



Written Submission
for the
Royal Society for the Protection of Birds
OVERVIEW and SUMMARY

19 November 2021

Planning Act 2008 (as amended)

In the matter of:

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

Response to October 2021 consultation on further information

Planning Inspectorate Ref: EN010079

Registration Identification Ref: 20012785

1 Introduction

Scope of submission

- 1.1 The RSPB is grateful for the opportunity to make submissions in response to the Secretary of State for Business, Energy and Industrial Strategy's (BEIS) request for comments on the information provided by Norfolk Vanguard Limited's ("the Applicant") in reply to the Secretary of State's requests for further information dated 5 July and 11 August 2021.
- 1.2 This document and its annexes set out the RSPB's comments on key elements of those submissions with particular reference to the following submissions:
- Norfolk Vanguard Cover Letter dated 2 August 2021 ("Cover Letter")
 - The Applicant's Response to the Requests for Additional Information dated 2 August 2021 ("the Response to the Requests for Additional Information");
 - Norfolk Vanguard Extract of Schedule 17 to the draft DCO: Compensation to protect the coherence of the Natura 2000 Network ("the Draft DCO compensation extracts", dated 25 August 2021);
 - Norfolk Vanguard Updated Population Viability Analysis: Flamborough and Filey Coast SPA ("the updated PVA" dated August 2021);
 - Norfolk Vanguard Updated information on cumulative and in combination effects with the Dudgeon and Sheringham Shoal Extension Projects ("the updated in-combination effects information" dated 2 August 2021);
 - In Principle Habitats Regulations Derogation Provision of Evidence: Appendix 1, Flamborough and Filey Coast SPA In Principle Compensation ("Appendix 1" dated July 2021); and
 - In Principle Habitats Regulations Derogation Provision of Evidence: Appendix 2, Alde-Ore Estuary SPA In Principle Compensation ("Appendix 2" dated 2 August 2021)
- 1.3 At this stage, we have not sought to comment on the Applicant's compensation proposals concerning the Haisborough, Hammond and Winterton Special Area of Conservation (Appendix 3) as we have not engaged on the issues raised. However, we have noted the Applicant's proposal for only implementing compensation after damage is caused to the SAC, notwithstanding having assessed the potential impacts of deploying cable protection within the

SAC.¹ This is of serious concern and raises significant and potentially damaging precedent issues. The RSPB will review the comments of those nature conservation organisations more familiar with the matters raised and we reserve the right to submit fuller comments on this issue at the next consultation.

1.4 We have where relevant drawn on RSPB submissions to the Norfolk Vanguard examination and post-examination consultation, as well as submissions in respect of other offshore wind farm proposals. The RSPB's submissions to the Norfolk Vanguard post-examination comprised:

- RSPB Written Submission dated 27 February 2020 to Secretary of State BEIS; and
- RSPB Written Submission dated 22 April 2020 to the Secretary of State BEIS's Consultations on Hornsea Project Three Offshore Wind Farm and Norfolk Vanguard Offshore Wind Farm (here included for reference as Annex 3).

1.5 Given its relevance to the treatment of in-combination impacts per se, the RSPB has responded in section 5 of this submission to the Applicant's 2 August 2021 submission on matters relating to the issue of "de minimis" as set out at paragraphs 1-34 of the "Response to the Requests for Additional Information" document.

[Contents of the RSPB's submission](#)

1.6 The RSPB's submission comprises the following documents:

- Overview and Summary (this document) which includes, among other things:
 - Section 5: The RSPB position on "de minimis" in response to paragraphs 1-34 of the Applicant's 2 August 2021 submission entitled "Response to the Requests for Additional Information"
- Annex 1: RSPB comments on "In Principle Habitats Regulations Derogation Provision of Evidence: Appendix 1, Flamborough and Filey Coast SPA In Principle Compensation (dated July 2021)";
- Annex 2: RSPB comments on: "In Principle Habitats Regulations Derogation Provision of Evidence: Appendix 2, Alde-Ore Estuary SPA In Principle Compensation (dated 2 August 2021)";

¹ Based on the summary of these set out on pages 16 to 18 of the Response to the Request for further information (dated 25 June 2021).

- Annex 3: Copy of the RSPB's combined response to the SoS BEIS's consultation on Hornsea Three and Norfolk Vanguard offshore wind farm schemes (22 April 2020);
- Annex 4: Extract from REP11-127 East Anglia One North and East Anglia Two examination: the RSPB's responses to the Examining Authority's Third Round of Written Questions: answer to Question 3.2.5;
- Annex 5: Extracts from the RSPB's Deadline 17 submission (REP17-012) to the Norfolk Boreas examination.

2 RSPB's assessment of the Applicant's overall approach to compensation measures

2.1 This section sets out the RSPB's assessment of the Applicant's overall approach to compensation measures. In summary, we consider the approach to be seriously flawed and, for reasons set out elsewhere in this document and its annexes, lacking any explicit, tangible compensation proposals that can give the Secretary of State confidence that compensation measures either have been or are capable of being secured.

Overview and critique of Applicant's approach (seabirds only)

2.2 The Applicant has produced two key documents in respect of its proposed compensation measures for SPA seabirds affected by the Norfolk Vanguard proposal:

- Appendix 1 Flamborough and Filey Coast SPA In Principle Compensation; and
- Appendix 2 Alde-Ore Estuary SPA In Principle Compensation.

2.3 Each document sets out the Applicant's analysis of possible compensation options and indicates a preferred approach as follows:

- Kittiwake: artificial nesting structures (onshore);
- Guillemot and razorbill: predator eradication (island restoration);
- Lesser black-backed gull: predator management (focused on an anti-predator fence).

2.4 Critically, the key legal mechanism comprises the proposed DCO wording for each compensation proposal. The Applicant has since submitted revised versions of its proposed DCO wordings in the Draft DCO compensation extracts document. The Applicant relies on essentially the same structure and approach in setting out its DCO wording, with minor adjustments related to the species. Below, we set out our understanding of the logic of the DCO wording's approach and why we consider it is seriously flawed.

2.5 In essence the logic of the proposed approach set out in the DCO wording is as follows:

- **Condition 1:** defines the meaning of "compensation plan"
 - Crucially, states that the "compensation plan" means the "relevant principles" set out in the Appendix for that species;
- **Condition 2:** requires a strategy for the delivery of the (compensation) measures to be submitted to and approved by the Secretary of State:

- No later than 18 months prior to the operation of any wind turbine generator forming part of the development; and with
- No wind turbine generator to be operated until the Secretary of State has approved any such strategy.
- **Conditions 3 and 4:** condition 3 requires the strategy to be prepared in accordance with the “principles” in the “compensation plan” (which is by definition the “relevant principles”) and to contain the relevant matters identified by Natural England in specified sections of the compensation plan (as per Appendix 1 and Appendix 2).
 - Condition 4 sets out the information that should be included in the “strategy” **BUT** only “in the event” that the strategy proposes a named compensation measure (as per paragraph 3.3 above). This construction clearly allows for a strategy to be developed post-consent which contains a different, unnamed, and un-examined compensation measure.
- **Condition 9:** allows for amendments to the strategy to be agreed in writing with the Secretary of State provided they accord with the “principles” set out in the “compensation plan”.

Failure to define the “compensation principles”

- 2.6 Therefore, the ability of (i) stakeholders to comment on the draft proposals and, ultimately, (ii) Secretary of State to ensure adherence to such DCO commitments, hinges on knowing what the “relevant [compensation] principles” are for each species’ compensation plan.
- 2.7 The RSPB has read each Appendix in detail and carried out a word search to ensure we have not overlooked anything. We can confirm that:
- Nowhere in Appendix 1 (kittiwake, guillemot and razorbill) is it clearly stated what the “relevant [compensation] principles” are for any of the species. Therefore, there are no “relevant principles” that can be scrutinised as to whether they are suitable to form the basis of such a compensation plan or the detailed delivery strategy that must be in accordance with said principles;
 - In Appendix 2 (lesser black-backed gull), the wording is subtly different but the approach is essentially the same. Condition 3 requires the delivery strategy to accord with the principles set out in the compensation plan. We can confirm the only reference in Appendix 2 that could be construed as “principles” is contained in paragraph 77 and this refers narrowly to principles to be used when siting proposed fencing. These are not compensation principles.

2.8 Therefore, we conclude that it is not possible to be certain what each species' compensation plan actually comprises. This makes it impossible to evaluate and understand how the legal requirement set out in the DCO condition should be implemented and to comment accordingly. We would further argue it makes it very difficult for the Secretary of State to be confident what the overarching framework is that will govern each species' compensation measures.

Condition 3 – Strategy approval

2.9 The RSPB welcomes the slight shift in approach by the Applicant (compared to the original drafting in Appendix 1 and Appendix 2) to ensure any compensation delivery strategy is submitted for approval slightly more in advance of first operation. We also welcome the requirement that no wind turbine can become operational before the compensation strategy is approved by the Secretary of State.

2.10 However, these changes do not overcome the RSPB's concerns. It is especially concerning given the critical lack of detailed compensation proposals available for scrutiny. There is no tangible compensation proposal for any of the four SPA seabird species and therefore no confidence that any compensation measure could be implemented and functional in advance of damage occurring.

2.11 In addition, the revised wording does not meet the minimum requirement of aligning with the approach adopted by the Secretary of State in respect of the Hornsea Project Three consent. We address this below in our related comments in paragraph 2.28, with particular reference to:

- Requiring the draft strategy to be subject to public consultation before the Secretary of State decides whether to approve it;
- An implementation timetable that ensures the first wind turbine is not operated until the compensation measure is in place for an agreed number of years to enable affected seabirds to colonise, breed and first recruits to breed. As per Hornsea Project Three, this should be a minimum of 4 years. *As it stands, the proposed wording would allow first operation of a wind turbine generator to start the day after the Secretary of State approves the strategy, if that approval was given at the end of the minimum 18-month period envisaged. In these circumstances, there would be no time for the compensation to be implemented and become effective before first impacts on SPA species occurred.* This conflicts with Defra guidance;
- Monitoring reports should be annual and be required to be made publicly available;

- For the same reasons as Hornsea Project Three, the compensation measures should be maintained beyond the operational lifetime of the authorised development.

Unspecified compensation measures

- 2.12 This serious flaw in the proposed approach, set out in paragraphs 2.6-2.7 above, is exacerbated by the provision in condition 4 in each DCO wording that expressly countenances an alternative compensation measure being put forward post-consent. This means that the public can have no confidence what compensation measure will be implemented for each species given that the proposed DCO wording allows for it to be changed post-consent. This means it is not possible at this time to be confident the coherence of the National Sites Network would be protected should consent be granted.
- 2.13 As we summarise in sections 3 and 4 below (and in detail in RSPB annexes 1 and 2), this is compounded by the lack of any substantive compensation proposals being put forward by the Applicant for any of the seabird species of concern. No tangible and secured proposal is put forward in either Appendix 1 or Appendix 2.

An alternative approach to the “compensation plan”

- 2.14 The Applicant has also made changes to paragraph 3 to make a more explicit link to the relevant matters identified by Natural England in the specified sections of the compensation plan. The Secretary of State will be aware that this is a generic list of matters.
- 2.15 We agree with Natural England’s comments on this issue in its August 2021 submissions in respect of Norfolk Boreas (see reference 2.36 in NE Annex 2² to Norfolk Boreas) which states the following with respect to the kittiwake example:

“We are pleased that the Applicant will use the list of key compensatory matters given here, as it was developed by Natural England. However, Natural England notes that this list was compiled with a view to informing submission of appropriately well-developed compensatory measures into the Examination (or as is the case with current projects, prior to determination), rather than to inform the development of compensatory measures in the post-consent period. It is Natural England’s view that sufficient clarity on all these matters is needed prior to determination.”

² See: <https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010087/EN010087-002864-EN010087%20351731%20Norfolk%20Boreas%20Annex%202%20Natural%20England%20advice%20on%20FFC%20SPA%20in%20principle%20compensation%20measures%20final.pdf>

- 2.16 In this context and as we set out in sections 3 and 4 below, the RSPB does not consider the Applicant's Appendix 1 and Appendix 2 are fit for purpose as "in principle compensation proposals". In brief, they lack the relevant evidence to demonstrate that compensation measures have been secured and can be delivered.
- 2.17 The RSPB does not consider "in principle" equates to "outline" proposals such that all the critical issues would be addressed post-consent as the Applicant still envisages. This completely undermines confidence in what the compensation measures will comprise and that the public interest to protect the coherence of the National Sites Network will be secured. We therefore agree with Natural England's comments in respect of Norfolk Boreas (see above) that sufficient clarity is needed on all of the matters listed prior to determination by the Secretary of State. However, at this point in time, it is simply a list of matters with no substance underneath it and with no tangible compensation proposals for each species.
- 2.18 As such, we consider the proposed wording remains seriously flawed.
- 2.19 It is evident that Natural England has provided clear advice to the Applicant on what the compensation plan should comprise. In the section after the proposed DCO wording in each appendix, the Applicant summarises Natural England's advice on what the relevant species' compensation plan should comprise. Natural England's advice is in line with the approach and level of detail we understand is now being required of current wind farm proposals. We see no reason why Norfolk Vanguard should not be required to operate to the same standards.
- 2.20 As such, we argue that Natural England's advice on what each compensation plan should contain provides a robust basis for the evidence on each proposed compensation measure that the Secretary of State should require from the Applicant before deciding whether to grant consent for the Norfolk Vanguard scheme. Any such revised proposals should be subject to public consultation.
- 2.21 This advice aligns with the RSPB's answer to a question posed by the Examining Authority into the East Anglia One North and East Anglia Two offshore wind farm schemes. In its REP12-096 Deadline 12 response³ to Question R17QF.4 posed by the Examining Authority, the RSPB stated the following, which we consider applies to Norfolk Vanguard and other similar schemes:

³ See: <https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010077/EN010077-005506-DL12%20-%20RSPB%20-%20Response%20to%20R17.pdf>

“Question (c), (d) and (e)

The Examining Authority’s questions touch on the important issue of the sequencing of informed decision-making in respect of compensation proposals and the tension that currently exists in dealing with proposals that are very much outline proposals with little, if any, practical detail. It also relates to the answers provided to the Examining Authority’s Question 3.2.8 (level of detail in relation to [compensation] implementation) at Deadline 11 and the reason why it is important to ensure the availability of sufficient information at the point of DCO consent on the implications of each proposed compensation measure e.g.:

- *The nature and location of the proposed measure(s) and an assessment of whether it is likely to have a reasonable guarantee of success;*
- *Whether it has been legally secured through relevant consents and agreements.*

As the RSPB’s answer to Question 3.2.8 highlighted (REP11-127)⁴, there are some highly significant and detailed considerations for the various compensation measures that it is both essential and appropriate to consider before DCO consent is granted, rather than assume a highly outline compensation measure can be translated in to a detailed and workable measure “on the ground” at a later date and all the necessary consents and agreements successfully secured.

Satisfying these issues prior to DCO consent being granted should, in general terms, ensure it is possible to:

- *Identify the location and mechanism(s) of the proposed compensation measure in detail;*
- *Identify the relevant consenting and/or licensing mechanisms required. Depending on location and mechanism, we consider these are likely to go beyond the outline changes to article 3 of parts 1-6 of Schedule 18 of the dDCO suggested in part (e) of the Examining Authority’s question;*
- *Identify any potential impacts of the proposed measure on the receptor site and surrounding environment and carry out appropriate screening;*
- *Based on this, identify any particular impact assessment requirements necessary which might arise from likely direct and indirect effects of the compensation measure on other receptors (e.g. Environmental Impact Assessment, Habitats Regulations Assessment, SSSI consents etc);*
- *Once these have been completed and relevant processes completed, be satisfied that the relevant legal consents are secured, assuming consent for the compensation measure is*

⁴ <https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010077/EN010077-005276-DL11%20-%20Royal%20Society%20for%20the%20Protection%20of%20Birds%20Written%20Questions.pdf>

granted by the relevant decision-making authority. If consent has not been granted, the Examining Authority and Secretary of State would know in advance.

This would in turn enable the Examining Authority and Secretary of State to be able to make a fully informed decision on whether proposed compensatory measures have been secured, have a reasonable guarantee of success and therefore will protect the overall coherence of the National Sites Network.”

- 2.22 If the Secretary of State is minded to pursue the Applicant’s approach, then the RSPB argues that both the principles and relevant matters should be fully described against detailed compensation proposals, and subject to public consultation before the Secretary of State determines the application. Otherwise, the Secretary of State will not be able to have confidence that appropriate compensation measures with a reasonable guarantee of success have been secured.

Comments on new paragraph 8 in Parts 4 (guillemot) and 5 (razorbill)

- 2.23 In Part 4 (guillemot) and Part 5 (razorbill) the Applicant has introduced a new paragraph 8. We understand this is in response to discussions with Natural England and their concerns that the draft DCO contained no requirement to seek approval for the end of the programme of compensatory measures, given that the compensation plan might (we say will) need to run longer than the works. We agree in principle with the need to obtain the formal approval of the Secretary of State to end the agreed programme of compensation measures for any particular species/feature.

- 2.24 Paragraph 8 reads as follows:

“A report which demonstrates completion of the activities required by the approved strategy must be submitted to the Secretary of State within 12 months of completion of such activities and following approval of the report by the Secretary of State, in consultation with the MMO and the statutory nature conservation body, the undertaker will be discharged from any further obligations under this Part.”

- 2.25 The RSPB has a number of concerns with this provision as drafted. These stem in large part from the overarching concern that no firm compensation proposal has been put forward for either guillemot or razorbill and that, as set out in section 5 of Annex 1 to this submission, the favoured measure (island restoration) requires substantial feasibility work before it can be properly evaluated by the Secretary of State to determine if it is appropriate and can be secured, let alone whether it would have a reasonable guarantee of success. These same concerns were

shared by Natural England in its response to similar provisions in respect of Norfolk Boreas (see NE Response Letter⁵ dated 20 August 2021 at 2.5.1.3 on page 14 (emphasis added)):

“Natural England can see possible merit in the proposed compensatory measure for the guillemot and razorbill features of the [FFC] SPA, but consider the proposals lack sufficient detail to have confidence in their relevance of their feasibility.”

2.26 Our concerns can be summarised as follows:

- The highly generic nature of the wording means it is imprecise and not tailored to a specific compensation measure. Reference to the completion of “activities” is unhelpful as it is a vague term;
- The lack of a precise and tangible compensation measure and associated understanding of the measures and activities required to implement it successfully (including appropriate and tailored success criteria) mean it is unclear what “*completion of the activities required by the strategy*” would entail in the context of guillemot and razorbill. For example, island restoration (assuming it is feasible) would, in addition to the initial eradication work, require ongoing biosecurity measures and associated monitoring to insure against reinvasion and potential failure. A proper understanding of how the compensation measure would be required to work in practice (including its objectives, success criteria, monitoring requirements and subsequent inclusion in the SPA network) is a pre-requisite to framing a condition dealing with when the undertaker may be discharged from any further obligations.

2.27 Therefore, while we welcome the suggestion in principle, we consider it is undermined by the lack of a proper understanding of the nature of the compensation measure to be required and implemented.

[Without prejudice comments on amendments to current DCO wording](#)

2.28 Notwithstanding our advice above, should the Secretary of State disagree with the RSPB’s proposed approach, then as a bare minimum the proposed DCO wordings should be brought in to line with the approach adopted by the Secretary of State in the Hornsea Project Three consent. For example:

⁵ See: <https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010087/EN010087-002853-EN010087%20351731%20Norfolk%20Boreas%20Post%20Examination%20Consultation%20Natural%20England%20response%20letter%20final1.pdf>

- Given the lack of detail currently available, that draft strategy should be made subject to public consultation before the Secretary of State decides whether or not to approve it;
- The strategy should include details of locations where compensation measures will be deployed and details of landowner agreements demonstrating how the land will be bought or leased and assurances that the land management will deliver the ecology objectives of the strategy;
- The implementation timetable must ensure the first wind turbine is not operated until compensation is in place for an agreed number of years to enable affected seabirds to colonise, breed and first recruits to breed. As a minimum, this should be 4 years but needs to take account of the breeding ecology of each species and the timescales likely to be required for the agreed compensation measure to be ecologically effective;
- The monitoring condition should require annual monitoring reports to be submitted to the Secretary of State. These reports should be required to be made publicly available at the same time;
- For the same reasons as Hornsea Project Three, the compensation measures should be maintained beyond the operational lifetime of authorised development i.e. the compensation measures should be required to be in place until such time as it is predicted the affected SPA will have recovered from the scheme's impacts. This is especially given the uncertainties associated with the compensation measures proposed for each species, and the potential need for both adaptive management measures and additional compensation measures.

2.29 If this sub-optimal approach is adopted, a further public consultation should be required on explicit compensation principles for each species before a decision on whether to consent the DCO is made. However, given the current lack of clear compensation proposals by the Applicant, we consider even this approach would still be significantly flawed.

3 Summary of response to “In Principle Habitats Regulations Derogation Provision of Evidence: Appendix 1 Flamborough and Filey Coast SPA”

3.1 Below we set out a summary of the RSPB’s position on:

- Adverse effect on the integrity of the FFC SPA
- The Applicant’s compensation proposals for kittiwake, guillemot and razorbill.

RSPB position on adverse effect on integrity of the FFC SPA

3.2 The RSPB’s conclusions for each species from the FFC SPA remain as they were at the end of the Norfolk Vanguard post-examination consultation (see paragraph 42 et. seq. in Annex 3), now taking account of the fact that that Hornsea Project Three has been consented:

- **Kittiwake:** no adverse effect on site integrity alone; adverse effect on site integrity exists in combination due to collision risk;
- **Gannet:** no adverse effect on site integrity alone; adverse effect on site integrity exists in combination due to collision risk and exacerbated by displacement;
- **Guillemot:** no adverse effect on site integrity alone; adverse effect on site integrity exists (when mortality from Hornsea Three (and now Four) are included) in combination due to displacement;
- **Razorbill:** no adverse effect on site integrity alone; adverse effect on site integrity exists (when mortality from Hornsea Three (and now Four) are included) in combination due to displacement;
- **Seabird assemblage:** no adverse effect on site integrity alone; not possible to rule out adverse effect on site integrity due to collision risk and displacement (based on combined impacts of: kittiwake, gannet, guillemot and razorbill).

RSPB summary position on the Applicant’s compensation proposals for kittiwake, guillemot and razorbill

3.3 The RSPB has set out its detailed comments on the Applicant’s updated information on compensation proposals in Annex 1 to this submission. For the detailed reasons set out there (and the other documents referred to) and the serious concerns set out in section 2 above, the RSPB’s overall conclusion is that the compensation proposals are not fit for purpose. At its most basic, none of the proposals have an identified and secured location and accompanying detailed design to be scrutinised, let alone relevant consents etc. We argue that significantly more detailed evidence is required in order to test the compensation proposals and determine whether or not they meet the legal requirements.

3.4 Therefore, based on the RSPB's careful consideration of the Applicant's compensation proposals for kittiwake, guillemot and razorbill set out in Appendix 1, the RSPB's overall conclusions are that Norfolk Vanguard has not presented compensation measures that:

- Have a reasonable guarantee of success based on the best scientific knowledge;
- Would be secured (legally, financially and technically) in advance of consent being granted;
- Would ensure the overall coherence of the National Sites Network was protected.

4 Summary of response to “In Principle Habitats Regulations Derogation Provision of Evidence: Appendix 2 Alde-Ore Estuary SPA”

Introduction

4.1 Below we set out a summary of the RSPB’s position on:

- Adverse effect on the integrity of the Alde-Ore Estuary SPA
- The Applicant’s compensation proposals for lesser black-backed gulls.

RSPB position on adverse effect on integrity

4.2 The RSPB’s conclusion for lesser black-backed gulls from the Alde-Ore Estuary SPA remains as it was at the end of the Norfolk Vanguard post-examination consultation:

- **Alone:** conclude that there will not be an adverse effect on site integrity;
- **In-combination:** conclude adverse effect on site integrity exists due to collision risk.

RSPB summary position on the Applicant’s compensation proposals for lesser black-backed gull

4.3 The RSPB has set out its detailed comments on the Applicant’s updated information on compensation proposals in Annex 2 to this submission. For the detailed reasons set out there (and the other documents referred to) and the serious concerns set out in section 2 above, the RSPB’s overall conclusion is that the compensation proposals are not fit for purpose. At its most basic, the proposal does not have an identified and secured location and accompanying detailed design to be scrutinised, let alone relevant consents etc. This is compounded by the issues we have described in Annex 2 which point to other factors besides predator management and disturbance affecting the breeding success of lesser black-backed gulls within the Alde-Ore Estuary SPA. We argue that significantly more detailed evidence is required in order to test the compensation proposals and determine whether or not they meet the legal requirements.

4.4 Based on the RSPB’s careful consideration of the Applicant’s compensation proposals for lesser black-backed gull set out in Appendix 2, the RSPB’s overall conclusions are that Norfolk Vanguard has not presented compensation measures that:

- Have a reasonable guarantee of success based on the best scientific knowledge;
- Would be secured (legally, financially and technically) in advance of consent being granted;
- Would ensure the overall coherence of the National Sites Network was protected.

5 The RSPB position on “de minimis” in response to paragraphs 1-34 of the Applicant’s August 2021 submission entitled “Response to the Requests for Additional Information”

5.1 This section sets out the RSPB’s position on the issue of “de minimis” in response to paragraphs 1-34 of the Applicant’s 2 August 2021 submission entitled “Response to the Requests for Additional Information”.

Context

5.2 Within its ‘Response to Request for Further Information’, Vattenfall has set out that:

- Design revisions have resulted in “*considerable reductions in the predicted ornithological impacts of the project.*” With a modelled reduction in collision risk “The number of kittiwake collisions apportioned to the Flamborough and Filey Coast SPA, derived using Natural England’s preferred methods, was thereby reduced from 121 to 21, which is less than 6% of the total predicted mortality of birds from the SPA, and 1/3rd the equivalent mortality predicted for the Hornsea Project Three wind farm (the only project for which kittiwake compensation has been required)....

[7] A very similar collision reduction was obtained for lesser black-backed gulls from the Alde-Ore Estuary SPA, with the collision prediction (using Natural England’s preferred methods) reducing from 8 to 2.6.” (paras 6-7)

- “...the predicted displacement impact of the Project on the guillemot and razorbill features of the Flamborough and Filey Coast SPA are very small. Even when the most precautionary combinations of parameters are used (70% displacement and 10% mortality, which Natural England has indicated they do not consider are likely to apply to the Project) the guillemot mortality from the SPA was only 15 individuals and for razorbill was only 6 individuals. Indeed, when evidence about realistic displacement mortality rates for these species is considered, the 10% mortality value reduces to no more than 2-3% (note that while Natural England’s assessment in [REP9-057] equates to this, Natural England has stressed to the Applicant that this does not represent their advice on this topic in all cases). Under these lower mortality rates the guillemot impact reduces to 3 individuals and the razorbill impact reduces to 1 individual.” (para 8)
- “Therefore the Applicant considers it is clear that any remaining impacts of the Project are extremely small and can be regarded as de minimis.”

5.3 At paras 10 – 35, Vattenfall addresses the “de minimis” concept and its application to HRAs in response to a position adopted by stakeholders such as the MMO and NE questioning the operation of the de minimis rule in the context of any lasting or irreparable loss of habitat whose conservation is the objective justifying the designation of a site as an SCI/SAC.

5.4 The MMO’s position is summarised in paragraph 11:

“...as the case law currently stands and in light of the uncompromising language use in the judgements [sic] of the CJEU, there is no scope for the MMO to apply any form of de minimis rule for projects involving any lasting and irreparable loss of habitat whose conservation was

the object that justified the designation of the site, even where the amount of habitat to be lost is to be very small.”

- 5.5 Vattenfall appears to be suggesting that, at the appropriate assessment stage, small scale negative impacts should be regarded as “de minimis” and therefore should be ignored in determining whether or not AEOI has been avoided due to in-combination impacts. The Applicant applies this to impacts on both SAC and SPA features.

De Minimis

- 5.6 To the extent that Vattenfall suggests in its Response that the CJEU and domestic courts have both recognised the ‘*de minimis*’ concept in the context of the Habitats Directive and the Conservation of Habitats and Species Regulations 2017 (“the Habitats Regulations”) that is technically correct.

- 5.7 In terms of the first stage of the HRA process (i.e. when considering whether an appropriate assessment is required), as AG Sharpston stated in C-258/11 Sweetman v An Bord Plenala [2013] CMLR 16 (“Sweetman No 1”):

“The requirement that the effect in question be “significant” exists in order to lay down a de minimis threshold. Plans or projects that have no appreciable effect on the site are thereby excluded. If all plans or projects capable of having any effect whatsoever on the site were to be caught by art.6(3) , activities on or near the site would risk being impossible by reason of legislative overkill.” (AG48)

- 5.8 Similarly, per Jay J in Wealden DC v Secretary of State for Communities and Local Government [2017] Env LR 31 at paragraph 53 (also in the context of the first stage of the HRA process):

“There was some debate at the Bar as to whether Hickinbottam J’s two-stage approach is consistent with the judgment of Lord Carnwath JSC in “Champion”. In my judgment, there is no inconsistency between them, although one continues to need to be careful with the use of terms such as “scoping”, “screening” and “trigger”. “Scoping” is not a term of art; “trigger” is a metaphor. “Screening” can be a term of art, but it also can be deployed more informally. Competent authorities are quite entitled to use threshold levels and values in order to eliminate from further consideration de minimis environmental impacts which, on scientific evidence, fall short of engendering any relevant risk. However, and this is another point which will require development, de minimis is not a synonym for nugatory.”

- 5.9 We note that reliance is also placed by Vattenfall on the Court of Appeal’s judgment in R (Morge) v Hampshire CC. However due to the Court considering what was meant by “disturbance” for the purposes of Article 12 of the Habitats Directive, not Article 6, and that the Supreme Court ultimately disagreed with the CA’s approach: [2011] 1 WLR 268, we suggest caution is required in taking account of that judgment.

- 5.10 To us it is clear that the ‘de minimis’ concept may be engaged when considering whether an appropriate assessment is required under regulation 63: it is part and parcel of the

consideration of whether the project is likely to have “significant” effects on the designated site. What is less clear, however, is whether and, if so, how, any such concept may be brought into effect at the second stage of appropriate assessment.

- 5.11 Firstly, regulation 64 must be read by reference to the objectives of the Directive (AG41). At AG37-8, the AG drew attention, to Article 2(2) and definitions in Articles 1(a) and (e):

“AG37 ... Article 2(2) goes on to provide that measures taken pursuant to the Directive must be designed to maintain at or restore to, a favourable conservation status, natural habitats and species of wild flora and fauna “of Community interest”.

AG38. The term “conservation” is defined in art.1(a) as “a series of measures required to maintain or restore ... natural habitats ... at a favourable status”. By art.1(e) , the conservation status of a natural habitat is to be taken as “favourable” when, inter alia, the natural range and areas it covers within that range are stable or increasing and the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future.”

- 5.12 This led to the conclusion in AG40 that:

“It is thus an essential objective of the Directive that natural habitats be maintained at and, where appropriate, restored to a favourable conservation status. Such an aim is necessary in the context—recorded in the fourth recital in the preamble to the Directive—of a continuing deterioration in those habitats and the need to take measures in order to conserve them. That is a fortiori the case as regards priority natural habitat types. ...”.

- 5.13 Secondly, the AG reiterated the approach to be applied at the appropriate assessment stage – and that the assessment must be undertaken having regard to the precautionary principle (AG51).

- 5.14 Thirdly, there was a helpful consideration of what is meant by “adverse effect” on the integrity of a site at AG57-61:

“AG57. Lastly, the effect on the integrity of the site must be “adverse”. In any given case, the second-stage appropriate assessment under art.6(3) may determine that the effect of the plan or project on the site will be neutral, or even beneficial. But if the effect is negative, it cannot proceed—by virtue of that provision, at least.

AG58. What then is a negative or “adverse” effect? Here, it may be helpful to distinguish between three situations.

AG59. A plan or project may involve some strictly temporary loss of amenity which is capable of being fully undone—in other words, the site can be restored to its proper conservation status within a short period of time. An example might be the digging of a trench through earth in order to run a subterranean pipeline across the corner of a site. Provided that any disturbance to the site could be made good, there would not (as I understand it) be an adverse effect on the integrity of the site.

AG60. Conversely, however, measures which involve the permanent destruction of a part of the habitat in relation to whose existence the site was designated are, in my view, destined by definition to be categorised as adverse. The conservation objectives of the site are, by

virtue of that destruction, liable to be fundamentally—and irreversibly—compromised. The facts underlying the present reference fall into this category.

AG61. The third situation comprises plans or projects whose effect on the site will lie between those two extremes. The Court has not heard detailed argument as to whether such plans or projects should (or should not) be considered to generate an “adverse effect on the integrity of the site”. I consider that it would be prudent to leave this point open to be decided in a later case.”

5.15 AG67 is also informative in this context:

“AG67. Seen in that overall context, it seems to me that any interpretation of art.6(3) that provides a lower level of protection than that which art.6(4) contemplates cannot be correct. To require the Member States to “take all compensatory measures necessary” when a plan or project is carried out under the latter provision so as to preserve the overall coherence of Natura 2000 while, at the same time, allowing them to authorise more minor projects to proceed under the former provision even though some permanent or long-lasting damage or destruction may be involved would be incompatible with the general scheme which art.6 lays down. Such an interpretation would also fail to prevent what the Commission terms the “death by a thousand cuts” phenomenon, that is to say, cumulative habitat loss as a result of multiple, or at least a number of, lower level projects being allowed to proceed on the same site.” (underlining added as emphasis)

5.16 And we assume it is those passages that the MMO had in mind in setting out the position summarised in Vattenfall’s Response.

5.17 It is also worth highlighting Owen J commentary in R(Akester) v Department for the Environment, Food and Rural Affairs [2010] Env LR 33 at paragraph 117 when considering a quasi *de minimis* argument in the context of differences of opinion between Natural England and the ferry operator’s consultants:

“In his oral submissions Mr Drabble also advanced what amounted to a *de minimis* argument, namely that the differences between Natural England and ABPmer as to adverse effects were minimal. But that was not advanced by the board as a reason for rejecting the advice of Natural England, and given the high level of protection for the environment afforded by art.6(3) (see [73] above), is not an argument that would of itself have carried sufficient weight to remove any doubt as to a possible adverse effect.”

5.18 Finally, it is worth highlighting that the language used in the case-law generally is the need, under regulation 63 for the competent authority to be satisfied to the requisite degree of certainty as to the “absence” of adverse effects on the integrity of the site.

5.19 We therefore question whether it is open to the competent authority to decide there would be some adverse effects on the integrity of a designated site, but because those effects were “*de minimis*” that consent could still be granted under regulation 63. Such an approach, in our mind, is inconsistent with:

- (a) 'de minimis' being already factored into the requirement that there be an adverse effect on the *integrity* of the site having regard to its conservation objectives (i.e. it is not just any adverse effect that would suffice);
- (b) the language used in case law being the "absence" of adverse effects and not, for example, a requirement that there be no significant adverse effects on the integrity of the protected site; and
- (c) the aims of the legislation more generally; and
- (d) as highlighted by AG Sharpston in *Sweetman (No 1)* at AG67, the need to avoid "*the "death by a thousand cuts" phenomenon, that is to say, cumulative habitat loss as a result of multiple, or at least a number of, lower level projects being allowed to proceed on the same site*".

In-combination effects and compensation for other schemes

- 5.20 Compensatory measures only enter the equation when it has been determined that there will be adverse effects on the integrity of the site (under regulation 63) or lack of certainty as to the absence of adverse effects and the need for the competent authority to decide whether consent should be granted under regulation 64.
- 5.21 It therefore follows that if compensation measures have been required for a project that that project has been identified as giving rise to adverse impacts on the integrity of a protected site (or lack of certainty as to the absence of adverse effects) and therefore also relevant when considering whether a later project is likely to have a significant effect on a designated site, whether on its own or in combination with other plans and projects whether the competent authority can be satisfied that there will not be adverse effects on the integrity of the designated site whether taken alone or in combination with other projects.
- 5.22 It is difficult to see on what basis the fact that compensation has been provided for the adverse effects of the first scheme should mean that the effects of that scheme should be removed from the equation when carrying out the assessments required by regulation 63 for a later scheme, although it may well be relevant when considering whether consent should be granted under regulation 64 for the second scheme and/or what compensation measures should be required at that stage.⁶ There are two points we would stress in that context:
- Firstly, the admonition of AG Sharpston in *Sweetman (No 1)* at AG47 (cited above). To exclude the adverse effects of scheme one when considering whether a later scheme would be likely to have significant effects / would not have an adverse effect on the integrity of a

protected site in combination with other projects would seem to risk perpetuating the “death by a thousand cuts” phenomenon discussed in that case;⁷ and

- Secondly, the uncertainty as to the effectiveness of measures that are designed to compensate for (for example) loss of habitat rather than to mitigate the harm which might otherwise be *caused*: see C-164/17 Grace v Sweetman at 52-3.

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

“50 In that regard, the Court has previously ruled that the measures provided for in a project which are aimed at compensating for the negative effects of the project cannot be taken into account in the assessment of the implications of the project provided for in Article 6(3) of the Habitats Directive...⁸.

51 It is only when it is sufficiently certain that a measure will make an effective contribution to avoiding harm, guaranteeing beyond all reasonable doubt that the project will not adversely affect the integrity of the area, that such a measure may be taken into consideration when the appropriate assessment is carried out⁹.

52 As a general rule, any positive effects of the future creation of a new habitat, which is aimed at compensating for the loss of area and quality of that habitat type in a protected area, are highly difficult to forecast with any degree of certainty or will be visible only in the future¹⁰.

53 It is not the fact that the habitat concerned in the main proceedings is in constant flux and that that area requires ‘dynamic’ management that is the cause of uncertainty. In fact, such uncertainty is the result of the identification of adverse effects, certain or potential, on the integrity of the area concerned as a habitat and foraging area and, therefore, on one of the constitutive characteristics of that area, and of the inclusion in the assessment of the implications of future benefits to be derived from the adoption of measures which, at the time that assessment is made, are only potential, as the measures have not yet been implemented. Accordingly, and subject to verifications to be carried out by the referring

⁷ For the avoidance of doubt, we would stress that the starting point would always need to be the scheme itself – and there would need to be some effect from the scheme which when combined with effects from the earlier scheme could give rise to likely significant effects / outcome.

⁸ *Judgments of 15 May 2014, Briels and Others, C-521/12, EU:C:2014:330, paragraph 29, and of 21 July 2016, Orleans and Others, C-387/15 and C-388/15, EU:C:2016:583, paragraph 48*

⁹ *See, to that effect, judgment of 26 April 2017, Commission v Germany, C-142/16, EU:C:2017:301, paragraph 38*

¹⁰ *See, to that effect, judgment of 21 July 2016, Orleans and Others, C-387/15 and C-388/15, EU:C:2016:583, paragraphs 52 and 56 and the case-law cited*

court, it was not possible for those benefits to be foreseen with the requisite degree of certainty when the authorities approved the contested development.

54 The foregoing considerations are confirmed by the fact that Article 6(3) of the Habitats Directive integrates the precautionary principle and makes it possible to prevent in an effective manner adverse effects on the integrity of protected areas as a result of the plans or projects being considered¹¹.”

¹¹ See, to that effect, judgment of 15 May 2014, *Briels and Others*, C-521/12, EU:C:2014:330, paragraph 26 and the case-law cited