



Written Submission
for the
Royal Society for the Protection of Birds

21 October 2021

Planning Act 2008 (as amended)

In the matter of:

Application by Norfolk Boreas Limited for an Order
Granting Development Consent for the Norfolk Boreas Offshore Wind Farm
Consultation on further information submitted by 20 August 2021

Planning Inspectorate Ref: EN010087

Registration Identification Ref: 2002291

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 Boreas Limited ("the Applicant") and other Interested Parties in reply to the Secretary of State's consultation letter dated 9 July 2021.
- 1.2 This document sets out the RSPB's comments on key elements of those submissions, with particular reference to the following submissions:

Submissions by the Applicant

- Norfolk Boreas Cover Letter dated 20 August 2021 ("Cover Letter");
- The Applicant's Response to the Request for Additional Information dated August 2021 ("the Response to the Request for Additional Information");
- Norfolk Boreas Extract of Schedule 19 to the Draft DCO: Compensation to protect the coherence of the Natura 2000 Network ("the Draft DCO compensation extracts");
- Norfolk Boreas Updated Population Viability Analysis: Flamborough and Filey Coast SPA ("the updated PVA");
- Norfolk Boreas Updated information on cumulative and in combination effects with the Dudgeon and Sheringham Shoal Extension Projects ("the updated in-combination effects information").

Submissions by Natural England

- Consultation Response letter dated 20 August 2021 ("NE Response letter");
 - Annex 2: Advice on the Flamborough and Filey Coast Special Protection Area (FFC SPA) in principle compensation measures ("NE Annex 2");
 - Annex 3: Advice on the Alde-Ore Estuary Special Protection Area (AOE SPA) in principle compensation measures ("NE Annex 3");
 - Annex 4: Advice on the Proposed DCO Conditions regarding Compensatory Measures ("Annex 4");
 - Annex 5: Overview appraisal of in principle compensation measures ("Annex 5").
- 1.3 Our response concentrates on the Applicant's submissions and, in order to help the Secretary of State, we draw on Natural England's advice on relevant matters.

1.4 Separately, we have:

- summarised other key issues where we agree with Natural England's 20 August 2021 submissions;
- set out our position on the issue of "de minimis" as promised in paragraph 1.7 of our Summary and Overview document dated 20 August 2021.

1.5 This submission should be read in conjunction with the RSPB's submissions on the 20 August 2021, in particular:

- Overview and Summary;
- Annex 1: RSPB comments on "In Principle Habitats Regulations Derogation Provision of Evidence: Appendix 1, Flamborough and Filey Coast SPA In Principle Compensation (dated 25 June 2021)";
- Annex 2: RSPB comments on: "In Principle Habitats Regulations Derogation Provision of Evidence: Appendix 2, Alde-Ore Estuary SPA In Principle Compensation (dated 25 June 2021)".

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

1.6 The RSPB's submission comprises the following:

- Comments on the Applicant's submissions related to impacts on features of the Flamborough and Filey Coast SPA i.e.
 - Comments on the updated in-combination effects information;
 - Comments on the updated PVA;
 - Comments on the issue of avoidance rates.
- Comments on the Applicant's submissions relating to compensation proposals, with reference to the Draft DCO compensation extracts;
- Summary of key issues where the RSPB agrees with Natural England's August 2021 submissions – compensation measures;
- The RSPB position on "de minimis" in response to paragraphs 1-33 of the Applicant's June 2021 submission entitled "Response to the Request for further information".

Summary of the RSPB's conclusions on adverse effect on site integrity on the Flamborough and Filey Coast SPA and the Alde-Ore Estuary SPA

- 1.7 As context to our submission, below we have repeated our summary position on adverse effect on site integrity set out in our August 2021 Overview and Summary document.

RSPB position on adverse effect on integrity of the FFC SPA

- 1.8 The RSPB's conclusions for each species from the FFC SPA remain as they were at the end of the Norfolk Boreas examination, now with the confirmation 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 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 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 position on adverse effect on integrity of the Alde-Ore Estuary SPA

- 1.9 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 Boreas examination:

- **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.

2 Comments on the Applicant's submissions related to impacts on features of the Flamborough and Filey Coast SPA

2.1 This section sets out the RSPB's comments on the Applicant's August 2021 submissions on matters relating to impacts on features of the Flamborough and Filey Coast SPA.

Comments on the updated in-combination effects information

2.2 The RSPB welcome the updated in-combination effects analysis, both with and without the preliminary collision and displacement estimates for Hornsea Project Four Offshore Wind Farm and the Dudgeon Extension Project (DEP) and Sheringham Extension Project (SEP).

2.3 For kittiwake, the impacts of these in-combination effects, if Hornsea Project Four and DEP and SEP are included, are predicted to result in the annual population growth rate at Flamborough and Filey Coast SPA declining in a ratio of impacted to unimpacted population growth rate of 0.9930. This means that after the 30-year lifetime of Norfolk Boreas, the population size of Flamborough and Filey Coast SPA is expected to be **80.51%** of what it would have been in the absence of these cumulative effects. As such, **it is impossible to rule out an adverse effect on the site integrity.**

2.4 For gannet, the impacts of these in-combination effects, if Hornsea Project Four and DEP and SEP are included, are predicted to result in the annual population growth rate at Flamborough and Filey Coast SPA declining in a ratio of impacted to unimpacted population growth rate of 0.9814. This means that after the 30-year lifetime of Norfolk Boreas, the population size of Flamborough and Filey Coast SPA is expected to be **55.82%** of what it would have been in the absence of these cumulative effects. As such, **it is impossible to rule out an adverse effect on the site integrity.**

2.5 For guillemot, the impacts of these in-combination effects, using the Applicants preferred displacement and mortality rates, if Hornsea Project Four and DEP and SEP are included, are predicted to result in the annual population growth rate at Flamborough and Filey Coast SPA declining in a ratio of impacted to unimpacted population growth rate of 0.9925. This means that after the 30-year lifetime of Norfolk Boreas, the population size of Flamborough and Filey Coast SPA is expected to be **79.11%** of what it would have been in the absence of these cumulative effects. As such, **it is impossible to rule out an adverse effect on the site integrity.**

2.6 For razorbill, the impacts of these in-combination effects, using the Applicants preferred displacement and mortality rates, if Hornsea Project Four and DEP and SEP are included, are predicted to result in the annual population growth rate at Flamborough and Filey Coast SPA declining in a ratio of impacted to unimpacted population growth rate of 0.9960. This means

that after the 30-year lifetime of Norfolk Boreas, the population size of Flamborough and Filey Coast SPA is expected to be **88.39%** of what it would have been in the absence of these cumulative effects. As such, **it is impossible to rule out an adverse effect on the site integrity.**

Comments on the updated PVA

2.7 The RSPB welcome the presentation of the updated PVA results, using the Natural England PVA tool. However, alongside this the Applicant present somewhat spurious arguments as to the greater utility of the Counterfactual of Population Growth Rate (CPGR) output metric as opposed to the Counterfactual of Population Size (CPS). This argument distracts from the usefulness of the metric, as they are best used in combination. This was a specific recommendation of a review of output metrics commissioned by JNCC and carried out by the BTO¹, recommending the ratio of growth rates are presented to quantify the consequence of impacts at a population level and the ratio of population sizes to present these impacts in an easily understandable context. The ease of understanding of the Counterfactual of Population Size is crucial; the numbers given by the Counterfactual of Population Growth Rate are less understandable outwith a population modelling context. To use the theoretical example quoted by the BTO, a CPS of 0.515 means the population size of a Breeding Colony is expected to be 51.5% (i.e. half) of what it would have been in the absence of the development after 25 years, which is easy to understand. Whereas the corresponding CPGR, 0.973, means that the annual population growth rate at the breeding colony declines from 0.994 to 0.967. The actual scale of the consequence of this is hard for a non-specialist to comprehend, that of the CPS is not.

2.8 Notwithstanding the above, it is wrong to disassociate the two metrics; aside from the question of comprehension, they are very similar, the only key difference is that CPGR does not include the length of time that the wind farm will be operational, as acknowledged by the Applicant, who state the CPGR is:

“time invariant; the value is the same whether the simulation runs for 20 years, 30 years or 100 years”.

2.9 While the Applicant presents this as a strength of CPGR, it is actually an argument for the use of CPS, which does include the operational time. As we have highlighted elsewhere, there is considerable uncertainty surrounding most of the aspects of the assessment. However, the

¹ Cook, A.S.C.P. & Robinson, R.A. (2016) Testing sensitivity of metrics of seabird population response to offshore wind farm effects, JNCC Report No. 553, JNCC, Peterborough, ISSN 0963-8091.

length of time that the development is operational is fixed and a crucial consideration into the scale of impact. The effect of using CPGR in isolation is to remove important contextual information, operational time, complicating the interpretation of impact, thereby increasing uncertainty and the need for precaution.

Comments on the issue of avoidance rates

- 2.10 In their submissions to the August 2021 deadline, both the RSPB and Natural England highlighted that a review of Avoidance Rates for use with the Band collision risk model had been carried out by the British Trust for Ornithology². The RSPB welcome this review, but note that there are unresolved issues with the rates recommended, particularly for kittiwake. As such, until the issues are resolved, which may involve re-examination of some of the data underpinning the recommendations, we consider impacts predicted by the default rates recommended by the SNCBs³ be considered, although these should be presented alongside those calculated using the recent recommendations.
- 2.11 These issues highlight the large amount of uncertainty inherent in the assessment and the consequent need for precaution, both in consideration of that assessment and in the design of any compensation measure arising from the predicted impact.

² Cook, A.S.C.P. 2021. [Additional analysis to inform SNCB recommendations regarding collision risk modelling](#) BTO research report no. 739

³ Joint Nature Conservation Committee (JNCC), Natural England (NE), Natural Resource Wales (NRW), Northern Ireland Environment Agency (NIEA), Scottish Natural Heritage (SNH) 2014 *Joint Response from the Statutory Nature Conservation Bodies to the Marine Scotland Science Avoidance Rate Review*

3 Comments on the Applicant's submissions relating to compensation proposals, with reference to the Draft DCO compensation extracts

Introduction

- 3.1 In section 2 of the RSPB's Overview and Summary submission in August 2021, we set out our critique of the Applicant's approach to the drafting of the DCO wording for each compensation proposal.
- 3.2 We were highly critical of the structure and approach adopted and considered it seriously flawed (paragraphs 2.4-2.10), especially when combined with the lack of any substantive compensation proposals being put forward by the Applicant. In this regard, we note and welcome the Secretary of State's request of 22 September 2021 that the Applicant provide greater detail on compensation site selection, how the proposed purchase/lease will be secured in the DCO and alternative compensation measures to be adopted. However, we remain of the view that more detail should be required to enable the compensation measures to be assessed robustly.
- 3.3 At paragraphs 2.11-2.15 of the Overview and Summary, we argued that Natural England's outline advice on what should be contained in a compensation plan should form the basis of the evidence and information that the Secretary of State should require from the Applicant before deciding whether to grant consent for the Norfolk Boreas scheme and that those revised proposals should be subject to public consultation. That remains the RSPB's position.
- 3.4 At paragraph 2.16 we went on to provide "without prejudice" comments on amendments to the then proposed DCO wording should the Secretary of State disagree with the RSPB's proposed approach. We advised that if such a sub-optimal approach was 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.
- 3.5 Below we evaluate the Applicant's proposed changes to the Draft DCO against the concerns set out in August 2021 and summarised above. The RSPB's comments relate solely to the draft DCO wording in respect of compensation measures for features of the Flamborough and Filey Coast SPA (kittiwake, guillemot and razorbill) and the Alde-Ore Estuary SPA (lesser black-backed gull).

The RSPB comments on the generic changes to the Schedule 19 of the draft DCO – compensation to protect the coherence of the Natura 2000 network

3.6 The Applicant has made three main and common changes to the draft DCO wording in Part 1 (kittiwake, FFC SPA), Part 2 (lesser black-backed gull, Alde-Ore Estuary SPA), Part 4 (guillemot, FFC SPA) and Part 5 (razorbill, FFC SPA). These are as follows:

- Paragraph 2:
 - Require the draft strategy (to deliver the species compensation plan) to be submitted for approval by the Secretary of State no later than 18 months prior to the operation of any wind turbine generator forming part of the development;
 - No wind turbine generator to be operated until the Secretary of State has approved any such strategy;
- Paragraph 3:
 - Requires the strategy to be in accordance with the principles of the relevant species compensation plan and to contain the relevant matters identified by Natural England in specified sections of the compensation plan (currently as per the June 2021 version of the compensation plans).

Comments on changes to paragraph 2

3.7 The RSPB welcomes this slight shift in approach by the Applicant 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.

3.8 However, these changes do not overcome the key issues we identified in our August 2021 submission. This is especially concerning given the critical lack of detailed compensation proposals available for scrutiny. Subject to what additional information is provided by the Applicant by the October 2021 deadline, 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.

3.9 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 and our related comments in paragraph 2.16 of the Overview and Summary submission in August 2021, 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, as well as Natural England’s advice e.g. see page 13 of Natural England’s Response Letter;
- 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.

Comments on changes to paragraph 3

3.10 Paragraph 3 continues to refer to unspecified “principles” contained in the species’ compensation plan. As set out in paragraphs 2.4-2.10 of our Overview and Summary submission (August 2021) the RSPB remains of the view that this is fundamentally flawed as no such principles are identified in any of the species’ compensation plans.

3.11 However, the proposed changes to paragraph 3 now 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.

3.12 We agree with Natural England’s comments on this issue in its August 2021 submissions. For example, reference 2.36 in NE Annex 2 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 clarify on all these matters is needed prior to determination.”

3.13 As noted above, the RSPB agrees that Natural England's list of key compensatory matters is a good starting point for what should be contained in a compensation plan. We agree with Natural England 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.

3.14 As such, we consider the proposed wording remains seriously flawed.

3.15 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)

3.16 In Part 4 (guillemot) and Part 5 (razorbill) the Applicant has introduced a new paragraph 8 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.

3.17 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."

3.18 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 the RSPB's Annex 1 to its August 2021 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 concerns are shared by Natural England and summarised in the NE Response Letter 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.**”*

3.19 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.

3.20 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.

4 Summary of key issues where the RSPB agrees with Natural England's August 2021 submissions – compensation measures

Introduction

- 4.1 Below we highlight some of the key issues where we agree with Natural England's August 2021 submissions in respect of compensation measures. This is not an exhaustive list of the areas where we agree with Natural England's August 2021 submissions.

Compensation measures overall

- 4.2 The RSPB agrees with Natural England's comments on the following issue in relation to the Applicant's proposals for various compensation measures:
- That there is still insufficient detail regarding several important aspects of the different compensation measures and that in some instances it has not been satisfactorily demonstrated that the measures are deliverable. Therefore, the Secretary of State has not been afforded sufficient confidence the measures can be secured (section 1, NE Response Letter).

Kittiwake compensation measures

- 4.3 The RSPB shares Natural England's concerns over the important uncertainties that remain around the proposed artificial nesting structure concept (see pages 13-14 of the NE Response Letter) and that these matters must be addressed prior to determination.
- 4.4 In addition, we would add the following comment. Quantification must take account of the high probability of artificial nesting structures located in Lowestoft/Suffolk being vulnerable to collision risk (see pages 15-16 and Figure 1 in the RSPB's Annex 1 dated 20 August 2021). This is a key risk with the multiple projects that are homing in on the Lowestoft/Suffolk coast area for such structures: it has not been properly addressed and acknowledged in any of the deliberations to date.
- 4.5 We also share Natural England's concerns over:
- the lack of any requirement for the compensation to be functional prior to impact (page 13, NE Response Letter). Natural England's concerns are essentially identical to the RSPB's (see paragraph 3.9 above and paragraph 2.16 of our Overview and Summary submission dated 20 August 2021). The Applicant's revised wording of the DCO condition does nothing to address this.
 - That the evidence provided by the Applicant does not support its position that the "mortality debt" that would arise from the compensation measures being in place following

operation could easily be repaid (see also the RSPB's comments on the same issue on page 18 of its Annex 1 submission in August 2021).

- That any artificial nesting structure located in the Port of Lowestoft is unlikely to function during the minimum 18-month period Associated British Ports will undertake redevelopment of the port (ref 2.21 in NE Annex 2), which relates in turn to the "mortality debt" issue referred to above. We share Natural England's concern over the lack of evidence that a 50m buffer around all construction activity would be sufficient to mitigate the nesting structures against the impacts of the port redevelopment (ref 2.25 in NE Annex 2).
- The reliance on a single location ("eggs in one basket") and, more generally, the concern relating to multiple offshore wind farm projects all seeking the same solution in broadly the same geographical location (NE Response Letter page 14). This is reinforced by ABP's own plans to restore the existing Lowestoft Harbour Kittiwake Wall as part of its redevelopment.

Guillemot and razorbill compensation measures

4.6 We have set out our detailed concerns with the Applicant's proposals for guillemot and razorbill compensation in our section 5 of Annex 1 of our August 2021 submissions and why we consider they are not fit for purpose i.e. they contain no clear proposals for any specific island to be restored, let alone the evidence we consider necessary to evaluate the feasibility and likely success of any such scheme in respect of restoring the populations of guillemots and razorbills. Such matters are fundamental to the proposals and therefore we agree with Natural England's comments in this regard:

- That it is inappropriate to leave matters that have profound implications for the effectiveness of compensatory measures to the post-consent period (refs 2.47 and 2.63 in NE Annex 2).
- that the proposals lack sufficient detail to have confidence in their relevance of their feasibility (2.5.1.3 in the NE Response Letter).

Lesser black-backed gull compensation measures

4.7 Section 5 of Annex 2 to our August 2021 submission sets out the RSPB's views on the Applicant's proposal for predator fencing to form the basis of its compensation measure for lesser black-backed gull. We reiterated our concern that the Applicant and Natural England were over reliant on this single measure to achieve a more successful breeding colony. We described the current situation at the RSPB Havergate Island reserve which indicates other critical factor(s) are driving the decline in population and productivity at that location i.e. not mammalian predation and

that further research was needed to understand the issues driving the observed declines. This underlined our concern with the predator fencing proposal at a fundamental level and the need to understand and address all critical factors which could undermine population growth and productivity to ensure any compensation measure has a reasonable guarantee of success.

- 4.8 We therefore agree with Natural England’s comments that other factors beside fox predation are likely to be a contributing factor in the decline of the lesser black-backed gull SPA colony (ref 3.6 in NE Annex 3), and their description of the productivity issue at RSPB Havergate Island (ref 3.12 in NE Annex 3). This supports our concern about the suitability of predator fencing as a compensation measure in this location as it may be doomed to fail or be less successful than is being assumed (see paragraph 3.24 of the RSPB’s Annex 2 submission in August 2021). In simple terms, we have fundamental concerns over the choice of the Suffolk coastal area as suitable for lesser black-backed gull compensation and consider a first-principles approach needs to be taken to identify the most suitable compensation options available to protect the coherence of the National Site Network for this species. This is exacerbated by the additional risk posed by collision with existing and planned offshore wind farms off the East Anglia coast.
- 4.9 We also agree with Natural England’s overarching concerns relating to the lack of detailed information on a secured location etc in relation to the predator fencing proposal and the fact that this reduces the level of confidence that the measure can be secured. See for example paragraph 2.5.2.1 of the NE Response Letter and refs 3.16, 3.20 and 3.23 in NE Annex 3.
- 4.10 We agree with Natural England (ref 3.25 in NE Annex 3) that clarity must be provided before determination on all the key matters identified by Natural England and listed by the Applicant at paragraph 4.6.2 of its “In Principle Habitats Regulations Derogation Provision of Evidence: Appendix 2, Alde-Ore Estuary SPA In Principle Compensation (dated 25 June 2021)”. No such clarity has yet been provided.

5 The RSPB position on “de minimis” in response to paragraphs 1-33 of the Applicant’s June 2021 submission entitled “Response to the Request for further information”

- 5.1 In our Overview and Summary submission in August 2021, the RSPB stated it would set out its position on the issue of “de minimis” in response to paragraphs 1-33 of the Applicant’s June 2021 submission entitled “Response to the Request for further information”.
- 5.2 Below we set out a short summary of our position, based on a short note contained in the Annex to this submission.

Context

- 5.3 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 50 to 14, which is less than 4% of the total predicted mortality of birds from the SPA, and 1/5th the equivalent mortality predicted for the Hornsea Project Three wind farm (the only project for which kittiwake compensation has been required)....

[6] 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 6 to 2.1.” (paras 5-6)
 - “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 42 individuals and for razorbill was only 3 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 [REP4-040] 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 13 individuals and the razorbill impact reduces to 1 individual.” (para 7)
 - “Therefore the Applicant considers it is clear that any remaining impacts of the Project are extremely small and can be regarded as de minimis.”
- 5.4 At paras 9 – 34, 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.

5.5 The MMO's position is summarised in paragraph 10:

"...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."

5.6 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

5.7 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.

5.8 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 Pleanála [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)

5.9 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 Hickinbottom 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."

5.10 We note that reliance is also placed by Vattenfall on the Court of Appeal's judgment in R (Morqe) 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.

5.11 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.

5.12 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."

5.13 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. ...".

5.14 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).

5.15 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.”

5.16 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)

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

5.18 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.”

5.19 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.

5.20 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

5.21 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.

5.22 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.

5.23 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.⁴ 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;⁵ 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.

5.24 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...⁶

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 out⁷.

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

⁵ 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.

⁶ *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*

⁷ *See, to that effect, judgment of 26 April 2017, Commission v Germany, C-142/16, EU:C:2017:301, paragraph 38*

area, are highly difficult to forecast with any degree of certainty or will be visible only in the future⁸.

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 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 considered⁹."

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⁸ 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

⁹ 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