting its energy policy obligations.

25. The RSPB rejected this assertion at the Hornsea Two Examination[16] and rejects it now. The Government's decision on 11th September 2015 to refuse consent for the Navitus Bay offshore wind farm demonstrated its willingness to reject a nationally significant offshore wind farm scheme due to its environmental impacts. If, as the Applicant contends, the demand for offshore wind was unconstrained, the Secretary of State would have been obliged to consent the scheme despite its perceived harm. Further, the constraints that the Government has put on Contract for Difference bidding rounds[17] indicates a further restriction on delivery of which the Government is clearly aware. This is also described in the Applicant's statement.[18]

26. The decision letter rejecting the Navitus Bay Development Consent Order addressed the interplay between the NPS policy statements and the potential impacts for an application:

> ... The Secretary of State accepts that the need for the development of the kind represented by the Application Development and the TAMO is in accordance with the policy set out in the relevant NPSs (EN-1 and EN-3) but she considered that, in this case, the potential impacts of the Application Development and the TAMO are of such a scale that they outweigh the policy imperatives set out in those Statements....[19]

27. The Navitus Bay decision makes it clear that policy-driven consideration of need does not trump considerations of impact, and that consequently rejection of applications is justifiable if the decision-maker concludes that the impacts of the scheme are considered sufficiently serious.

28. In terms of the nature of the impact, the RSPB stated at Hornsea Two:

> 63. It is worth noting that the visual impacts on the WHS [World Heritage Site] were considered to be essentially temporary – capable of being addressed as soon as the turbines are removed. This needs to be contrasted with the likely ecological impacts of the Hornsea Project 2 scheme where the impacts upon the various populations of birds will require a number of years to recover, if Indeed they can. The Hornsea Project Two impacts are not readily reversible.
>
> 64. The RSPB submits that if transient aesthetic impacts justify the refusal of an NSIP renewable energy scheme then ecological impacts upon the designated species of a European site clearly justify refusal of the Hornsea Project 2 scheme. The RSPB contends that the fact that the

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[16] See Final submission on alternative solutions under the Habitats Regulations for The Royal Society for the Protection of Birds, paragraphs 54 to 70.
[17] The *Contracts for Difference (CfD): Draft Budget Notice for the third allocation round* indicates that the Government will release £60m for the third CfD round, with an overall capacity cap of 6GW (Department for Business, Energy and Industrial Strategy, 20 November 2018).
[18] Ørsted's *Detailed response to the ExA Q2.2.7 and Q2.2.44*, paragraph 5.6.26.
[19] Secretary of State's Decision Letter, 11 September 2015, paragraph 52. The "TAMO" was a reduced 630 MW "Turbine Area Mitigation Option" scheme introduced by the Applicant in an attempt to address concerns about the original 970 MW scheme's likely impacts.

Secretary of State could justify refusal on the basis of visual, green belt and National Park impacts clearly demonstrates that it is acceptable to reject a scheme on Natura 2000 grounds.

29. The Secretary of State subsequently rejected the Myndd Y Gwynt onshore wind farm NSIP application. The Secretary of State's consideration of national energy policy was extremely limited:

> The Secretary of State has had regard to the Energy National Policy Statements ("NPS") EN-1 (Overarching National Policy Statement for Energy) and EN-3 (NPS for Renewable Energy Infrastructure).[20]

Beyond this there was no consideration of energy issues such as need by the Secretary of State. Again, this counters the argument that need is unconstrained and that potentially damaging schemes should be consented.

30. In relation to Hornsea Project Three, it is worth noting that the Myndd Y Gwynt scheme was refused because the Applicant had failed to provide sufficient ecological information in the HRA, such that:

> 38. The Secretary of State cannot grant development consent ***because she is not able to conclude that there is no adverse effect on the integrity*** of the red kite feature of the Elenydd – Mallaen SPA. She is therefore refusing the Application in accordance with regulation 61(5) of The Conservation of Habitats and Species Regulations 2010. (our emphasis)

31. There was no requirement for Natural Resources Wales to prove that the scheme would have an effect – instead the onus was on the Applicant to demonstrate that there was no adverse effect on the integrity of the SPA. This is the approach required by the Habitats Regulations and Habitats Directive. Consequently we contend that the situation there relates closely to the present situation.

32. At Hornsea Two the RSPB noted:

> 69. Two key points can be taken from these Government decisions:
>
> - The impacts of a scheme must be taken into account and may justify its refusal, even in the context of a clear national need for renewable energy generating infrastructure; and
> - Applicants must fully comply with the requirements of the Habitats Regulations. A failure to support sufficient information to enable a proper conclusion at any stage of the assessment process is sufficient to justify the refusal of the application.

We stand by those points in relation to Hornsea Project Three.

What alternative solutions should be considered?

33. For ease of reference we have drawn together several key points made by the Applicant in relation to alternative solutions that rely upon the DEFRA guidance. We respond to them below.

> Paragraphs 13 and 14 of the DEFRA guidance confirm that the competent authority must use its judgement to ensure that the framing of alternatives is <u>reasonable</u> by reference to the identified

[20] Decision Letter, paragraph 9.

objectives, as they provide the context and set the scope for consideration of alternative solutions.[21]

34. We return to the issue of reasonableness at paragraph 37 below.

35. The Applicant sets out points from the DEFRA guidance:

> DEFRA's guidance states that what must be considered are (our [Ørsted's] emphasis): "*other feasible ways to deliver the overall objective of the plan or project"*. The word 'feasible' is important and is also used in the MN 2000 guidance. DEFRA explain that this means (our [Ørsted's] emphasis):
>
> > "*The consideration of alternatives should be limited to options which are financially, legally and technically feasible. An alternative should not be ruled out simply because it would cause greater inconvenience or cost to the applicant. However, there would come a point where an alternative is so very expensive or technically or legally difficult that it would be unreasonable to consider it a feasible alternative."*[2223]
>
> While the DEFRA guidance advises that the "do-nothing" options should be considered, it acknowledges this would rarely be a true alternative:
>
> > "*Normally this would not be an acceptable alternative solution because it would not deliver the objective of the proposal. However it can help form a baseline from which to gauge other alternatives. It can also help in understanding the need for the proposal to proceed, which will be relevant to any later consideration of the IROPI test...*"[2425]

36. The RSPB agree that the need to tackle pressing climate change is such that a "do nothing" approach is inappropriate. However, we are clear that the need to tackle climate change must be carefully considered through the legal tests and that the consenting of a potentially damaging scheme must have been clearly demonstrated by satisfying all of the tests.

37. The RSPB consider that a key role for the competent authority is to identify the alternative solutions that can meet the public interest(s) which the plan or project serves. To do this will require a clear view of what the relevant public interest objectives are, the contribution of the project to each of those public interests, and whether there are other ways the public need can be delivered without damaging Natura 2000 sites. The RSPB consider that the alternative solutions to be considered should not be limited by the Applicant's view or definition of the need: the competent authority should ensure that all alternative solutions to the plan or project have been considered. We note the Applicant's position:

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[21] Ørsted's *Detailed response to the ExA Q2.2.7 and Q2.2.44*, paragraph 6.3.3.
[22] DEFRA guidance, paragraph 18.
[23] Ørsted's *Detailed response to the ExA Q2.2.7 and Q2.2.44*, paragraph 6.4.1.
[24] DEFRA guidance, at paragraph 17.
[25] Ørsted's *Detailed response to the ExA Q2.2.7 and Q2.2.44*, paragraph 6.5.1.

DEFRA explain in their guidance[26] that the competent authority must use its judgement to ensure that the framing of alternatives is reasonable. With regard to the specific example of an offshore wind farm they state (second bullet, our [Ørsted's] emphasis added):

> "*In considering alternative solutions to an offshore wind renewable energy development the competent authority would normally only need consider alternative offshore wind renewable energy developments. Alternative forms of generation (e.g. building a nuclear power station instead) are not alternative solutions to the project as they are beyond the scope of its objective."*[27]

38. The Applicant expands upon this argument:

> ... Other forms of renewable energy generation are not alternatives to offshore wind because the UK Government has determined that it is necessary for the energy mix to include a substantial component of offshore wind (irrespective of other forms of renewable energy generation that may be developed). This is evident from NPS EN-1 and EN-3, the latter stating that offshore wind is expected to provide a "*significant proportion of the UK's renewable energy generating capacity up to 2020 and towards 2050*"[28]. Developing solar or onshore wind farms does not deliver that objective. Moreover, the UK Government has set its mind against future onshore wind development at this time, and neither onshore wind nor solar can be developed at the same scale as offshore wind and do not provide the same level of economic benefit.[29]

It is important to note that the constraints on onshore wind development mentioned relate only to England. Although energy policy is reserved to the UK government, planning policy in relation to the construction of onshore wind farms is a matter for the devolved governments. Scottish, Welsh and Northern Ireland government planning policy is far more supportive of onshore wind development. Given that the search for alternative solutions should be at a UK level (in line with the public interests served), it is the RSPB's view these are relevant to the consideration of alternative solutions to meet the public interests described by the Applicant.[30]

39. Therefore, the RSPB disagrees with the Applicant. As highlighted above, the refusal to countenance onshore wind is a domestic policy constraint that only applies in England. Further, we consider that if it is possible to deliver the desired level of renewable energy generating capacity within the required time frame that it does not matter whether this comes from one or two large schemes or a number of smaller schemes. We note that the Applicant also raises the issue of economic benefit: We consider that this may be an entirely inappropriate consideration in the context of alternative solutions. In addition, it is not clear to whom the economic benefit is supposed to accrue, or indeed what the economic benefits are, which makes it particularly difficult for other parties to make representations about them or for decision-makers to take them into account.

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[26] DEFRA guidance, at paragraph 13.
[27] Ørsted's *Detailed response to the ExA Q2.2.7 and Q2.2.44*, paragraph 6.6.1.
[28] NPS EN-3, at paragraph 2.6.1.
[29] Ørsted's *Detailed response to the ExA Q2.2.7 and Q2.2.44*, paragraph 6.6.2.
[30] Ørsted's *Detailed response to the ExA Q2.2.7 and Q2.2.44*, paragraph 6.3.2.

40. The RSPB fundamentally disagrees with the approach recommended by DEFRA quoted in paragraph 37 above as we consider that its consideration of alternatives is unduly narrow. We contend that the DEFRA guidance has to be read in a manner which accords with the revised *Managing Natura* 2000. This states:

> All feasible alternatives that meet the plan or project ***aims***, in particular, ***their relative performance with regard to the site's conservation objectives, integrity and contribution to the overall coherence of the Natura 2000 network*** have to be analysed, taking also into account their proportionality in terms of cost. They might involve alternative locations or routes, different scales or degrees of development, or ***alternative processes***.[31] (our emphasis)

41. *Managing Natura 2000* clearly frames the consideration of alternative solutions around the ***designated site*** and not the individual scheme which is being proposed. It also clearly envisages alternative ***means*** to achieve the ***aims*** of the project - in this case the provision of renewable energy.

42. For the avoidance of doubt the RSPB disagrees with elements of the statement in the DEFRA guidance that:

> In considering alternative solutions to an offshore wind renewable energy development the competent authority would normally only need consider alternative offshore wind renewable energy developments. Alternative forms of energy generation (e.g. building a nuclear power station instead) are not alternative solutions to this project as they are beyond the scope of its objective.[32]

43. This approach appears to be contradicted by *Managing Natura 2000* cited at paragraph 40 above. The RSPB considers that a nuclear power station may not be an appropriate alternative[33], but we consider that measures such as energy efficiency and/or alternative forms of renewable energy generation would be appropriate alternatives and within the scope of its objective, which is to help combat climate change (the same could be argued in terms of energy security and economic growth). Energy efficiency would help reduce the need for the scheme, whereas the alternative renewables (e.g. solar) would contribute towards the Government's renewable energy targets. Ultimately the question is the ***aim*** that the scheme seeks to achieve – which is to reduce greenhouse gas emissions whilst ensuring that "the lights stay on" by ensuring that the nation's electricity demand is matched by a sufficient supply of renewable energy. In considering the implications of adopting an alternative solution, it is important to note that to the end user it is not possible to discern the way in which the electricity that is being consumed was generated. We contend that this has a significant bearing on the range of potential alternative solutions. Consequently, the restriction to offshore wind is an unjustified restriction of the scope of the consideration of alternatives, as other renewable energy schemes as well as energy efficiency

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[31] *Managing Natura 2000*, section 3.7.4, page 57.
[32] DEFRA guidance, at paragraph 13, second bullet point.
[33] This view is set in terms of the types of energy generation, rather than in the context of the recent withdrawal of the Moorside and Wylfa schemes.

measures that seek to reduce demand would also serve the overall end as we have set it out in this paragraph. This also accords with the DEFRA guidance:

> In some cases wide ranging alternatives may deliver the same overall objective, in which case they should be considered.[34]

44. The DEFRA guidance also notes

> The consideration of alternatives should be limited to options which are financially, legally and technically feasible. An alternative should not be ruled out simply because it would cause greater inconvenience or cost to the applicant.[35]

In the event that the Examining Authority and/or the Secretary of State are minded to disagree with the RSPB's position on alternative solutions, we draw attention to the fact that there are already a number of consented offshore wind farms which have yet to be funded which would be capable of providing energy outputs to match that of Hornsea Three. Consequently these offer valid alternatives to the Hornsea Three scheme that meet the narrow test set out by the Applicant and would comply with the extract from DEFRA's guidance at paragraph 37 above.

No feasible locations outside the Hornsea Zone

45. The Applicants have sought to restrict consideration of alternative solutions to the former Hornsea Zone. The RSPB notes the statements made by the Applicant in relation to the Strategic Environmental Assessment work which supported the Round 3 leasing process:

> In the UK context, this application is found on, initially, an extensive and rigorous UK wide zone selection process undertaken over many years originally by the Government and TCE and, subsequently, by an equally extensive and rigorous project specific site selection process within the former Hornsea Zone.[36]

And further:

> In parallel, DECC concluded a Strategic Environmental Assessment ("SEA") in accordance with the Environmental Assessment of Plans and Programmes Regulations 2004 (the SEA Regulations). As set out in NPS EN-3, through this Offshore Energy SEA ("OESEA")(DECC, 2009), the Government assessed "*the environmental implications and spatial interactions of a plan/programme for some 25GW of new offshore wind capacity, on top of existing plans for 8GW of offshore wind".* The OESEA included consideration of alternatives to the draft plan/programme for all elements covered by the SEA, including future offshore wind leasing. The Government concluded there were no overriding environmental considerations to prevent the achievement of the plan/programme.[37]

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[34] DEFRA guidance, at paragraph 13.
[35] DEFRA guidance, paragraph 18.
[36] Ørsted's *Detailed response to the ExA Q2.2.7 and Q2.2.44*, paragraph 6.7.2.
[37] Ørsted's *Detailed response to the ExA Q2.2.7 and Q2.2.44*, paragraph 6.7.9.

46. The RSPB does not wish to engage in a detailed discussion over an assessment and consultation exercise that was conducted nearly 10 years ago. However, we do wish to highlight for the record the concerns that the RSPB and the Statutory Nature Conservation Bodies set out about the "extensive and rigorous" process that was undertaken at the time.

47. The RSPB made detailed comments on the Offshore Energy Strategic Environmental Assessment (June 2009). We highlight some key points that we made at the time which are pertinent for this case in terms of alternatives and cumulative effects (text in bold italics are our emphasis now):

> However, this SEA fails to consider a wide range of alternatives for each activity (section 5.16), ***nor has it undertaken a satisfactory assessment of likely cumulative effects*** (sections 5.5.4 & 5.14), particularly for birds.[38]
>
> In our view, the above conclusion does not adequately reflect the likely significance of the Draft Plan's effects on birds a population level. While significant displacement, barrier and collision effects **might be unlikely**, ***significant effects cannot be ruled out in the absence of a strategic-level Cumulative Impact Assessment (CIA) of the offshore wind element*** of the Draft Plan.[39]
>
> Most of the RSPB's objections to OWF proposals ***have related to cumulative effects of multiple wind farms and impacts on the relevant SPA populations*** (e.g. Sheringham Shoal), rather than implying biogeographical population level impacts. [40]
>
> ***The SEA identification and evaluation of the potential cumulative effects of multiple offshore licences is unsatisfactory, particularly with respect to birds***. The claim made in section 5.5.4 that there are unlikely to be cumulative effects on biogeographical populations is not supported by a robust assessment. This effect cannot be ruled out for specific species depending on the scale of multiple wind farms and other developments affecting species across occupied sea areas, including transboundary effects.[41]
>
> We ***recommend that a strategic level Cumulative Impact Assessment (CIA) is undertaken***, ideally led by DECC, as project level CIA is unlikely to adequately predict cumulative effects. This CIA could underpin the assessment of cumulative and in-combination effects for the Appropriate Assessment of the Draft Plan.[42]
>
> The assessment of Alternative 3, the preferred alternative, concludes that there are potential negative effects due to barrier effects and changes in food availability, and potential minor

[38] UK Offshore Energy Plan – SEA for Offshore Oil and Gas Licensing and Wind Leasing – Environmental Report Consultation, Response by The Royal Society for the Protection of Birds, page 8.
[39] UK Offshore Energy Plan – SEA for Offshore Oil and Gas Licensing and Wind Leasing – Environmental Report Consultation, Response by The Royal Society for the Protection of Birds, page 11.
[40] UK Offshore Energy Plan – SEA for Offshore Oil and Gas Licensing and Wind Leasing – Environmental Report Consultation, Response by The Royal Society for the Protection of Birds, page 14.
[41] UK Offshore Energy Plan – SEA for Offshore Oil and Gas Licensing and Wind Leasing – Environmental Report Consultation, Response by The Royal Society for the Protection of Birds, page 16.
[42] UK Offshore Energy Plan – SEA for Offshore Gas and Oil Licensing and Wind Leasing – Environmental Report Consultation, Response by The Royal Society for the Protection of Birds, page 17.

negative impacts upon birds due to collision and behavioural changes (p.109). However, the overall conclusion is that these effects are not significant at a strategic level. As mentioned above, our view is that the criteria for determining significance are unclear and the data to make such an assessment are not robust. We therefore believe that some of these potential negative/minor negative effects are as likely to be significant at the biogeographical scale as they are likely to be insignificant and as such, we cannot make a definitive determination either way. Therefore, the most we can say is that there is no evidence that there is a significant effect, but equally, there is no evidence to show that there is not a significant effect.[43]

48. A paper written by the RSPB, *Assessing Marine Cumulative Effects in SEAs: An Overview of Basic Principles (August 2008)* which was appended to the RSPB's response to the Offshore Energy Strategic Environmental Assessment concluded:

> ***The scale of the Round 3 programme implies potential for significant cumulative effects*** both within and between the development zones proposed by the Crown Estate. (page 4) (our emphasis)

49. The Joint Nature Conservation Committee's (JNCC) response to the Offshore Energy Strategic Environmental Assessment Research Programme, representing the collected views of the Countryside Council for Wales, Natural England and Scottish Natural Heritage, noted:

> We also agree, subject to important caveats, that the environmental data presented in the SEA provides no conclusive evidence that overriding environmental considerations will prevent the achievement of the plan/programme. However we do have concerns with respect to the evidence base and with some of the interpretation. In our view ***there are significant environmental risks that need to be effectively managed to ensure the plan/programme can be delivered***. We are not convinced that the recommendations as currently represented are sufficiently robust to ensure that environmental risks will be adequately addressed.[44] (our emphasis)

50. The JNCC continued:

> In our view there is significant uncertainty with respect to the likely impacts of implementing the plan/programme on birds. For example, locations of marine SPAs have yet to be finalised. We believe ***the evidence base for likely cumulative impacts at the strategic/population level needs to be improved*** and that the recommendations could more clearly reflect this need.[45] (our emphasis)
>
> Our principal concern with the SEA conclusion that there is unlikely to be a significant effect on birds, is the ***lack of available evidence in the form of synthesised post-construction monitoring***

[43] UK Offshore Energy Plan – SEA for Offshore Gas and Oil Licensing and Wind Leasing – Environmental Report Consultation, Response by The Royal Society for the Protection of Birds, page 19.
[44] JNCC response, page 2.
[45] JNCC response, page 2.

reports from the UK. ***Available evidence is not appropriate for assessment of the impacts of the draft plan***, due primarily to differences in scale and site characteristics.[46] (our emphasis)

51. Natural England's response to the Offshore Energy Strategic Environmental Assessment noted:

> We are surprised that there are no specific recommendations to gather more data or initiate research into specific topics such as modelling displacement or barrier effects and ways in which cumulative effects on birds might be assessed and mitigated.
>
> Whilst we support in general the conclusion that there are more numerous and potentially greater sensitivities in coastal waters, the SEA does acknowledge that there are data gaps further offshore, especially for up to date bird distributions, therefore ***we are concerned that there could be areas beyond territorial waters which may be more sensitive to windfarm development than areas within where we can have greater confidence in the data available***.[47] (our emphasis)

52. Drawn together these concerns highlight the lack of available data, coupled with the lack of an assessment of cumulative impacts which prevent firm conclusions being drawn on the likely cumulative effects arising from offshore wind farms in Round 3. This criticism would not be expected of a rigorous evaluation of potential areas for development. However, as stated in paragraph 46 above, the RSPB highlights these historic concerns not to be drawn into further debate but rather to draw attention to the importance of good strategic level assessment and to highlight that any problems arising now are a legacy of potential historic deficiencies. The question for all parties now is how to proceed in dealing with the current application if the Examining Authority and the Secretary of State are unable to exclude the risk of an adverse effect on the integrity of one or more Natura 2000 sites.

53. The Applicant offers the following conclusions with regard to site selection:

    (a) Developers can only bid for the right to develop sites or zones made available by TCE. Sites not within areas identified to date by the TCE are not legally available.

    (b) The location/boundaries of the former Hornsea Zone were outside the control of the Applicant and locations outside the former Hornsea Zone are not legally available to the Applicant (i.e. not feasible). Furthermore, the coordinates within the Agreement for Lease awarded by TCE mean Ørsted has to focus development projects within identified areas of the former Hornsea Zone.

    (c) But in any event, the identification of the former Hornsea Zone was the output of a robust Government and TCE process involving SEA on the environmental implications of developing 25GW of offshore wind (which encompassed the Round 3 proposals) to identify indicate relative levels of constraint and opportunity, and an AA by TCE of its plan to award the 9 ZDAs. The former Hornsea Zone, within which Hornsea Three is located, was identified through this process.

[46] JNCC response, page 8.
[47] Natural England response, section 3, Birds.

(d) There is no good published evidence that identifies other less constrained sites which could host a comparable large-scale offshore wind proposal and avoid or have less impact on Natura 2000 interests. No one has identified an alternative location that could replace the current proposal wholescale.

(e) The notion that as yet unidentified and unconstrained areas exist to deliver the scale of development required, without the same or similar effects on the same or other Natura 2000 interests is speculative, as is the proposition that it is possible that a number of smaller schemes, developed incrementally across a wider geographical area, could come forward and deliver the same benefits, without similarly giving rise to impacts on Natura 2000 interests (cumulatively if not individually). Neither can reasonably be viewed as an alternative to Hornsea Three.[48]

54. The RSPB offers the following comments in relation to the points in paragraph 53 above, repeating the lettering used by the Applicant:

(a) The restrictions on bidding locations are a constraint introduced by a domestic procedure. However, there are other schemes (in all phases of the consenting process) within other licensed zones that are legally available and could act as alternative solutions within the offshore wind sector.

(b) As with (a) above, this is a domestic procedural constraint and is not a relevant consideration here. The alternative solutions that should be considered include ones which are not open to the Applicant.

(c) The RSPB has highlighted a number of concerns that were raised at the time that the assessments were undertaken. It would be inappropriate to disregard them when considering issues now that were raised then.

(d) At paragraph 44 above the RSPB has highlighted that other potentially less constrained sites have already been consented and are merely waiting for appropriate funding to enable them to proceed.

(e) The RSPB observes that The Crown Estate has publicly announced ongoing Round 3 Extensions and Round 4 leasing rounds which seek to identify other areas of future offshore wind development. In addition, subject to appropriate assessment, other schemes could be delivered across a wider geographical area to deliver the same benefits: in the absence of an exercise to evaluate these possible alternatives it is not appropriate to rule them out of consideration.

Imperative reasons of overriding public interest

55. The DEFRA guidance is clear on IROPI:

> In practice, plans and projects which enact or are consistent with national strategic plans or policies (e.g. covered by or consistent with a National Policy Statement or identified within the National Infrastructure Plan) are ***more likely*** to show a high level of public interest. ***However consideration would still need to be given to whether***, in a specific case***, that interest***

[48] Ørsted's *Detailed response to the ExA Q2.2.7 and Q2.2.44*, paragraph 6.7.10.

outweighs the harm to the affected site(s) and therefore whether IROPI can be demonstrated.[49] (our emphasis)

56. The RSPB respectfully submit that this statement, coupled with the points flagged above in relation to alternative solutions and the refusal by the government of two renewable energy NSIPs provide a clear steer that damaging proposals are highly unlikely to satisfy the tests.

57. The Applicant states:

> The DEFRA guidance advises[50] that NPS and other documents setting out Government policy (e.g. the UK Renewable Energy Roadmap) provide a context for competent authorities in considering Article 6(4) and that projects which enact or are consistent with national strategic plans or policies (e.g. such as those provided for in NPS EN-1 and EN-3) are more likely to show a high level of public interest.[51]

58. The RSPB consider that it is helpful to separate this précis out into its constituent text (paragraphs 18 and 26):

> National Policy Statements and other documents setting out Government policy (e.g. the UK Renewable Energy Roadmap) provide a context for competent authorities considering the scope of alternative solutions they will assess.[52]

The other element of the text (paragraph 26) has been set out at paragraph 55 above.

59. Although these documents do provide a context for considering Article 6(4) they are by no means determinative. The RSPB considered this issue during the course of the Hornsea Two Examination[53]. We attach copies of the relevant documents.

60. The Applicant states:

> As noted above, the DEFRA guidance explains[54] that a project which enacts or is consistent with national strategic plans or policies such as one (or more) NPS, is likely to show a high level of public interest. Offshore wind projects such as Hornsea Three are covered by and strongly supported in principle by:
>
> (a) EN-1 Overarching National Policy Statement for Energy (July 2011); and
> (b) EN-3 National Policy Statement for Renewable Energy Infrastructure (July 2011).[55]

61. The Applicant also states:

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[49] DEFRA guidance, paragraph 26.
[50] See paragraphs 14 and 26.
[51] Ørsted's *Detailed response to the ExA Q2.2.7 and Q2.2.44*, paragraph 5.6.2.
[52] DEFRA guidance, paragraph 14.
[53] Set out in paragraphs 25, 26, 27, 28 and 32 above.
[54] DEFRA guidance, at paragraph 26.
[55] Ørsted's *Detailed response to the ExA Q2.2.7 and Q2.2.44*, paragraph 5.6.30.

Hornsea Three enacts and is consistent with national strategic policy in NPS EN-1 and EN-3 and therefore demonstrates a high level of public interest[56].[57]

62. In relation to these points raised by the Applicant it is important to note paragraph 1.7.13 of EN-1, which states:

> Habitats Regulation Assessments (HRA) have been carried out and published for the non-locationally specific NPSs EN-1 to EN-5 and for EN-6 which does specify sites suitable for development. As EN-1 to EN-5 do not specify locations for energy infrastructure, the HRA is a high-level strategic overview. Although the lack of spatial information within the EN-1 to EN-5 made it impossible to reach certainty on the effect of the plan on the integrity of any European Site, the potential for proposed energy infrastructure projects of the kind contemplated by EN-1 to EN-5 to have adverse effects on the integrity of such sites cannot be ruled out. The HRA explains why the Government considers that EN-1 to EN-5 are, nevertheless, justified by imperative reasons of overriding public interest, while noting that ***its conclusions are only applicable at the NPS level and are without prejudice to any project-level HRA, which may result in the refusal of consent for a particular application***. Section 1.7 of EN-6 sets out details of the nuclear HRA. (our emphasis)

63. This sentence in EN-1 is particularly important. In the context of the national overarching policy on energy it makes it clear that it is necessary for individual projects to be assessed on their own merits under Article 6(4) and that it is perfectly feasible for applications to be refused as a result of its project-level HRA.

64. Critically, *Managing Natura 2000* states:

> It is for the competent authorities to weigh up the imperative reasons of overriding public interest of the plan or project against the objective of conserving natural habitats and wild fauna and flora. ***They can only approve the plan or project if the imperative reasons for the plan or project outweigh its impact on the conservation objectiv***e.[58] (our emphasis)

It will be up to the Applicant to demonstrate, in relation to the FFC SPA species which will be affected, that this requirement is being met. As *Managing Natura 2000* sets out, they will need to demonstrate that the contribution Hornsea Three makes to its claimed public interests outweigh the public interest of conserving the relevant features of the FFC SPA.

Considerations of health and safety public interest arguments

65. The Applicant has made a number of statements about health and safety and their importance in the consideration of IROPI. For ease of reference the RSPB includes the key excerpts here.

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[56] DEFRA guidance, paragraph 26.
[57] Ørsted's *Detailed response to the ExA Q2.2.7 and Q2.2.44*, paragraph 5.11.1
[58] *Managing Natura 2000*, box, page 59.

> While the full range of IROPI can apply for Hornsea Three, it is important to recognise that considerations relating to human health, public safety and beneficial consequences of primary importance are central planks of the case for Hornsea Three.[59]
>
> ... the most important reasons which may arise in the context of IROPI, and the considerations which must carry most weight, are those arising under the heads (i) 'human health', (ii) 'public safety' and (iii) 'primary beneficial consequences for the environment.[60]

The RSPB consider that the Applicant's arguments on these points merit careful consideration, focusing especially upon the circumstances within which, in the RSPB's view, health and safety issues can be properly considered.

66. The Applicant relied on the DEFRA guidance and section 5 of *Managing Natura 2000*:

> The ambit of IROPI is not precisely defined but the EC and DEFRA guidance articulates some broad principles:
>
> (a) **Urgency and importance:** There would usually be urgency to the objective(s) and it must be considered "indispensable" or "essential" (i.e. imperative). In practical terms, this can be evidenced where the objective falls within a framework for one or more of the fundamental values for citizens' life (health, safety, environment);[61]

67. The Applicant then continues to expand on this by referring to combatting climate change and the threats it poses to human well being:

> Combating climate change and contributing to the provision of affordable and sustainable energy for future generations are objectives of fundamental social and environmental as well as economic importance which fall into the categories 'human health', 'public safety' and 'primary beneficial consequences for the environment; as these are the most important forms of IROPI, the case for Hornsea Three carries substantial weight.[62]

The Applicant has also mentioned the role of increased energy security in relation to human health and public safety[63].

68. The Applicant has contended that

> The relevant public interests relating to Hornsea Three must be set against the weight of the interests protected by the Birds and Habitats Directives, having regard to the nature and extent of the harm identified to the relevant Natura 2000 interests. The overriding nature of the public interests engaged in this case should be evident from the suite of legislation and policy

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[59] Ørsted's *Detailed response to the ExA Q2.2.7 and Q2.2.44*, paragraph 5.4.1.
[60] Ørsted's *Detailed response to the ExA Q2.2.7 and Q2.2.44,* paragraph 5.4.2.
[61] Ørsted's *Detailed response to the ExA Q2.2.7 and Q2.2.44*, paragraph 5.5.1.
[62] Ørsted's *Detailed response to the ExA Q2.2.7 and Q2.2.44*, paragraph 5.11.5. Similar statements are made at 5.6.1(a), 5.7.1 and 6.5.4.
[63] Ørsted's *Detailed response to the ExA Q2.2.7 and Q2.2.44*, paragraph 5.6.1(b).

documentation summarised above and need not be repeated. In this case, in terms of the approach to the balancing exercise, two key points should be borne in mind:

...

(b) Second, related to the above, not all IROPI weigh equally in the balance. Hornsea Three would deliver benefits relating to human health, public safety and beneficial consequence of primary importance for the environment. These considerations carry greatest weight because these reasons are capable of automatically overriding the competing public interest of preserving priority habitats and species.[64]

69. We have several comments on the approach described by the Applicant. First, we fundamentally disagree with the assertion that the considerations of human health, public safety and beneficial consequence of primary importance for the environment can "automatically" override competing public interests. By definition, they are public interests to be weighed in the balance following careful analysis. There is nothing "automatic" about it: Article 6(4) demands a deliberative and careful approach in determining where the balance of public interest lies in any specific case. Therefore, praying them in aid of an IROPI argument does not negate the need for that balancing exercise to be carried out.

70. Second, the Applicant does not go on to set out how the provision of renewable energy through this specific project directly contributes to human health, public safety and beneficial consequences of primary importance for the environment. The RSPB argues that it is not enough to make the case in only the most general of terms, given that IROPI is predicated on a careful balancing exercise between the competing public interests of the need to avoid the residual adverse effects on Natura 2000 sites and the contribution of the project to the claimed public interests. The Applicant has failed to make out its IROPI case in terms that establish precisely the contribution of its project to the claimed public interests. The RSPB considers this makes it difficult for the Secretary of State to undertake the IROPI assessment necessary under Article 6(4).

Compensation

71. The RSPB notes the Applicant's statement:

> the Applicant has not identified any relevant compensation at this stage. This is reasonable, particularly since a real and fundamental doubt exists as to whether an adverse effect will actually arise in practice and if so what the extent of that impact may be.[65]

We consider that the decision not to identify compensation is a matter for the Applicant, but note that if the Examining Authority and/or Secretary of State conclude that an adverse effect on the integrity of one or more of the sites highlighted cannot be excluded that this would jeopardise the ability of the Secretary of State to consent the scheme as the SoS would not have any confidence the compensatory measures required under Article 6(4) had been secured. Therefore, in line with *Managing Natura 2000*, consent could not be granted.

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[64] Ørsted's *Detailed response to the ExA Q2.2.7 and Q2.2.44*, paragraph 5.9.2.
[65] Ørsted's *Detailed response to the ExA Q2.2.7 and Q2.2.44*, paragraph 7.3.

72. The RSPB notes the Applicant's statement:

> The Applicant is open to discuss this matter in principle on a without prejudice basis with NE to understand its views on compensatory measures, in the event that the Applicant's primary case that Article 6(4) need not be invoked at all is not accepted and the Secretary of State is considering this question. In this context it is noted that DEFRA advise that competent authorities and SNCBs should help applicants identify suitable compensatory measures[66].[67]

We are willing to enter into such discussions. However, the onus remains on the Applicant to identify and secure any necessary compensation measures.

73. The Applicant sets out its position in relation to compensation, based on the DEFRA guidance:

> DEFRA's guidance recognises that in designing compensation requirements, competent authorities and SNCBs should ensure the requirements are "*flexible to ensure adequate compensation without going further than necessary"*[68]. DEFRA has in contemplation a case where the anticipated harm to a site proves to be less than anticipated, such that compensatory measures could be scaled-back. The issue is more acute where the adverse effect may not arise at all, such that compensation was never "necessary". In this context it may be noted:
>
> (a) research projects continue (e.g. the Offshore Renewables Joint Industry Programme – ORJIP) with government and industry funding intended to provide a firmer evidence base;
> (b) there are key disputes between the Applicant and NE, particularly over the adequacy of the baseline characterisation and the correct approach to risk assessment (notably Collision Risk Modelling). However, on some of the points NE has previously provided different advice, their advice now differs from that being provided by other SNCBs (eg SNH). Furthermore, projects have recently been consented in Scotland (Neart na Gaoithe) that have a similar, if not greater, proportional effect on the same species which form the qualifying interest features of other SPAs. The implication is that if the current application were being decided in Scotland, under the same Habitats regime, no issue of adverse impact on the SPA might arise.
> (c) other approved plans or projects may not proceed, or where they do proceed, may not fully-build out to the size and extent consented or assessed in the corresponding EIA, such that the conclusion of adverse effect on integrity is likely to have been predicated on a false cumulative baseline (on a precautionary basis). This is addressed further in Appendix 4 of the Applicant's Deadline 1 submission (Analysis of precaution in cumulative and in-combination assessments – as-built scenarios)[REP1-148].[69]

74. The Applicant developed this point:

> This principle is reflected in DEFRA's guidance at paragraph 32, which states bluntly: "*Competent authorities should not require more compensation than is needed to ensure the integrity of the*

[66] DEFRA guidance, at paragraph 30.
[67] Ørsted's *Detailed response to the ExA Q2.2.7 and Q2.2.44*, paragraph 7.4.
[68] DEFRA guidance, at paragraph 33.
[69] Ørsted's *Detailed response to the ExA Q2.2.7 and Q2.2.44*, paragraph 7.7.4.

network of European sites is maintained". This further underlines the importance of DEFRA's advice that SNCBs should provide their view on "*the extent of any AEoI and the compensatory measures required"*[70] (our [Applicant's] emphasis).[71]

75. The RSPB notes the Applicant's position. However, *Managing Natura 2000* is clear that compensatory measures "are intended to offset the residual negative effects of the plan or project so that the overall ecological coherence of the Natura 2000 network is maintained."[72] Consequently, the fundamental requirement for compensatory measures is that there should be certainty that they will address the adverse effect on integrity caused by the particular scheme. This has to be approached on a precautionary basis, and as a result of this, and the requirement that compensation is normally in place before the adverse effect is experienced, it is likely that compensation measures will be required to err on the cautious side.

76. Further, the Applicant poses the question:

> (c) If compensatory measures are identified as necessary and become available, how would they be calibrated and allocated between offshore projects which collectively have given rise to the conclusion of adverse effect on integrity?[73]

77. The RSPB consider that this question is fundamentally misplaced. The position is clear: if a scheme cannot exclude the risk of an adverse effect on the integrity of a Natura 2000 site (whether the impact arises from the scheme alone or in combination with other plans or projects) it is for that scheme to demonstrate why there are no alternative solutions, that imperative reasons of overriding public interest exist, and, crucially, it is then up to that scheme to secure the compensation necessary to address the impacts that the scheme may have if it is consented. Whether this arises from the scheme on its own or in combination with other plans or projects is immaterial: it is for this scheme to compensate as it is this scheme which has, so to speak, "broken the camel's back".

Evidence for the compensation measures

78. The RSPB notes the Applicant's statement:

> The Applicant would agree that measures for which there is no reasonable prospect of success should not in general be considered and that evidence would need to be provided as to the technical feasibility. However, it is not the case that there must be empirical evidence as suggested. It is recognised that compensatory measures by their nature be novel.[74]

We note *Managing Natura 2000*'s position in relation to this:

> Compensatory measures must be feasible and operational in reinstating the ecological conditions needed to ensure the overall coherence of the Natura 2000 network. The estimated

[70] DEFRA guidance, at paragraph 9."
[71] Ørsted's *Detailed response to the ExA Q2.2.7 and Q2.2.44*, paragraph 7.9.3.
[72] *Managing Natura 2000*, bullet point 2, section 3.7.6, page 60.
[73] Ørsted's *Detailed response to the ExA Q2.2.7 and Q2.2.44*, paragraph 7.7.5(c).
[74] *Applicant's Comments on Interested Parties' Responses to the ExA's Second Written Questions submitted at Deadline 4*: response to Natural England's answer to Q2.2.8.

timescale and any maintenance action required to enhance performance should be known and/or foreseen right from the start before the measures are rolled out. This must be ***based on the best scientific knowledge available***, together with specific investigations of the precise location where the compensatory measures will be implemented. ***Measures for which there is no reasonable guarantee of success should not be considered*** under Article 6(4), and the likely success of the compensation scheme should influence the final approval of the plan or project in line with the prevention principle. In addition, when it comes to deciding between different possibilities for compensation, the most effective options, with the greatest chances of success, must be chosen.[75] (our emphasis)

The RSPB contend that the stipulations cited above place very clear limitations upon the Applicant's contention that there does not need to be empirical evidence. *Managing Natura 2000* makes it clear that there must, at a minimum, be a reasonable guarantee of success. Reliance on "technical feasibility" alone without any empirical evidence would not provide that reasonable guarantee. Therefore, we fundamentally disagree with the Applicant's argument on this key point. The compensatory measures must therefore be both credible and feasible, rather than simply technically feasible.

79. The RSPB also notes the overall statement about compensatory measures provided by DEFRA which reflects the guidance in *Managing Natura 2000*:

> The competent authority, liaising with the SNCB and others as necessary (and, before consent is granted, consulting the appropriate authority) must have confidence that the compensatory measure will be sufficient to offset the harm. This can be a complex judgement and requires consideration of factors including:
>
> - The technical feasibility of the compensatory measures as assessed based on robust scientific evidence. Measures for which there is no reasonable expectation of success should not be considered
> - Whether there is a clear plan for undertaking the compensation, with the necessary provision of management and objectives for the duration over which compensation will be needed
> - Distance from the affected site. In general compensation close to the original site will be preferable, but there may be instances where a site further away will be better suited, in which case it should be selected. This judgement must be based solely on the contribution of the compensatory measures to the coherence of the network of European sites
> - Time to establish the compensatory measures to the required quality
> - Whether the creation, re-creation, or restoration methodology is technically proven or considered reasonable.[76]

[75] *Managing Natura 2000*, section 3.7.11.
[76] DEFRA guidance, paragraph 31.

Based on this, DEFRA is stating that the technical feasibility of such measures must be based on robust scientific evidence. Logically this will need to be empirical in nature. This will need to be expanded upon with a clear evaluation of the types of measures that are required to compensate for the predicted impacts of the scheme. This will need to consider whether different types of compensatory measures are required for the different species that are likely to be affected. A final consideration will need to be given to selecting a suitable location to ensure that the measures that will be brought forward will not be affected by the same scheme that they are being introduced to compensate for. We return to this final point at paragraph 81 below.

80. The DEFRA guidance continues: "Competent authorities should require no more compensation than is needed to ensure the integrity of the network of European sites is maintained."[77] The DEFRA guidance continues:

> In designing compensation requirements competent authorities and SNCBs should ensure the requirements are flexible enough to ***ensure adequate compensation*** without going further than necessary. This recognises that ***in some cases compensation requirements will need to cater for uncertainty over the harm that might be caused*** by a proposal or the effectiveness of compensation measures, or to account for any time lag before compensatory habitat becomes established. For example:
>
> - ***If there is uncertainty*** about the success of the proposed measures, ***the compensation area might need to be larger than the area damaged***
> - Potential actions may be required as a condition of consent in case compensation proves to be less successful than anticipated
> - It may be that anticipated harm to a site proves to be less than anticipated, or compensation measures are more successful than expected. Where feasible, compensation requirements should be sufficiently flexible to scale back the compensation required in such cases. Habitats legislation should not be used to force applicants to over-compensate.[78] (our emphasis)

This guidance clearly envisages that due to uncertainty the provision of sufficient compensation has to err on the side of caution. This is distinct from "over-provision" and relates to the ability of human interventions to replicate precisely the ecological functions provided by habitats and any other functions relied upon by the impacted species. The RSPB would not argue for over-provision of compensatory measures, but given the precautionary nature of the Directive any argument that what is being required represents over-provision would need to be clearly evidenced.

Location of compensation

81. The RSPB notes the Applicant's statement:

> It is not the case that compensation in all cases must be in the same biogeographical region. MN 2000 notes (pages 62/63) that the Birds Directive does not provide for biogeographical regions,

[77] DEFRA guidance, paragraph 32.
[78] DEFRA guidance, paragraph 33.

or selection at EU level. However, by analogy, it gives an example that *the overall coherence of the network* may be ensured if compensation fulfils the same purposes and function along the same migration path; and compensation areas are accessibly with certainty by the birds usually occurring on the site affected by the project.[79]

82. From the page numbers given above it is clear that the statement above is a reference to the revised version of *Managing Natura 2000*. We consider that the reference to biogeographical regions does not necessarily accurately reflect the position, and consequently we set out the full text below.

> In order to ensure the overall coherence of Natura 2000, the compensatory measures proposed for a project should therefore: a) address, in comparable proportions, the habitats and species negatively affected; and (b) provide functions comparable to those which justified the selection criteria for the original site, particularly regarding the adequate geographical distribution. Thus, ***it would not be enough for the compensatory measures to concern the same biogeographic region*** in the same Member State.
>
> The distance between the original site and the place of the compensatory measures is not necessarily an obstacle ***as long as it does not affect the functionality of the site, its role in the geographic distribution*** and the reasons for its initial selection.[80] (our emphasis)

83. Further, *Managing Natura 2000* states that in relation to SPAs it

> could be considered that *the overall coherence of the network* is ensured if:
>
> - compensation fulfils the same purposes that motivated the site's classification under Article 4(1) and (2) of the Birds Directive;
> - compensation fulfils the same function along the same migration path; and
> - the compensation areas are accessible ***with certainty by the birds usually occurring on the site affected by the project***. (our emphasis)[81]

84. *Managing Natura 2000* is clear:

> The compensatory measures have to ensure that a site ***continues*** contributing to the conservation at a favourable status of natural habitats types and habitats of species 'within the biogeographical region concerned', in short, ensure the maintenance of the overall coherence of the Natura 2000 network. (our emphasis)[82]

85. The RSPB interprets the cumulative implications of these statements in *Managing Natura 2000* to indicate a strong preference for compensatory measures to be located in the same biogeographical region ***and*** to show a strong connection with the existing site. However, the RSPB recognises that there is an inherent challenge in this context: the bird populations provided for by the

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[79] *Applicant's Comments on Interested Parties' Responses to the ExA's Second Written Questions submitted at Deadline 4*: response to Natural England's answer to Q2.2.8.
[80] *Managing Natura 2000*, box, page 63.
[81] *Managing Natura 2000*, section 3.7.7, pages 62-63.
[82] *Managing Natura 2000*, section 3.7.8, page 63.

compensatory measures must not be subject to the same adverse effects giving rise to the need for those very compensatory measures. This is likely to have significant implications for the identification of a suitable location for compensatory measures, especially in and around the North Sea where we would, by definition, be reaching a critical threshold of cumulative adverse effects on site integrity. As referred to at paragraph 79 above, the RSPB consider that these requirements will present significant challenges to the Applicant to be able to demonstrate that the necessary compensatory measures are both sufficiently connected to the Flamborough and Filey Coast SPA to compensate for the impacts from the offshore array whilst sufficiently removed to be confident that birds using the compensatory measures will not be harmed by the array area.

Timing of compensation

86. The RSPB has already considered the issue of the technical feasibility of the compensatory measures at paragraphs 78 to 80 above. Expanding upon those points, if the Applicant proposes to rely upon measures that are considered to be "technically feasible" but which have never been tested, then logically these measures should be provided many years in advance of the predicted damage in order to test the effectiveness of the measures empirically and allow time to make any adjustments to the compensatory measures before any damage has occurred. Otherwise there will be a high risk of a negative effect that the compensation is supposed to address. This underlines the inherent uncertainty in proceeding in the absence of scientific evidence that the compensation measures will succeed and strongly suggests that consent could not be given in such circumstances.

87. The RSPB notes the Applicant's statement:

> It is not the case that any compensatory measures must always be completed before any work on the plan or project may proceed. In some cases damage to European sites may necessarily occur before the compensatory measures are fully functioning. The DEFRA guidance also recognises that there may also be circumstances where the compensatory measures will take a long time to become fully-functioning. This is set out in paragraph 36 of the DEFRA guidance.[83]

88. For ease of reference the RSPB sets out paragraph 36 of the DEFRA guidance in full here:

> Where possible, compensation measures should be complete before the adverse effect on the European site occurs. However, in some case damage to European sites may necessarily occur before the compensatory measures are fully functioning. ***There may also be circumstances where the compensatory measures will take a long time to become fully-functioning (e.g. re-creation of woodland). In such circumstances*** it may be acceptable to put in place measures which do not provide a complete functioning habitat before losses occur – provided undertakings have been made that the measures will in time provide such a habitat, and additional compensation is provided to account for this. Such cases require careful consideration by the competent authority in liaison with SNCBs. (our emphasis)

89. *Managing Natura 2000* states:

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[83] *Applicant's Comments on Interested Parties' Responses to the ExA's Second Written Questions submitted at Deadline 4*: response to Natural England's answer to Q2.2.8.

> as a general principle, a site should not be irreversibly affected by a project before the compensation is in place. However, there may be situations where it will not be possible to meet this condition. For example, the recreation of a forest habitat would take many years to ensure the same functions as the original habitat negatively affected by a project. Therefore ***best efforts should be made to ensure that compensation is in place beforehand***, and, ***in the case this is not fully achievable, the competent authorities should consider extra compensation for the interim losses that would occur in the meantime***;[84] (our emphasis)

90. *Managing Natura 2000* also makes it clear that:

> Time lags ***must not be permitted***, for example, ***if they lead to population losses*** for any species protected on the site under Annex II to the Habitats Directive or Annex I to the Birds Directive;[85] (our emphasis)

91. The RSPB considers that it will be for the Applicant to clearly demonstrate why it is not possible for necessary compensation measures to be put in place before the offshore wind array is constructed, and that this would need to be justified solely on the basis of the length of time required to properly establish the ecological functions that the compensation is seeking to provide. In addition, the Applicant would need to demonstrate that delays would not lead to any population losses and what additional compensatory measures it proposed to put in place to cover any period whilst the main compensation measures were still being delivered.

92. Given the considerations above, the RSPB considers that the requirements for compensation will be difficult to identify and secure. In particular it will be essential for the Applicant to be able to clearly demonstrate that any measures proposed are truly compensation (as required under Article 6(4) of the Habitats Directive) rather than necessary for site management (under Article 6(2) of the Habitats Directive). Measures that should be delivered to address current problems with the condition of the site will not be acceptable as they arise from a separate obligation.

The role of Natural England in identifying compensatory measures

93. In paragraph 3.6 of Appendix 63 the Applicant states:

> The DEFRA guidance sets out the Government's expectation that applicants and statutory nature conservation bodies ("**SNCBs**") will engage constructively, and that SNCBs will provide their view on "*the extent of any AEoI and the compensatory measures required"*[86] (our emphasis). DEFRA add that where Article 6(4) is engaged, they expect SNCB to play a role in helping to identify compensatory measures.

94. The RSPB notes that the expectation is that the SNCB will "have a role in helping", but ultimately the requirement to provide adequate compensatory measures (if required) is a matter for the Applicant. If the Applicant wishes the scheme to go ahead and it is unable to demonstrate to the required standards that an adverse effect on integrity of one or more Natura 2000 sites cannot be avoided then the onus is clearly upon it to demonstrate to the Secretary of State that it has identified and

[84] *Managing Natura 2000*, section 3.7.8, bullet point 1, page 63.
[85] *Managing Natura 2000*, section 3.7.15, bullet point 4, page 69.
[86] DEFRA guidance, at paragraph 9.

legally secured the necessary compensation, with appropriate advice from Natural England. We consider that the role of the SNCB is limited to helping evaluate the quantum of compensation required and offering advice on the suitability of measures proposed. The RSPB would strongly resist any other interpretation of this point in the guidance.

95. The RSPB wishes to be involved in any future discussions about the design and implementation of compensatory measures if these are deemed necessary by the Examining Authority and/or the Secretary of State.

Concluding remarks

96. The RSPB has produced this document to set out its views on the appropriate way to approach the legal tests that will need to be considered in the event that the Examining Authority and/or the Secretary of State are unable to conclude that the risk of an adverse effect on the integrity of one or more Natura 2000 sites can be excluded on the basis of the best available scientific information. The RSPB's view is that, based on the evidence that has been presented to the Examination, that it is not possible to exclude the risk of an adverse effect on the integrity on the Flamborough and Filey Coast SPA.

97. Based on the Applicant's submission, the RSPB considers that the Examining Authority and Secretary of State have not been provided with the necessary information to consent the Hornsea Three project on the basis of no alternative solutions, IROPI and securing of necessary compensatory measures. Therefore, based on the information presented to the Examination, the RSPB considers consent cannot be granted.

98. The RSPB reserves the right to amend or make further submissions on this issue, in particular if the issue falls to be considered further after the close of the Examination.