



**Written Representation  
for the  
Royal Society for the Protection of Birds**

**Submitted for Deadline 1  
24 October 2024**

**Planning Act 2008 (as amended)**

**In the matter of:**

**Application by Outer Dowsing Limited for an Order  
Granting Development Consent for the Outer Dowsing Offshore Wind Farm**

**Planning Inspectorate Ref: EN010130  
RSPB Registration Identification Ref: 20049053**

# Contents

1. Introduction .....	3
2. The nature conservation importance of the seabirds affected by the Outer Dowsing offshore wind farm scheme .....	5
3. Nature conservation legislation and policy background .....	7
4. Onshore ornithology – Export Cable Corridor .....	15
5. Derogation case: the RSPB’s approach to evaluating compensation measures under the Conservation of Habitats and Species Regulations 2017 (as amended) .....	16
6. RSPB comments on the Applicant’s specific compensation proposals .....	27
Annex A: copy of section 3 of the RSPB’s submission REP5-120 to the Hornsea Four Offshore Wind Farm examination in respect of connectivity .....	34

## 1. Introduction

### The RSPB

- 1.1. The Royal Society for the Protection of Birds (the RSPB) was set up in 1889. It is a registered charity incorporated by Royal Charter and is Europe's largest wildlife conservation organisation, with a membership of over 1.1 million<sup>1</sup>. The principal objective of the RSPB is the conservation of wild birds and their habitats. The RSPB therefore attaches great importance to all international, EU and national law, policy and guidance that assist in the attainment of this objective. It campaigns throughout the UK and internationally for the development, strengthening and enforcement of such law and policy. In so doing, it also plays an active role in the domestic processes by which development plans and proposals are scrutinised and considered, offering ornithological and other wider environmental expertise. This includes making representations to, and appearing at, public inquiries and hearings during the examination of applications for development consents.

### The RSPB's interest in offshore wind development

- 1.2. Faced with the threats of climate change to the natural world the RSPB considers that a low-carbon energy revolution to reach net zero is essential to safeguard biodiversity. However, inappropriately designed and/or sited developments can also cause serious and irreparable harm to biodiversity and damage the public acceptability of the necessary low-carbon energy transition technologies.
- 1.3. The RSPB recognises the significant role that offshore wind will play in decarbonising our energy systems and the renewed urgency with which this must happen. Installing this technology at the scale and pace needed is no easy task: there are significant challenges rooted in the planning frameworks and the state of our seas which threaten both nature *and* our ability to reach net zero.
- 1.4. The UK is of outstanding international importance for its breeding seabirds, including northern gannet for which the UK supports over 50% of the world population and around 10% of the world populations of kittiwake and puffin. The UK is also of international importance for its non-breeding seabirds and waterbirds. The latest review of the UK Birds of Conservation Concern<sup>2</sup> highlights alarming recent declines in UK seabird populations meaning that ten seabirds are now red-listed.
- 1.5. The available evidence suggests that the main risks of offshore wind farms for birds are collision, disturbance/displacement, barriers to movement (e.g. migrating birds, or disruption of access between the breeding areas and feeding areas), and habitat change particularly with associated changes in food availability and the cumulative and in-combination effects of these across multiple wind farms.
- 1.6. Such impacts are avoidable, and the RSPB has spent considerable time working with stakeholders in the UK offshore wind industry to ensure that decisions about deployment of

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<sup>1</sup> <https://www.rspb.org.uk/about-us/annual-report> Accessed 14 October 2024.

<sup>2</sup> <https://www.rspb.org.uk/whats-happening/news/alarming-declines-in-uk-seabird-species-sees-five-more-added-to-the-red-list> Accessed 14 October 2024.

renewable energy infrastructure take account of environmental constraints and seek to avoid or minimise impacts wherever possible. The RSPB therefore strongly advocates the use of rigorous, participative environmental assessments to inform the development of projects.

### Scope of written submission

1.7. This Written Submission covers the following:

- The nature conservation importance of the seabirds affected by the Outer Dowsing wind farm scheme.
- Nature conservation legislation and policy background.
- Onshore ornithology.
- Derogation case: the RSPB's approach to evaluating compensation measures under the Conservation of Habitats and Species Regulations 2017 (as amended).
- RSPB comments on the Applicant's specific compensation proposals.

### *Offshore ornithology matters*

1.8. The Examining Authority's Rule 8 letter (dated 17 October 2024) addressed issues arising from the Applicant's proposal in respect of its Offshore Restricted Build Area (ORBA). We note that the Examining Authority has requested these be dealt with as part of a formal Change Request by the Applicant (Rule 8 letter, page B6) and in Annex C has requested clarification from the Applicant on various matters related to the associated ornithology impact assessments.

1.9. Given the significance of these changes for the RSPB's understanding of the offshore ornithology impacts of the Outer Dowsing scheme, the RSPB is deferring its Written Representation on offshore ornithology matters until Deadline 2 (27 November 2024).

1.10. However we have, as far as practicable, made comments in relation to compensation measures arising from the Applicant's response to the RSPB's Relevant Representation. This is in order to assist the Examining Authority in its consideration of possible First Written Questions.

## 2. The nature conservation importance of the seabirds affected by the Outer Dowsing offshore wind farm scheme

### Introduction

- 2.1. As set out in section 1, the UK is of outstanding international importance for its breeding seabirds. As with all Annex I and regularly occurring migratory species, the UK has particular responsibility under the Birds Directive<sup>3</sup> to secure the conservation of these important seabird populations.
- 2.2. As set out in our Relevant Representation (RR-056), the RSPB is particularly concerned regarding the impacts on the following designated sites:
  - Flamborough and Filey Coast Special Protection Area (SPA).
  - North Norfolk Coast SPA.
  - Greater Wash SPA.
- 2.3. Natural England has referred to the conservation advice for each of the designated sites listed above in Table 5.1 in Natural England's Relevant Representation (RR-045) including Conservation Objectives and Supplementary Advice on Conservation Objectives.

### *Conservation objectives*

- 2.4. The Conservation Objectives for the SPAs generally follow the same format i.e.:

“...to ensure that, subject to natural change, the integrity of the site is maintained or restored as appropriate, and that the site contributes to achieving the aims of the Wild Birds Directive, by maintaining or restoring;

  - The extent and distribution of the habitats of the qualifying features
  - The structure and function of the habitats of the qualifying features
  - The supporting processes on which the habitats of the qualifying features rely
  - The populations of each of the qualifying features
  - The distribution of the qualifying features within the site.”

### *Supplementary Advice on Conservation Objectives*

- 2.5. Natural England's Supplementary Advice on the Conservation Objectives for the various SPAs identifies, for each SPA feature, key attributes and targets. Attributes are the ecological characteristics or requirements of the classified features within the SPA and deemed to best describe the site's ecological integrity. If safeguarded this will enable achievement of the Conservation Objectives and favourable conservation status for all the designation features, including the assemblage.
- 2.6. For each qualifying feature, targets are typically set in respect of the following attributes (as appropriate):
  - (Non-) Breeding population: abundance;

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<sup>3</sup> Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (codified version) (the Birds Directive).

- Connectivity with supporting habitats;
- Disturbance caused by human activity;
- Extent and distribution of supporting habitat for the (non-) breeding season; and
- Food availability.

2.7. The RSPB considers these attributes and targets are particularly relevant to consideration of the Outer Dowsing offshore wind farm as they respectively relate to:

- the population levels at which the features should be maintained or restored to;
- the need to:
  - maintain or restore safe passage of birds moving between their nesting and/or feeding areas;
  - reduce/avoid disturbance to foraging, feeding, moulting and/or loafing birds;
  - maintain the extent, distribution and availability of suitable (non-) breeding habitat which supports the feature; and
  - maintain or restore the distribution, abundance and availability of key food and prey items.

2.8. The RSPB considers these attributes and targets are directly relevant to the consideration of whether an SPA's conservation objective to maintain or restore site integrity can be met and the SPA achieve favourable conservation status for all its features including, where appropriate, the seabird assemblage throughout the lifetime of the development and any subsequent period here its impacts continue to affect the SPA features.

### Summary

2.9. It is vital to consider whether an SPA and its qualifying features meet the attributes and targets set by Natural England when considering whether the SPA's conservation objectives to maintain or restore site integrity can be met and the SPA achieve favourable conservation status throughout the lifetime of the development and any subsequent period where its impacts continue to affect the SPA features.

### 3. Nature conservation legislation and policy background

#### Introduction

- 3.1. Below we summarise the RSPB’s understanding of the key nature conservation legislation and related policy background relevant to the RSPB’s concerns.

#### The Conservation of Habitats and Species Regulations 2017 and the Conservation of Offshore Marine Habitats and Species Regulations 2017

- 3.2. SACs and SPAs are protected as “European sites” in inshore waters (up to 12 nautical miles from the baselines) under provisions within the Conservation of Habitats and Species Regulations 2017 (Habitats Regulations)(as amended); and in offshore waters (i.e. from 12-200 nautical miles) under provisions within the Conservation of Offshore Marine Habitats and Species Regulations 2017 (Offshore Habitats Regulations)(as amended)<sup>4</sup>.
- 3.3. The Habitats & Offshore Habitats Regulations set out the sequence of steps to be taken by the competent authority (here the Secretary of State for Energy Security and Net Zero (DESNZ)) when considering authorisation for a project *likely to have an effect* on a European site and its species before deciding to authorise that project. These are as follows (with references to just the Habitats Regulations):
- Step 1: consider whether the project is directly connected with or necessary to the management of the SPA and its species (regulation 63 (1)). If not –
  - Step 2: consider, on a precautionary basis, whether the project is likely to have a significant effect on the SPA and its species, either alone or in combination with other plans or projects (the Likely Significance Test) (regulation 63 (1)).
  - Step 3: make an appropriate assessment of the implications for the SPA and its species in view of its conservation objectives with the aims and objectives of the requirements including the National Sites Network management objectives (reg 16A) to also be considered. There is no requirement or ability at this stage to consider extraneous (non-conservation e.g. economics, renewable targets, public safety etc) matters in the appropriate assessment (regulation 63 (1)).
  - Step 4: consider whether it can be ascertained that the project will not, alone or in combination with other plans or projects, adversely affect the integrity of the SPA and its species, having regard to the manner in which it is proposed to be carried out, and any conditions or restrictions subject to which that authorisation might be given (the Integrity Test) (regulation 63 (6)).
  - Step 5: In light of the conclusions of the assessment, the competent authority shall agree to the project only after having ascertained that it will not adversely affect the integrity of the SPA, alone or in combination with other plans or projects (regulation 63 (5)).
  - Step 6: only if the competent authority is satisfied that, there being no alternative solutions and the plan or project must be carried out for imperative reasons of

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<sup>4</sup> The Conservation of Habitats and Species Regulations 2017: <https://www.legislation.gov.uk/uksi/2017/1012/contents>. The Conservation of Offshore Marine Habitats and Species Regulations 2017 are also relevant - <https://www.legislation.gov.uk/uksi/2017/1013/contents>.

overriding public interest (which, subject to (regulation 64(2)), may be of a social or economic nature), they may agree to the plan or project notwithstanding a negative assessment of the implications for the European site (regulation 64 (1)).

- Step 7: in the event of the no alternative solutions and imperative reasons of overriding public interest tests being satisfied, the Secretary of State must secure that any and all necessary compensatory measures are taken to ensure that the overall coherence of the National Site Network is protected (regulation 68) taking account of the National Site Network management objectives (reg 16A, as set out below).

3.4. It is important to add that in addition to the requirements set out above, in relation to both inshore marine area and the offshore marine area, any competent authority must exercise its functions so as to secure compliance with the requirements of the Habitats Directive and the Birds Directive as set out in regulations 9 and 10, Habitats Regulations; and in particular to take such steps as it considers appropriate to secure the preservation, maintenance and re-establishment of a sufficient diversity and area of habitat for wild birds<sup>5</sup>, having regard to the requirements of Article 2 of the Birds Directive.<sup>6</sup> And for offshore SPAs and SACs regulation 26, Offshore Habitats Regulations requires competent authorities to exercise their functions (as far as possible) to secure steps to avoid the disturbance of species and the deterioration of habitats or habitats of species within those sites.

#### *SPA and SAC Conservation Objectives*

3.5. Under the Habitats Regulations, a site's Conservation Objectives are intrinsic to the Integrity Test when considering whether to grant consent for a plan or project – see Habitats Regulations 63(1).

3.6. In order to understand the Conservation Objectives and the Supplementary Advice in the context of Regulation 63(1) it is important to remind oneself of the role of SPAs within these legislative requirements. These protected sites are part of the requirement for special conservation measures in order to ensure that their contribution to national and international “conservation status” of the species<sup>7</sup> is maximised, as set out in the headline words at the start of all Conservation Objectives:

“Ensure that the integrity of the site is maintained or restored as appropriate, and ensure that the site contributes to achieving the aims of the Wild Birds Directive, by maintaining or restoring...”

3.7. The Conservation Objectives are to be an articulation of the contribution that it is appropriate for the SPA to make in an enduring way. It would be inconsistent with the purposes of the protection and the role of SPAs to have SPA Conservation Objectives (or the

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<sup>5</sup> As required by Article 3, Birds Directive

<sup>6</sup> See regulation 9(1) and 10(1)(2)(3) and (8) of the Habitats Regulations and regulation 6 of the Offshore Regulations. Article 2 Birds Directive imposes a requirement on Member States to maintain all wild bird populations at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or if necessary, to restore the population of these species to that level (Article 2).

<sup>7</sup> Please see points below on the management objectives of the National Sites Network and the requirements for SPAs to ensure that the species are maintained and/or restored across their natural range.



interpretation of them) aiming for lower populations particularly since so many sites were designated at a time when populations were not in favourable condition.

### *Appropriate assessment*

- 3.8. As part of the assessment requirements, regulation 63, Habitats Regulations (regulation 28, Offshore Habitats Regulations) require the application of the precautionary principle. Meaning that if it cannot be excluded, on the basis of objective scientific information, that it is likely to have a significant effect on an SPA or SAC and its species an appropriate assessment will be required: see *Waddenzee*.<sup>8</sup>
- 3.9. Following that appropriate assessment, a project may only be granted consent if the competent authority is convinced that it will not have an adverse effect on the integrity of the European site(s) and their species of concern, having applied the precautionary principle and taken account of the conservation objectives for those European sites and their habitats and species. *Waddenzee* confirmed that where doubt remains as to the absence of adverse effects on the integrity of the European site, approval should be refused<sup>9</sup> (subject to the considerations of alternative solutions, imperative reasons of overriding public interest and the provision of compensatory measures as set out in regulations 64 and 68).
- 3.10. An appropriate assessment requires all aspects of the project which could affect the European site, its species and its conservation objectives to be identified in the light of the best scientific knowledge in the field.<sup>10</sup> The competent authority, “taking account of the conclusions of the appropriate assessment of the implications...for the site concerned, in the light of the conservation objectives, are to authorise such activity only if they have made certain that it will not adversely affect the integrity of the site. That is the case where no reasonable scientific doubt remains as to the absence of such effects”<sup>11</sup>.
- 3.11. Defra Circular 01/2005 states at page 20, that the ‘integrity of the site’ should be defined as ‘the coherence of the site’s ecological structure and function, across its whole area, or the habitats, complex of habitats and/or populations of species for which the site is or will be classified’.<sup>12</sup> A European site can be described as having a high degree of integrity where the inherent potential for meeting site conservation objectives is realised, the capacity for self-repair and self-renewal under dynamic conditions is maintained, and a minimum of external management support is required. When looking at the ‘integrity of the site’, it is therefore important to take into account a range of factors, including the possibility of effects manifesting themselves in the short, medium and long-term”.<sup>13</sup>
- 3.12. As is clear from the requirements of the Habitats and Offshore Habitats Regulations, the assessment of integrity is to be considered by reference to the impact of the project alone

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<sup>8</sup> CJEU Case-127/02; [2004] ECR-7405 at [45].

<sup>9</sup> [56]-[57].

<sup>10</sup> [61].

<sup>11</sup> [59].

<sup>12</sup> Please note the Defra Circular 01/2005 is also titled ODPM Circular 6/2005.

<sup>13</sup> See too the European Commission; Guidance document on wind energy developments and EU nature legislation, 2020, section 2.2.3.2, page 24.

and in-combination with other plans and projects, taking account of the European site(s) conservation objectives. As clearly set out in *Waddenzee*, para 61:

61 In view of the foregoing, the answer to the fourth question must be that, under Article 6(3) of the Habitats Directive, an appropriate assessment of the implications for the site concerned of the plan or project implies that, prior to its approval, all the aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site's conservation objectives must be identified in the light of the best scientific knowledge in the field. The competent national authorities, taking account of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned in the light of the site's conservation objectives, are to authorise such an activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects. (emphasis added)

#### *In-combination effects and compensation for other schemes*

- 3.13. 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 there is a 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.
- 3.14. It therefore follows that if compensation measures have been required for a project then that project has been identified as giving rise to potential adverse impacts on the integrity of a protected site. Therefore, potential adverse effects from that project are 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, and subsequently
  - whether the competent authority can be satisfied that there will not be adverse effects on the integrity of the European site whether taken alone or in combination with other projects.
- 3.15. It is difficult to see on what basis the fact that compensation has been provided for potential adverse effects of the first scheme should mean that the effects of that scheme should be removed from the equation when carrying out the assessments required by regulation 63 for a later scheme, although it may well be relevant when considering whether consent should be granted under regulation 64 for the second scheme and/or what compensation measures should be required at that stage. There are two points we would stress in that context:

Firstly, the admonition of AG Sharpston in *Sweetman (No 1)* at AG47. To exclude the adverse effects of scheme one when considering whether a later scheme would be likely to have significant effects / would not have an adverse effect on the integrity of a protected site in combination with other projects would seem to risk perpetuating the “death by a thousand cuts” phenomenon discussed in that case. (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);<sup>14</sup> 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.

- 3.16. 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...<sup>15</sup>*

*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 out<sup>16</sup>.*

*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 future<sup>17</sup>.*

*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*

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<sup>14</sup> 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.

<sup>15</sup> 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

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

<sup>17</sup> 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

*effective manner adverse effects on the integrity of protected areas as a result of the plans or projects being considered<sup>18</sup>.”*

#### *Habitats Regulations General Duties*

3.17. We would like to also highlight, in particular, the requirements in regulation 9(3)<sup>19</sup>:

##### 9.— Duties relating to compliance with the Directives

(1) The appropriate authority, the nature conservation bodies and, in relation to the marine area, a competent authority must exercise their functions which are relevant to nature conservation, including marine conservation, so as to secure compliance with the requirements of the Directives.

...

(3) Without prejudice to the preceding provisions, a competent authority, in exercising any of its functions, must have regard to the requirements of the [Birds and Habitats] Directives so far as they may be affected by the exercise of those functions.<sup>20</sup>

3.18. And the further duties in Regulation 10<sup>21</sup>:

##### 10.— Duties in relation to wild bird habitat

(1) Without prejudice to regulation 9(1), the appropriate authority, the nature conservation bodies and, in relation to the marine area, a competent authority must take such steps in the exercise of their functions as they consider appropriate to secure the objective in paragraph (3), so far as lies within their powers.

...

(3) The objective is the preservation, maintenance and re-establishment of a sufficient diversity and area of habitat for wild birds in the United Kingdom including by means of the upkeep, management and creation of such habitat, as appropriate), having regard to the requirements of Article 2 of the new Birds Directive (measures to maintain the population of bird species).

...

(7) In considering which measures may be appropriate for the purpose of securing or contributing to the objective in paragraph (3), appropriate account must be taken of economic and recreational requirements.

...

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<sup>18</sup> 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.

<sup>19</sup> <https://www.legislation.gov.uk/uksi/2017/1012/regulation/9>.

<sup>20</sup> The terms of regulation 9(3) are not amended by the Conservation of Habitats and Species (Amendment) (EU Exit) Regulations although it needs to be read with the amended definitions of the relevant Directives and with the new regulation 9(4A) – regard must be had to any Secretary of State guidance – currently we do not believe this has been fully produced.

<sup>21</sup> <https://www.legislation.gov.uk/uksi/2017/1012/regulation/10>.

(8) So far as lies within its powers, a competent authority in exercising any function in or in relation to the United Kingdom must use all reasonable endeavours to avoid any pollution or deterioration of habitats of wild birds (except habitats beyond the outer limits of the seaward limits of the offshore marine area (as defined in regulation 4(2)).”<sup>22</sup>

- 3.19. As mentioned above following the UK’s departure from the EU these regulations have been changed to include (amongst other changes) management objectives for the National Sites Network. Although these requirements already existed, it is helpful to have them clearly within our domestic legislation.
- 3.20. In summary regulation 16A<sup>23</sup>, Habitats Regulations sets out the requirements for the Network jointly and separately recognising the differences between SPAs and SACs (as set out above).
- 3.21. Authorities with relevant responsibilities must manage the National Site Network with a view to contributing to the achievement of the management objectives of it, namely (focusing just on SPAs):
- 3.22. **For SPAs** to contribute, in their area of distribution, to ensuring the survival and reproduction of:
- the species of birds listed in Annex I to the new Wild Birds Directive;
  - regularly occurring migratory species of birds; and
  - to contribute, to securing compliance with regulation 9(1) (as set out above).
- 3.23. **Overall**, take account of:
- the importance of SACs and SPAs;
  - the importance of the sites for the coherence of National Site Network;
  - the threats of degradation or destruction (including deterioration and disturbance of protected features) to which the sites are exposed; and
  - in the case of migratory bird species, the importance of their breeding, moulting and wintering areas and staging points along their migration routes.
- 3.24. The RSPB believes it is essential both during the appropriate assessment and consideration of compensation measures stages for these management objectives to be taken into account.

### Environmental Impact Assessment

- 3.25. The Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (as amended)<sup>24</sup> state that development consent cannot be granted for Environmental Impact Assessment (EIA) development unless the decision-maker has taken into account environmental information including an environmental statement which describes the

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<sup>22</sup> Again the terms of regulation 10 are not amended by the Conservation of Habitats and Species (Amendment) (EU Exit) Regulations although it needs to be read with the amended definitions of the relevant Directives

<sup>23</sup> <https://www.legislation.gov.uk/uksi/2017/1012/regulation/16A> Accessed 14 October 2024.

<sup>24</sup> The Infrastructure Planning (Environmental Impact Assessment) Regulations 2017: <http://www.legislation.gov.uk/uksi/2017/572/contents/made> Accessed 14 October 2024.

significant effects, including cumulative effects, of the development on the environment. This will include effects on all wild bird species whether SPA species or not.

- 3.26. Offshore wind farms have the potential to impact on birds through collision with rotating blades, direct habitat loss, disturbance from construction activities, displacement during the operational phase (resulting in loss of foraging/roosting area) and impact on bird flight lines (i.e. barrier effect) and associated increased energy use by birds for commuting flights between roosting and foraging areas. This is acknowledged in NPS EN-3<sup>25</sup>. These potential impacts have been taken into account by the RSPB and its remaining concerns with the applications are set out below, in the context of the legislative provisions summarised above, in particular those relating to appropriate assessment.

### Summary

- 3.27. There is a statutory duty to comply with the Conservation of Habitats and Species Regulations 2017 (the Habitats Regulations, as amended) which offer protection for protected sites (Ramsar, SPA, SAC) and the Conservation of Offshore Marine Habitats and Species Regulations 2017 (Offshore Regulations)(as amended). The Habitats and Offshore Regulations set out a sequence of steps to be taken by the competent authority (here the Secretary of State for Energy Security and Net Zero (DESNZ)) when considering authorisation for a project *likely to have an effect* on a European site and its species before deciding to authorise that project.
- 3.28. We set out a series of related matters to be considered in this context, including:
- SPA and SAC Conservation Objectives;
  - Appropriate assessment;
  - In-combination effects and compensation for other schemes;
  - Habitats Regulations General Duties;
  - Environmental Impact Assessment.

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<sup>25</sup> Paragraph 2.8.136; see paragraphs 2.8.136-146 generally. Effects on foraging areas outside a SPA are to be taken into account when assessing the effects on bird populations of the SPA: see *Hargreaves v Secretary of State for Communities and Local Government* [2011] EWHC 1999 (Admin), which concerned effects on pink-footed geese which commuted inland from their roosting sites in the SPA to feed on grain and winter cereal crops on fields adjacent to the proposed development site.

#### 4. Onshore ornithology – Export Cable Corridor

- 4.1. The export cable route passes close to a number of national and international protected areas, as well as the RSPB's Frampton Marsh and Freiston Shore reserves and land within the Defra-funded Lincolnshire Wash Landscape Recovery Project (formerly known as the Greater Frampton Vision Landscape Recovery Project) and therefore has potential wildlife impacts.

##### *The Wash Special Protection Area/Ramsar site and the Greater Wash SPA*

- 4.2. Further to the additional winter bird survey data submitted as part of the Applicant's response to Section 51 advice (AS1-108), the RSPB has reviewed this data and agrees that the assessment of significant effects in the EIA and the conclusion on adverse effects on site integrity in the RIAA, in relation to onshore ornithology, have not changed. Therefore, the RSPB can confirm it has no further concerns in relation to this aspect of the project.

##### *Impacts on the RSPB's Frampton Marsh and Freiston Shore reserves*

- 4.3. The Applicant has acknowledged the RSPB concern in relation to the potential for the construction of the cable route to affect the mains water supply to the RSPB Frampton Marsh reserve, as the route of the cable, and the works access route, crosses the pipe carrying the water supply.
- 4.4. The Applicant has indicated that as can be seen on the Crossing Schedule (APP-143), all assets in this part of the Order Limits will be crossed using trenchless techniques, and that it is likely that the pipeline will be crossed by the Project's access track at AC-40, where the access enters the field to the north of Wyberton Road (APP-089, Figure 3.4.41).
- 4.5. Based on our investigations, it appears that there is no 'as-built plan of the pipeline' as requested by the Applicant but the RSPB will provide the Applicant with an indicative plan of the pipeline, which is located along the north side of Wyberton Road, so that it can be transposed onto the Applicant's works plans in order to avoid any damage to the supply pipe during any future works. Any further update will be provided via the draft Statement of Common Ground.

##### *Impact on the Lincolnshire Wash Landscape Recovery Project (LWLRP)*

- 4.6. The RSPB will review the applicant's Outline Landscape and Ecological Management Strategy (PD1-054) in respect of how mitigation may be aligned to the plans for the Landscape Recovery Project and will provide further updates via the draft Statement of Common Ground.

## 5. Derogation case: the RSPB’s approach to evaluating compensation measures under the Conservation of Habitats and Species Regulations 2017 (as amended)

### Introduction

5.1. This section sets out the RSPB’s approach to evaluating compensation measures. It includes our general approach to assessing compensation proposals and the level of detail we consider is required in order to evaluate compensation proposals as part of the Examination process, before drawing out some general issues raised by the Applicant’s proposals. We have set it out under the following headings:

- The RSPB’s approach to assessing compensation proposals;
- What level of detail is required on proposed compensation measures?
- Generic issues raised by the Applicant’s compensation proposals:
  - Lack of specific proposals and locations for compensation measures.
  - Scale of compensation.
  - Lead-in times for compensation.
  - Lifetime of compensation in relation to damage.

5.2. Section 6 following sets out, as far as practicable at this time, the RSPB’s comments on the Applicant’s specific compensation proposals.

### The RSPB’s approach to assessing compensation proposals

5.3. The RSPB has reviewed both the EC<sup>26</sup> and Defra<sup>27</sup> guidance on compensatory measures. Both are in broad alignment as to the principles to adopt when considering compensatory measures. This review also draws on the RSPB’s over 20 years experience evaluating and negotiating compensation proposals under the Habitats Regulations by developers across various sectors. As the EC Guidance is fuller, we have used that as our primary reference, while drawing out any additional points made in the Defra guidance since it is UK focused.

5.4. We have specifically not referred to the consultation draft document from Defra entitled “Best practice guidance for developing compensation measures in relation to Marine Protected Areas” published in July 2021 due to it still being a draft produced for consultation and yet to be finalised.

5.5. In Table 1, we summarise the EC’s criteria for designing compensatory measures and annotate them with additional commentary based on the RSPB’s experience of the principles that should be applied when assessing compensatory measures. We will use the combination of the EC guidance and the RSPB’s experience in this field to assess compensatory measures put forward by scheme proponents.

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<sup>26</sup> EC (2018) Managing Natura 2000 sites – The provisions of Article 6 of the ‘Habitats’ Directive 92/43/EEC (21/11/18) C(2018) 7621 final. Due to the further details this EU guidance provides, we believe it is important to also consider along with the Defra guidance.

<sup>27</sup> Defra (2021) <https://www.gov.uk/guidance/habitats-regulations-assessments-protecting-a-european-site>. Accessed October 2024.



**Table 1: Criteria for designing compensatory measures**

EC criteria	EC guidance summary (emphasis added)	RSPB additional commentary
<b>Targeted</b>	<p>Measures should be the <b>most appropriate to the impact predicted and focused on objectives and targets addressing the Natura 2000 elements affected.</b></p> <p>Must refer to <b>structural and functional aspects of site integrity and habitats/species affected.</b></p> <p><b>Must consist of ecological measures:</b> payments to individuals/funds are not appropriate.</p>	<p>Clear objectives and success criteria must be established for the compensation measures.</p> <p>Must address the ecological functions and processes required by impacted species/habitat. Requires shared understanding and agreement on what the impacts are i.e. need to agree nature, magnitude including that they will continue for as long as the project's impacts. This includes the time likely to be required for the SAC/SPA to recover from those impacts in the case of proposals that are in place for a specified time period.</p> <p>This is in order to define objectives for compensation measures and to set out the success criteria to determine whether those objectives have been/are being achieved.</p>
<b>Effective</b>	<p><b>Based on best scientific knowledge available alongside specific investigations for the location where the measures will be implemented.</b> Must be <b>feasible and operational in reinstating the conditions needed to ensure the overall coherence</b> of the Natura 2000 network.</p> <p><b>Measures where no reasonable guarantee of success should not be considered.</b> The likely success of the compensation scheme should influence final approval of the plan or project in line with the prevention principle.</p> <p><b>The most effective option, with the greatest chance of success, must be chosen.</b></p> <p><b>Detailed monitoring required</b> to ensure long-term effectiveness with remediation provisions if shown to be less effective.</p>	<p>Scientific evaluation of proposed measures must be carried out before consent is granted to avoid agreeing to measures that is/are not effective or technically feasible. This should include appropriate baseline survey and assessment.</p> <p>Compensation must address the impacted SPA/SAC (or Ramsar site) feature to ensure overall coherence of the network for that feature is maintained. Substitution is not acceptable.</p> <p>Must be clearly defined timescales for delivery and measuring success (See success criteria under Targeted above).</p> <p>Monitoring must directly relate to the target species or habitat and the relevant ecological functions and processes.</p> <p>The compensation measures should be provided in perpetuity in line with obligations to ensure the overall coherence of the National Site Network is maintained.</p>

EC criteria	EC guidance summary (emphasis added)	RSPB additional commentary
		Where it is not possible to devise compensatory measures to offset the adverse effects on site integrity, the project should not proceed.
<b>Technical feasibility</b>	<b>Design must follow scientific criteria and evaluation</b> in line with best scientific knowledge and take into account the specific requirements of the ecological features to be reinstated.	See <b>Effective</b> above.
<b>Extent</b>	Extent required <b>directly related to:</b> <ul style="list-style-type: none"> <li>- the <b>quantitative and qualitative aspects inherent to the elements of integrity likely to be impaired</b></li> <li>- <b>estimated effectiveness of the measure(s)</b></li> </ul> <p>Therefore, ratios best set on a case-by-case basis. Ratios should generally be well above 1:1. Ratios of 1:1 or below only considered when shown measures will be fully effective in reinstating structure and functionality in a short period of time.</p>	Based on an assessment of the necessary ecological requirements to restore species' populations and the related habitat structure and functions identified in the compensation objectives. Determining the minimum appropriate quantity will require an understanding of the quality of the compensation measures and how effective they will be in reinstating the required structures and functions.  Any identified uncertainty in success should be factored in to increased ratios.  Ratios need to be used where they make ecological sense and will help secure a successful outcome by providing more of something. Simply multiplying capacity to address uncertainty risks giving a false level of confidence.  If there is no reasonable guarantee of success that measure should not be considered (see <b>Effective</b> under EC criteria).
<b>Location</b>	<b>Located in areas where they will be most effective</b> in maintaining overall coherence of the Natura 2000 network. Pre-conditions to be met include: <ul style="list-style-type: none"> <li>- <b>must be within same range/ migration route/wintering areas for bird species and provide functions comparable those justifying selection of original site esp. geographical distribution;</b></li> <li>- <b>must have/be able to develop the ecological structure and functions required by the relevant species</b> (or habitat)</li> <li>- <b>must not jeopardise integrity of any other Natura 2000 site.</b></li> </ul> <p>Spatial search hierarchy starting as close as possible to the impacted Natura 2000 site and working out from there.</p>	While the preference is for compensation measures as geographically close to the location of the damage, it is important to consider whether or not the compensation measures will be subject to pressures impacting their efficacy in that location e.g. prey availability, disturbance, and/or other impacts from the same or similar developments such as collision risk or displacement due to offshore wind farms.  Therefore, compensation measures should be located so as to maximise proximity while minimising external pressures that may reduce likelihood of success.

EC criteria	EC guidance summary (emphasis added)	RSPB additional commentary
		Compensation measures proposed to benefit one SPA/SAC/Ramsar site feature must not result in damage to the integrity of any other SPA/SAC/Ramsar site and their features.
<b>Timing</b>	<p>Case by case approach but <b>must provide continuity in the ecological processes essential to maintain the structure and functions that contribute to the Natura 2000 network coherence.</b></p> <p>Requires <b>tight co-ordination between implementation of the plan or project and the compensation measures.</b></p> <p>Factors to consider include:</p> <ul style="list-style-type: none"> <li>- <b>no irreversible damage to the site before compensation in place</b></li> <li>- <b>compensation operational at the time damage occurs.</b> If not possible, over-compensation required</li> <li>- <b>time lags only admissible if will not compromise objective of “no net loss” to coherence of Natura 2000 network;</b></li> <li>- May be possible to scale down in time depending on whether the negative effects are expected to arise in short, medium or long term.</li> </ul> <p><b>All technical, legal or financial provisions must be completed before plan or project implementation starts</b> to prevent unforeseen delays that compromise effective compensation measures.</p>	<p>Compensation measures should be fully functional before any damage occurs to ensure the overall coherence of the National Site Network is protected. This requires careful alignment of the timelines for implementing the plan or project and the compensation measures.</p> <p>Suggested time lags in delivering fully functional compensation will need to be carefully considered and can only be accepted where this will not compromise the continuity of essential ecological processes,</p> <p>Any effect of delay should be factored into the design and additional compensation measures provided (see also <b>Extent</b> above).</p>
<b>Long-term implementation</b>	<b>Legal and financial security required for long-term implementation and for protection, monitoring and maintenance of sites to be secured before impacts occur.</b>	<p>Legal rights to secure and implement the compensation measures must be in place prior to consent being granted.</p> <p>And robust financial guarantees are required to fund implementation, monitoring and any necessary remediation measures.</p> <p>In line with Government policy, the Government should commit to including compensation measures, once delivered, within the National Site Network.</p>

5.6. The current Defra guidance (aimed at competent authorities) reinforces some of the points above:

- Must be confident the measures will fully compensate for negative effects.

- The measure is technically feasible based on scientific evidence and previous examples.
- Whether the compensation measure is financially feasible.
- Compensation should be no more than is needed (to protect the coherence of the National Site Network).
- How the compensation will be carried out, including how it will be managed and monitored over time, and how it has been secured.
- How long the compensation measure will take to reach the required quality.
- Should make sure the compensation measures will remain in place all the time they are needed.
- Must put in place all necessary legal, technical, financial and monitoring arrangements.
- Compensation measures should usually be in place and effective before the negative effect is allowed to occur.

5.7. Overall, this can be expressed in another way to help identify ecologically effective compensation and the options to deliver it:

- **Understanding and defining what is ecologically effective compensation for a given feature** i.e. what is needed to address the ecological functions affected by the predicted impact(s) e.g. improvements in breeding productivity of an impacted seabird species;
- **Identifying the potential options** to provide ecologically effective compensation in principle and agreeing the scale of compensation required to protect the overall coherence of the National Site Network for the impacted feature taking account of the management objectives for that Network. This should consider factors affecting the likely success of the compensation measure in order to identify appropriate search criteria. In the case of seabirds, this might include avoiding proximity to current and planned offshore wind farms while ensuring access to areas with good food supply etc;
- **Applying a hierarchical search for suitable locations** to carry out those options to determine where they might be feasible. This should follow the following spatial hierarchy based on where the benefit of the compensation will accrue:
  - Provides benefit to the impacted SPA/SAC where that is appropriate given the risk factors considered above. Note: this is not the same as being located inside the MPA, which in UK MPA terms is unlikely to be feasible given the constrained boundaries usually applied i.e. all areas within the boundary are integral to its functioning already;
  - Provides benefit to a different SPA/SAC for the impacted feature;
  - A “de nouveau” site that provides benefit to the feature itself and can be added into the relevant site network once it has met its compensation objectives.
- **Detailed assessment of the feasibility of successfully delivering the chosen option** in the selected location(s). It is important to separate out the type of measure (and its ecological effectiveness as compensation) and the likelihood of it succeeding in

practice at a particular location to meet the required compensation objectives. Certainty of success of a specific measure per se is not the same as whether it will be ecologically effective as compensation. However, it needs to be deemed potentially ecologically effective as compensation first before detailed options are drawn up and assessed. If it is not potentially ecologically effective as compensation, then it should not be considered further (in line with existing Defra guidance).

### *Additionality*

5.8. The EC guidance (section 5.4.1) makes the general, overarching point that:

“Compensatory measures should be additional to the actions that are normal practice under the Habitats and Birds Directives or obligations laid down in EU law”

5.9. In practical and legal terms, this means compensatory measures must be additional to:

- Measures necessary to site management of the affected SPA or SAC e.g. to restore a designated feature to favourable status;
- Measures designed to meet other obligations e.g. achievement of Good Environmental Status (GES) under the Marine Strategy Regulations 2010.<sup>28</sup>

### *What level of detail is required on proposed compensation measures?*

5.10. In his decision<sup>29</sup> on the Hornsea Project Three scheme, the Secretary of State for Business, Energy and Industrial Strategy set out clear expectations that offshore wind (and other) developers should submit (what have been termed by other developers) “in principle” compensation measure packages as part of their application, following appropriate pre-application discussions with stakeholders (emphasis added):

*“6.3 The Secretary of State is clear that the development consent process for nationally significant infrastructure projects is not designed for consultation on complex issues, such as HRA, to take place after the conclusion of the examination. On occasion, as a pragmatic response to particular circumstances, he may undertake such consultation, but no reliance should be placed on the fact that he will always do so. In this instance, he has, on balance, accepted that the situation in respect of potential significant adverse effects on the sites referred to in para 6.2 was novel and so has exercised his discretion, and allowed the Applicant to make further representations on the matter of possible compensatory measures for those sites. However, he wishes to make it clear that, in order to maintain the efficient functioning of the development consenting regime, he may not always request post-examination representations on such matters, indeed it should be assumed that he will not do so, and he may therefore make decisions on such evidence as is in front of him following his receipt of the ExA’s report. **It is therefore important that potential adverse impacts on the integrity of designated sites are identified during the pre-application period and full***

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<sup>28</sup> Marine Strategy Regulations 2010. No. 1627. <http://www.legislation.gov.uk/ukxi/2010/1627/contents/made> Accessed 22 October 2024

<sup>29</sup> <https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010080/EN010080-003265-EN010080%20Hornsea%20Three%20-%20Secretary%20of%20State%20Decision%20Letter.pdf> Accessed 22 October 2024

**consideration is given to the need for derogation of the Habitats Regulations during the examination.** He expects Applicants and statutory nature conservation bodies (“SNCBs”) to engage constructively during the pre-application period and **provide all necessary evidence on these matters, including possible compensatory measures, for consideration during the examination.**

*6.4 This does not mean that it is necessary for Applicants to agree with SNCBs if SNCBs consider that there would be significant adverse impacts on designated sites. The final decision on such matters remains for the Secretary of State (though the Secretary of State reserves the right not to request further evidence from Applicants following the examination). Applicants should be assured that where they disagree with SNCBs and maintain a position that there are no significant adverse impacts, but provide evidence of possible compensatory measures for consideration at the examination on a “without prejudice” basis, both the ExA in the examination and the Secretary of State in the decision period will give full and proper consideration to the question of whether there are or are not significant adverse impacts. It will not be assumed that the provision of information regarding possible compensatory measures signifies agreement as to the existence of significant adverse impacts. The ExA will be required to provide an opinion on the sufficiency of the proposed compensation even if it considers that compensation is not required (in case the Secretary of State disagrees with that conclusion), but such measures would only be required if the Secretary of State were to find that there would be significant adverse impacts (and that the proposed compensatory measures are appropriate).”*

- 5.11. Statements to similar effect were made in subsequent Secretary of State decisions e.g. on the Norfolk Boreas and Norfolk Vanguard decisions.
- 5.12. In this context, the RSPB does not consider “in principle” equates to “outline” proposals such that all/most of the critical issues are deferred in order to be addressed post-DCO consent. We consider this would completely undermine confidence in what the compensation measures will comprise and that the public interest to protect the coherence of the National Site Network can be secured.
- 5.13. Based on its review of various offshore wind farm compensation proposals over the last 3-4 years, the RSPB considers that much greater detail about the location, design and implementation, monitoring and review of any proposed compensatory measures is needed to inform the application and examination process and enable proper public scrutiny. Details of the associated agreements, consents and permissions required to deliver the compensation measures should also be available for scrutiny. This in turn should provide the Secretary of State with the necessary confidence as to whether those measures can be secured and implemented with a reasonable guarantee of success, thereby protecting the coherence of the National Site Network.
- 5.14. We consider there are detailed requirements that should be subject to public scrutiny during the Examination process and settled before its conclusion, thereby enabling the final DCO to include all necessary conditions and requirements and any lack of confidence that compensation measures have/can be secured and/or will have a reasonable guarantee of success highlighted, so that the Examiners can take account of these concerns. Therefore,

details of the proposals should be available as part of the application documentation in order that any potential interested parties have a full opportunity to review and assess their adequacy at an early stage of the Examination; thus ensuring that should further information and consideration be required this is possible within the Examination timetable, minimising the need for further submissions.

5.15. The following are key details, with some adaptation, common to all compensation measures that, we believe, should be included within proposals preferably with the application documents or at least at the very early stages of the Examination. Once these have been completed and relevant processes completed, the Secretary of State should be satisfied that the relevant legal consents are secured before any decision on DCO consent, assuming consent for the compensation measure is granted by the relevant decision-making authority. If consent has not been granted, the Examining Authority and Secretary of State would know in advance.

- **Nature/magnitude of compensation:** sufficient detail to enable review of :
  - the scale of compensation required in relation to the predicted impacts;
  - the detailed compensation proposals including objectives and associated success criteria to address those impacts;
  - Identify the relevant consenting and/or licensing mechanisms required; Identify any potential impacts of the proposed measure on the receptor site(s) 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);
  - best estimate of the timeline by which each proposed compensation measure can be fully implemented and when it will achieve its objectives (including assessment of ecological uncertainty), the latter to work out the lead-in time necessary to implement the compensation measure and ensure the overall coherence of the National Site Network is protected;
- **Location:** identification of precise location of compensation measure and legal securing of proposed compensation sites/measures with ability to scrutinise:
  - compensation design (detail);
  - evidence of relevant consents, licences, agreements etc being secured or at least being able to be legally secured;
  - both relevant processes and legal consents are included within the DCO; and
  - evidence of relevant legal agreements to secure land to ensure compatibility with compensation objectives are possible;
- **Monitoring and review:** detailed monitoring and review packages. As well as the relevant technical detail addressing the objectives for each compensation measure and success criteria, these should include:
  - Detailed terms of reference and ways of working for any “regulators group” to oversee implementation of measures, review periods, feedback loops etc;

- Commitment to ensure the data and results of monitoring are publicly available to enable lessons to be learned and applied elsewhere, and to demonstrate the level of success and compliance.
  - **Compliance and enforcement:** details and evidence of how the proposed compensation measures will be subject to review by the relevant regulator and the legal mechanisms available to those regulators to review and enforce any approved compensation plans e.g. if the agreed success criteria are not met. This is especially important if the proposed measures lie outside the jurisdiction of the decision-making authority.
- 5.16. At Annex A of Appendix G to its Relevant Representation (RR-045) Natural England has included a checklist it has developed for compensatory measure submissions. We fully support Natural England’s advice especially the approach and level of detail considered to be required as part of the application documentation. It flows from the criteria and other factors we have described above and provides a robust basis for the evidence on each proposed compensation measure that should be submitted as part of any application.
- 5.17. The RSPB considers there are significant, detailed considerations for compensation measures that are essential to consider before consent is granted; rather than assume an 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.
- 5.18. Not only should these details be subject to public scrutiny as part of the Examination process but to enable these issues to be properly addressed by the Examiners and the Secretary of State, such confirmed details are vital for confidence to be placed on the measures proposed.
- 5.19. 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 Site Network.
- 5.20. The criteria, guidance and associated requirements set out above will guide how the RSPB assesses the Outer Dowsing compensation measure proposals.

### Generic issues raised by the Applicant’s compensation proposals

#### *Lack of specific proposals and locations for compensation measures*

- 5.21. As set out in our relevant representation (RR-056), the RSPB’s overarching comment is that the Applicant has failed to put forward the necessary detail to enable proper scrutiny of the compensation measures for any impacted species. Neither have any been secured. It is therefore not possible at this stage for the RSPB to assess any of the compensation measures properly and provide advice to the Examining Authority on whether each has a reasonable guarantee of success in meeting specific, agreed compensation objectives.
- 5.22. However, we have, as far as is practicable, provided comments in section 6 on each of the broad compensation measures.



### *Scale of compensation*

- 5.23. The RSPB consider it would, as far as practicable, be sensible to agree the range of predicted mortalities (using the preferred outputs of the Applicant, Natural England and the RSPB) and apply these to an agreed approach to calculating the scale of compensation that may be required.

### *Lead-in times for compensation*

- 5.24. Any implementation timetable must ensure that the compensation measure is in place and ecologically functional before the damage occurs. Factors that need to be taken in to account in developing the required timeline include:
- The breeding ecology of the impacts species and timescales likely to be required for the agreed compensation measure to be ecologically effective;
  - The point at which the adverse effect is predicted to occur. This will depend on the nature of the impact e.g.:
    - For collision: it would be at the point the wind farm becomes operational;
    - For displacement: it would be at an agreed point relating to when the physical presence of the wind farm infrastructure (operational or not) is deemed to be giving rise to displacement that is impacting on the relevant seabird species' population.
  - That it is highly unlikely that the compensation will be delivering at the scale required before the impacts occur or during any period of colony establishment.

### *Lifetime of compensation in relation to damage*

- 5.25. It is the RSPB's view that compensation measures should remain in place for as long as the project's adverse impacts on the SAC/SPA/Ramsar site continue. Typically, this has been "in perpetuity" as impacts have been permanent. We recognise this is not automatically the case when dealing with offshore wind farms. However, it is also not as simple as just the lifetime of the development. This is in line with our advice to the Secretary of State regarding the Hornsea Project Three compensation. As noted in paragraph 2.18 of that response (November 2020)<sup>30</sup>:

*"The length of time the compensation measures should be secured for must be based on the combination of the lifetime of the development plus the time it will take the affected seabird population to recover from the impacts."*

- 5.26. There are two key factors:
- Time lag in a new colony reaching the necessary population size meaning there is likely to be a significant delay before the required population is reached (assuming it is colonised);
  - The time taken for the relevant population at the affected SPA to recover from the accumulated annual losses of e.g. breeding adults over the lifetime of the

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<sup>30</sup> <https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010080/EN010080-003259-RSPB.pdf> Accessed 22 October 2024

development, and once the wind farm has ceased operation. The development's impact on the affected SPA will likely go substantially beyond the lifetime of the development.

- 5.27. We welcome the fact that the Secretary of State has followed our advice and that of Natural England on this matter in decisions on Hornsea Three and subsequent schemes by requiring that the various compensation measures be maintained beyond the operational lifetime of the development (if they are colonised).

### Summary

- 5.28. This section sets out the RSPB's approach to evaluating compensation measures. It includes our general approach to assessing compensation proposals and the level of detail we consider is required in order to evaluate compensation proposals as part of the examination process, before drawing out some general issues raised by the Applicant's proposals.
- 5.29. The RSPB has reviewed both the EC and Defra guidance on compensatory measures. This review also draws on the RSPB's over 20 years experience evaluating and negotiating compensation proposals under the Habitats Regulations by developers across various sectors. As the EC Guidance is fuller, we have used that as our primary reference, while drawing out any additional points made in the Defra guidance since it is UK focused.
- 5.30. The RSPB will use the EC's criteria and its experience to evaluate the various compensation measures where sufficient detail is available:
- Targeted;
  - Effective;
  - Technical feasibility;
  - Extent;
  - Location;
  - Timing;
  - Long-term implementation;
  - Additionality.
- 5.31. In addition, we have set out the level of detail we consider is required in any proposed compensation measures, and have gone on to identify generic issues raised by the Applicant's proposals:
- Lack of specific proposals and locations for compensation measures;
  - Scale of compensation;
  - Lead-in times for compensation;
  - Lifetime of compensation in relation to damage.

## 6. RSPB comments on the Applicant's specific compensation proposals

### Introduction

- 6.1. Below we set out the RSPB's views on the following compensation measures put forward by the Applicant:
- Kittiwake.
  - Guillemot and Razorbill.
- 6.2. As set out in our Relevant Representation, the RSPB considers the Applicant has failed to put forward the necessary detail to enable proper scrutiny of the compensation measures for any impacted species. Neither have any been secured. It is therefore not possible at this stage for the RSPB to assess any of the compensation measures properly and provide advice to the Examining Authority on whether each has a reasonable guarantee of success in meeting specific, agreed compensation objectives.
- 6.3. Our Relevant Representation submission identified key issues where we consider further information is needed. To avoid repeating those submissions we have, where practicable, provided comment on the Applicant's response to the RSPB's Relevant Representation (PD1-071, section 1.56 (RR-056)). Any fuller evaluation of the proposed compensation measures will require more detailed information to be provided by the Applicant during the examination.

### Generic issues

#### *Submission of updated information*

- 6.4. The Applicant's response to the RSPB's Relevant Representation alludes, at various ID references, to actual or possible updates to its information on the various compensation measures:
- RR-056.11 (general): "...the Applicant is continuing to progress the compensation measures as necessary. Further updates will be provided as appropriate during the course of the Examination."
  - RR-056.12 (general): "The Applicant is continuing to progress these measures and will provide updates to the ExA, including where specific measures can be identified for each site."
  - RR-056.15 (Predator control measures at Plemont Seabird Reserve): "Where further information becomes available throughout the Examination for this measure, the relevant documents will be updated."
  - RR-056.16 (Additional compensation measures for Guillemot and Razorbill - in relation to disturbance surveys carried out at 8 sites during the breeding season): "The relevant information from these surveys will be provided in due course."
- 6.5. The RSPB requests that the Applicant provides a schedule of which updates it plans to provide, when, and an outline of the nature of each update. This will enable the Interested Parties to plan accordingly. Given our ongoing concerns at the lack of key detail, the RSPB

would welcome such updates as soon as practicable during the examination in order that Interested Parties can respond and so assist the Examining Authority's consideration.

#### *Sufficient detail to assess the proposed compensation measures*

- 6.6. The nature and scope of the proposed updates is critical to the question of whether there will be sufficient detail in front of the Examining Authority and Secretary of State to review and have confidence in each proposed measure.
- 6.7. The RSPB's position remains as set out in its Relevant Representation that there is insufficient detail available for each of the proposed measures to enable a full assessment of whether each has a reasonable guarantee of success. The Applicant's reply to the RSPB's Relevant Representation (RR-056.11) supports this concern (emphasis added):

*"The Applicant maintains that the derogation cases will be sufficiently developed at the close of the Examination to enable the Secretary of State to have confidence in the measures being sufficient and securable should compensation measures be identified as necessary."*

#### *Kittiwake compensation measures*

- 6.8. The Applicant's response to the RSPB's Relevant Representation on these measures is set out in document PD1-071 at rows RR-056.12 and RR-056.13.

#### *Response to RR-056.12 and RR.056.13*

- 6.9. The key points raised in the Applicant's response include:
- There is considerable evidence that ANSs are likely to be an effective compensation measure;
  - Construction of the offshore Artificial Nesting Structures (oANS) at the Applicant's two proposed locations would be consented through the deemed Marine Licences set out in Schedules 13 and 14 of the latest draft Development Consent Order (DCO)(document PD1-025);
  - The measures set out in the post-consent Kittiwake Compensation Implementation and Monitoring Plan (KCIMP) must be in place at least three full breeding seasons prior to operation of any turbine;
  - Whether the oANSs are delivered at project-level or strategically (through the Marine Recovery Fund or otherwise), Schedule 22 of the draft DCO requires the submission of a KCIMP;
  - In relation to the design of an oANS, the Applicant has developed a set of initial design considerations set out in APP-256 and considers the matters raised by the RSPB are all matters for detailed design (i.e. post-consent).
- 6.10. The RSPB makes the following comments:
- **Evidence base:** The RSPB maintains its position that both onshore and offshore ANS are yet to be proven as an effective compensation measure for kittiwakes (or any other seabird species). We accept that there is considerable evidence of kittiwakes choosing to nest on some, but not all, man-made structures both onshore and offshore. This is distinct from evidence they will choose to colonise a bespoke

structure and then nest successfully at the scale required for compensation. It remains very early in the lifecycle of the initial onshore/nearshore ANS compensation structures and therefore any ability to demonstrate the effectiveness of such structures as compensation measures. They remain experimental in nature.

- **Design details, timescales and lead-in times:** in our Relevant Representation, the RSPB posed a series of questions relating to engineering, manufacturing, supply chain and logistics of securing and installing a bespoke oANS. These questions have a bearing on both the timescales and level of security for installation of an oANS and thereby its relationship with the operation of the first turbine of the offshore wind farm. We make the following observations:
  - We note the Applicant's response that the timing of implementation of an oANS is bound by the terms of draft DCO Schedule 22. Notwithstanding the Applicant's preference for a three breeding season gap before first turbine operation (as opposed to accepted four breeding season gap in respect of other ANS compensation measures), the RSPB draws to the Examining Authority's attention the fact that post-consent delays in an ability to secure and implement compensation measures have resulted in requests from offshore wind farm developers to reduce that time gap e.g. Hornsea Three. It would therefore be preferable if potential, realistic risks to meeting the agreed timescales were identified and discussed during the examination and any appropriate measures put in place to avoid such delays.
  - A full understanding of the supply chain and logistic challenges associated with the construction of a bespoke offshore structure is essential to understand whether or not such post-consent delays in the ability to implement the compensation measure are possible or probable. The Applicant has failed to answer the RSPB's questions on these issues. It is apparent from the draft Deemed Marine Licences e.g. Schedule 13, Part 2(1), that the Applicant has identified broad design parameters for an offshore structure.
  - Drawing on the Applicant's expert knowledge of offshore construction requirements, we consider it is reasonable to request answers to the RSPB's questions in order to improve collective understanding of the potential risks to meeting the Applicant's preferred three breeding season gap between oANS implementation and turbine operation, how such risks can be managed through appropriate safeguards, and where any risk should be placed e.g. on the timing of the oANS implementation versus operation of the first turbine. For example, based on its knowledge and experience, can the Applicant inform the Examination as to whether the oANS envisaged would require access to specialist installation vessels, what the lead-in times for securing such vessels is likely to be in competition with other users, when such vessels need to be secured to meet its proposed deadlines, and how this affects the post-consent timelines to deliver an oANS in accordance with the Applicant's overall project timelines for first operation of Work No.1? Our additional questions in relation to determining who is responsible for commissioning such work also bear on the issue of complying with implementation timescales.

- **Interaction of post-consent Crown Estate strategic process with any post-consent Project-level process:** this remains unclear and requires clarification to aid understanding in terms of the influence of decisions of oANS location selection on implementation. Our questions on this remain unanswered. Final decisions on the location and number of oANS appear to rest with the Crown Estate’s Kittiwake Strategic Implementation and Monitoring Plan (KSIMP) process. It would be helpful if either the Applicant or The Crown Estate could set out how this decision-making process will work, including how and when it is anticipated decisions will be taken on whether to pursue non-project level options i.e. those outside the control of the Applicant (and therefore the Deemed Marine Licences and Schedule 22 in the draft DCO). Any decision to pursue non-project level options raises further concerns to those above in respect of responsibility for delivery and potential delays in implementation.

### Guillemot and razorbill compensation measures

- 6.11. The Applicant’s response to the RSPB’s Relevant Representation on these measures is set out in PD1-071 at rows RR-056.14 to RR-056.18. The RSPB’s response to matters raised in rows RR-056.14 to RR-056.16 is set out below.

#### *Response to RR-056.14*

- 6.12. The Applicant restates its confidence that the proposed predator control measure (see response to RR-056.15 below) can deliver the scale of compensation required.
- 6.13. As noted in section 1 above, the RSPB is aware of the Applicant’s proposal in respect of its Offshore Restricted Build Area (ORBA) in order to reduce impacts on guillemots and razorbills. The significance of these changes for the RSPB’s understanding of the offshore ornithology impacts of the Outer Dowsing scheme, will be set out in our response at Deadline 2. We will seek to review the implications of the proposed changes for the compensation measures at that time.

#### *Response to RR-056.15 – Predator control measures at Plemont Seabird Reserve*

- 6.14. The key points raised in the Applicant’s response include:
- It remains confident this measure will benefit both guillemots and razorbills at the site. In this respect it notes that guillemots, while not known to breed at the site (or elsewhere in Jersey) have been recorded during the breeding season;
  - In respect of possible causes of the historic guillemot extinction on Jersey and significant reduction in razorbills, National Trust Jersey has confirmed that ferrets were introduced to Jersey within the last 100 years. The Applicant relates this to those seabird declines and maintains its confidence that mammalian predation is [sic] a leading cause of the decline in both species nesting at the Plemont site;
  - In the context of connectivity to the UK National Site Network for guillemots and razorbills, makes observations in relation to the potential for future fledged guillemots and razorbills at Plemont to end up breeding in another, potentially distant colony;

- Notes that re-routing of the proposed fence following public consultation and, based on our interpretation of the comment, assumes public support for the predator control measures as a consequence.

6.15. The RSPB makes the following comments:

- **Causes of decline of guillemots and razorbills in Jersey:** we consider overly simplistic the apparent attribution of the historic decline of razorbills in Jersey (and extirpation in the case of guillemot) to the occurrence of ferrets alone. While we acknowledge that ferrets can predate seabirds (e.g. see the LIFE Raft project to restore the Rathlin Island SPA in Northern Ireland), the Applicant has failed both to provide evidence of such predation and, equally importantly, to consider which other factors may have contributed to the historic declines (especially between the 1920s-1960s) and explain why those other factors have been ruled out e.g. historic role of oil pollution. This is relevant to aid understanding as to the contribution any predator control programme may make to the successful breeding of each species at Plemont. We request the following:
  - An analysis (probably in table form) of the potential historic causes of seabird population change in the UK and their likely affect on guillemots and razorbills in Jersey during the period of their decline and extinction. We would hope something along these lines has been carried out by National Trust Jersey. We accept this would necessarily be qualitative. Mitchell et al (2004)<sup>31</sup> and Burnell et al (2023)<sup>32</sup> provide useful summaries of potential causes of seabird decline;
  - Any evidence available from the National Trust Jersey on productivity of breeding razorbills at Plemont, along with information showing current nesting sites and relationship with ferret tracking data and any evidence demonstrating predation by ferrets (or other mammals) of razorbills (or other seabirds) at Plemont;
  - An assessment of potential threats to recovery of seabirds at Plemont, including but not restricted to mammalian predation. This would place the risk posed by mammalian predation in a broader context and help understand its potential role in the population recovery being sought. This could utilise the list of potential causes of seabird decline since Seabird 2000 set out in Table 2 on page 449 of Burnell et al (2023).
- **Connectivity to the UK National Site Network for guillemots and razorbills:** to assist the Examination, the RSPB provides as Annex A to this submission the full text of its comments on this matter to the Hornsea Four examination (and referred to in our Relevant Representation), with particular reference to paragraphs 3.11-3.23. We consider this relevant to help understand the issues and considerable uncertainty surrounding assumptions that birds fledged from Plemont might end up breeding within the UK SPA network for these species. In line with our comments to the Hornsea Four examination, the RSPB does not consider it is safe to presume

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<sup>31</sup> Mitchell, I.P., Newton, S.F., Ratcliffe, N. & Dunn, T.D (2004) Seabird Populations of Britain and Ireland. Christopher Helm. London.

<sup>32</sup> Burnell, D., Perkins, A.J., Newton, S.F., Bolton, M, Tierney, T.D. & Dunn, T.D. 2023. Seabirds Count, A census of breeding seabirds in Britain and Ireland (2015–2021). Lynx Nature Books, Barcelona.

that (assuming the success of the compensation measure) guillemots and razorbills reared at Plemont may breed in another, potentially distant colony, with particular reference to the UK SPA network for each species.

- **Public support:** the RSPB notes that possible public support for a fence route does not equate to public support for a predator control programme. In its Relevant Representation the RSPB highlighted that public support for eradication or control programmes is considered critical to their (long-term) success and requested the Applicant to provide a full copy of its public opinion survey to the Examination (including detailed methodology and results) for assessment by Interested Parties and the Examining Authority. This will help all parties understand the level and type of public support expressed.

#### *Response to RR-056.16 –additional compensation measures*

- 6.16. The Applicant sets out that it has carried out in-depth disturbance surveys of 8 sites during the 2024 breeding season and that the results of these surveys will set out:
- The nature and levels of disturbance at each site;
  - The potential of that disturbance to impact productivity or the availability of breeding habitat at each site;
  - Assist in the identification of measures at appropriate scales for each site to improve number and/or productivity of guillemot and razorbill at each site;
  - The results will be provided in due course.
- 6.17. We have already requested (paragraph 6.5 above) an update on when the results of the survey will be submitted to the examination for review.
- 6.18. In respect of the survey itself, based on the description summarised above, we would welcome clarification as to whether the 2024 survey recorded breeding productivity information for guillemots and razorbills at each location. This would enable a fuller understanding of any analysis presented on the potential of disturbance to impact productivity and any proposed measures to improve (recorded) productivity. We acknowledge there will be inherent limitations in basing any such analysis on a single season given the potential fluctuations in productivity and the range of influencing factors. However, developing baseline information on productivity will greatly assist the ability of Interested Parties to assess the likely efficacy of possible recreational management measures as compensation.

#### *Summary*

- 6.19. Section 6 sets out the RSPB's views on the following compensation measures put forward by the Applicant:
- Kittiwake
  - Guillemot and razorbill
- 6.20. As set out above, the RSPB's key and most critical concern is that the Applicant has failed to put forward detailed, proven and location specific compensation measures for any impacted species.



6.21. The RSPB's current assessment of the Applicant's proposed measures is summarised below:

- **General issue:** request for detailed timetable and scope of proposed updates to Examination on the various compensation measures.
- **Kittiwake – offshore ANS:**
  - further information required on matters relating to identification of risks associated with site selection, engineering, manufacturing, supply chain and logistics and impact on lead-in times;
  - further information on the risks posed to implementation by the interaction of the post-consent Crown Estate strategic process with any post-consent Project-level process, especially in relation to selection of oANS locations outside the control of the Applicant.
- **Guillemot and razorbill:**
  - **Scale of compensation:** ongoing uncertainty over scale of compensation required pending full evaluation of ORBA information;
  - **Plemont predator control** – further information needed on:
    - Causes of historic declines of guillemot and razorbill populations in Jersey and relative contribution of mammalian predation;
    - Evidence of mammalian predation on breeding seabirds (especially razorbill) at Plemont, and assessment of potential threats to the recovery of seabirds at Plemont that provides fuller context of relative risk posed by mammalian predation and the benefits of the proposed predator control;
    - Applicant's public opinion survey of the proposed predator control measures (including detailed methodology and results);
    - Ongoing concerns over the lack of robust evidence of connectivity of guillemots and razorbills bred in the Channel Islands to the UK National Site Network for each species.
  - **Other measures:** further information required on the impact of recreational disturbance on guillemot and razorbill breeding success at the sites surveyed by the Applicant and assessment of the effectiveness of any proposed measures on measurably increasing breeding success.

Annex A: copy of section 3 of the RSPB's submission REP5-120 to the Hornsea Four Offshore Wind Farm examination in respect of connectivity.



**Written Representation  
for the  
Royal Society for the Protection of Birds  
Comments on selected Deadline 3 and Deadline 4 submissions**

**Submitted for Deadline 5**

**20 June 2022**

**Planning Act 2008 (as amended)**

**In the matter of:**

**Application by Hornsea Project Four Limited for an Order  
Granting Development Consent for the Hornsea Project Four Offshore Wind  
Farm**

**Planning Inspectorate Ref: EN010098**

**RSPB Registration Identification Ref: 20029909**

### 3. Compensation Connectivity

#### Introduction

- 3.1. This section sets out the RSPB's comments on the following documents submitted by the Applicant and Natural England at Deadlines 3 and 4 of the Examination:
- REP3-032: G3.4 Compensation measures for FFC SPA: Compensation Connectivity Note - Revision: 01 (Applicant)
  - REP3-034: G3.4.1 Compensation measures for FFC SPA: Ecological Connectivity of Compensation Measures Annex 1 - Revision: 01 (Applicant)
  - REP4-056: Natural England Deadline 4 Submission - Appendix C4 – Comments on G3.4 Compensation measures for Flamborough and Filey Coast (FFC) Special Protection Area (SPA) Compensation Connectivity Note Revision: 01
- 3.2. For clarity, we have divided our comments into three topics:
- Legal/policy issues
  - Scientific evidence
  - Monitoring
- 3.3. In order to assist the Examining Authority we have, as far as possible, indicated where we agree with Natural England's position set out in [REP4-056](#).
- 3.4. The RSPB welcomes the Applicant's submissions on this important topic and their work to determine whether an evidence base exists on connectivity in respect of their proposed compensation measures. It goes to the heart of whether a proposed compensation measure will be effective in terms of meeting the legal tests to protect the coherence of the National Site Network. We consider the same evidence base requirements would apply to any SPA species or feature for which an adverse effect on site integrity cannot be ruled out i.e. not confined to guillemot and razorbill.
- 3.5. In addition to our concerns about sufficient certainty regarding the ecological effectiveness of the compensation measures, in the context of the Applicant's Deadline 3 submissions, we are considering whether the Applicant has provided sufficient evidence to justify its claim that its compensation measures will directly benefit the UK National Site Network populations (as set out in the Applicant's paragraph 5.1.1.4, REP3-032) i.e. there will be connectivity between the UK SPA networks for guillemot and razorbill in respect of:
- Predator eradication measures on Guernsey – dispersal of guillemots and razorbills fledged from Guernsey and eventual recruitment into the UK SPA network;
  - Bycatch reduction somewhere in the English Channel (location currently unspecified) – increased survival of adult and immature guillemots and razorbills during the non-breeding season that will go on to breed within the respective UK SPA networks.

#### Legal/policy issues

- 3.6. We agree with the Applicant that the test with respect to the purpose of compensation measures is from Article 6(4) of the Habitats Directive and repeated in the Applicant's paragraph 2.1.1.4 of REP3-032. However we think it is more appropriate to reference our domestic legislation namely, regulation 36 of the Conservation of Offshore Marine Habitats

and Species Regulations 2017 (Offshore Habitats Regulations)(as amended) to save any confusion.

3.7. The purpose of compensation measures is to protect the overall coherence of the National Site Network in the United Kingdom. In this context that refers to the Network as a whole and the specific management objectives for the UK network of Special Protection Areas. It is important to note the differences as the management objectives for the Network (as set out in Regulation 18 of the Offshore Habitats Regulations) are separated out into SPA and SAC requirements (see paragraphs 3.22-3.27 of the RSPB's Written Representation REP2-089 for a description of these in reference to the equivalent regulation 16A in the Conservation of Habitats and Species Regulations 2017 (Habitats Regulations)(as amended)). In respect of the SPA network, the management objectives are:

- to contribute, in their area of distribution, to ensuring the survival and reproduction of:
  - the species of birds listed in Annex I, Birds Directive;
  - regularly occurring migratory species of birds; and
  - to contribute to securing compliance with regulation 6(1) of the Offshore Habitats Regulations
- overall, take account of:
  - the importance of SACs and SPAs;
  - the importance of the sites for the coherence of National Site Network;
  - the threats of degradation or destruction (including deterioration and disturbance of protected features) to which the sites are exposed; and
  - in the case of migratory bird species, the importance of their breeding, moulting and wintering areas and staging points along their migration routes.

3.8. We agree with the following comments by Natural England ([REP4-056](#)) on the Applicant's submission in how this should be interpreted and applied (emphasis added) (paragraph 1, page 2):

*"The Applicant states that compensation does not necessarily have to be delivered at the site of impact, in this case Flamborough and Filey Coast Special Protection Area (FFC SPA). **Natural England agrees that this is in accordance with the hierarchy approach set out in Defra's draft guidance on compensation for Marine Protected Areas (Defra, 2021).**"*

The RSPB notes that this hierarchical approach also accords with existing adopted guidance published by Defra<sup>2</sup> and the European Commission.<sup>3</sup> Whilst useful to reference the Defra 2021 guidance<sup>4</sup> it should be noted that it is a consultation draft and therefore not final.

The RSPB considers the following to be a critical clarification by Natural England:

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<sup>2</sup> See Defra (February 2021) Test 3: <https://www.gov.uk/guidance/habitats-regulations-assessments-protecting-a-european-site#derogation>. Accessed June 2022.

<sup>3</sup> EC (2018) Managing Natura 2000 sites – The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC (21/11/18) C(2018) 7621 final.

<sup>4</sup> [https://consult.defra.gov.uk/marine-planning-licensing-team/mpa-compensation-guidance-consultation/supporting\\_documents/mpacompensatorymeasuresbestpracticeguidance.pdf](https://consult.defra.gov.uk/marine-planning-licensing-team/mpa-compensation-guidance-consultation/supporting_documents/mpacompensatorymeasuresbestpracticeguidance.pdf)

*“As options to provide compensation with direct benefits to the site of impact (e.g. prey availability) and/or other sites within the National Site Network have not been submitted, consideration must be given to the implications for the current proposals in terms of the nature of the benefits to the National Site Network provided by the compensation and the level of compensation required.”* (paragraph 2, page 2)

*“...the test for compensation delivery is to maintain the coherence of the National Site Network. In the context of these compensatory proposals, **this means the network of SPAs classified for guillemot and razorbill – not the general populations of these species.**”* (paragraph 3, page 2)

The purpose of compensation is to protect the coherence of the network for the **impacted** SPA or SAC features. In this context, that means the (UK) Network as a whole and the SPA networks for guillemot and razorbill, taking account of both the SPA’s conservation objectives as well as the management objectives for the SPA network as part of the National Sites Network (see paragraphs 3.22-3.27 in the RSPB Written Representation REP2-089). Whilst acknowledging the wider bio-geographical range of these species, we continue to be concerned about how the National Site Network will be maintained and whether robust evidence can be provided to demonstrate how the proposed compensation measures will benefit that Network.

- 3.9. As noted by the Applicant and Natural England, in describing the role of location in determining the benefits of compensation measures you must first consider possibilities to “compensate” the affected SPA to ensure coherence of the Network i.e. both:
- a. Measures that replicate or benefit the same feature within the affected site<sup>5</sup>.
  - b. Measures that replicate or benefit the same feature outside the affected site.

This approach is consistent with that set out in section 5.5.5 of the European Commission’s guidance (Managing Natura 2000 sites<sup>6</sup>). As Natural England set out, the focus should be on the SPAs within the network for the species or feature for which an adverse effect on site integrity cannot be ruled out. In the context of the current submissions, that means the SPA networks for guillemot and razorbill respectively.

- 3.10. A sound understanding of the scientific evidence base is essential to determine whether there can be reasonable confidence in the ecological benefit claimed for any particular compensation measure to the relevant SPA network. We comment below on matters relating to the scientific evidence base submitted by the Applicant in respect of guillemot and razorbill.

### Scientific evidence

- 3.11. The RSPB has reviewed the Applicant’s submissions, in particular REP3-034, alongside Natural England’s comments (REP4-056).

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<sup>5</sup> Noting the Draft Defra Guidance is also clear “compensation must be additional to the normal practices required for the protection and management of the MP so that measures should provide additional benefit.” (page 20). Again, this is consistent with EC (2018) Managing Natura 2000 sites (see section 5.4.1).

<sup>6</sup> EC (2018) Managing Natura 2000 sites – The provisions of Article 6 of the ‘Habitats’ Directive 92/43/EEC (21/11/18) C(2018) 7621 final.

### *Evidence of connectivity*

- 3.12. The RSPB agrees with the following comments made by Natural England in its submission:

*“Any increase in nesting guillemot and razorbill at the seabird colonies on the Channel Islands will make no contribution to the UK National Site Network. Therefore, benefits to the UK National Site Network would only accrue should these colonies in time produce birds that disperse from those colonies and occupy the sites in the network”* (paragraph 5, page 1)

*“Given the test of the compensation measures relates to maintaining the coherence of the National Site Network of SPAs for these species, the question then is what level of dispersal to these National Site Network colonies is likely. The Applicant has demonstrated in REP3-034 that there is the potential for connectivity, however it is also fair to say that the level of ecological connectivity to the above sites is likely to be rather low, given i) the evidence available regarding philopatry of these species, ii) the high dispersal distances required between the Channel Islands and colonies such as FFC SPA and Farne Islands SPA and iii) the number of other guillemot/razorbill colonies to which dispersing birds could recruit, based on the dispersal distances cited by the Applicant in document REP3-034. We note that the at-sea distance from the Channel Islands to FFC SPA is approximately equivalent to the greatest dispersal distance recorded for guillemots in the Baltic Sea and is over double the mean dispersal distance from that study (Lyngs, 1993).”* (paragraph 2, page 2)

- 3.13. The Applicant claims that the proposed compensation measures for guillemots and razorbills will directly benefit their UK SPA network populations. As we have set out immediately above, the RSPB agrees with Natural England that the evidence for the Applicant’s seemingly definitive statements is low. One of our key concerns is that the basic scientific evidence is missing that would provide the level of confidence claimed by the Applicant. This would require strong evidence of connectivity between the relevant UK SPA networks and:

- The non-breeding populations of guillemots and/or razorbills purported to benefit from bycatch reduction somewhere in the English Channel;
- Birds fledged from the Channel Islands.

- 3.14. The RSPB welcomes the review carried out by the Applicant of the connectivity of guillemot and razorbill from the Flamborough and Filey Coast SPA and the English Channel and Channel Islands (REP3-034, to support REP3-032). However, while we agree that there is likely to be some degree of connectivity, we are concerned that this review greatly overstates that evidence, and it may be that the extent of connectivity is very small. It is acknowledged within the review that there are challenges in establishing connectivity. The review draws largely on two pieces of evidence; the GLS tracking studies described in Buckingham *et al.*, (2022<sup>7</sup>) and the ringing data collected by the BTO.

- 3.15. The work reported in Buckingham *et al.*, (2022) is the first multi-colony scale study of wintering movements of guillemot and razorbill and represents an important piece of science. Unfortunately though, for logistical reasons, the authors were unable to tag birds from the Flamborough and Filey Coast SPA. This means that there is no direct evidence from it of connectivity of the SPA with the English Channel and Channel Islands. The Applicant

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<sup>7</sup> Buckingham, L., Bogdanova, M.I., Green, J.A., Dunn, R.E., Wanless, S., Bennett, S., Bevan, R.M., Call, A., Canham, M., Corse, C.J. and Harris, M.P., 2022. Interspecific variation in non-breeding aggregation: a multi-colony tracking study of two sympatric seabirds. *Marine Ecology Progress Series*, 684, pp.181-197.

instead cites the study as tracking data showing birds from the Farne Islands in the English Channel in winter, although they do not specify if these were guillemot or razorbill. For the paper itself, because of low sample size (one guillemot and four razorbill had tags recovered) the data from the Farne Islands is not analysed or presented, so it is unclear where the Applicant has received this information.

- 3.16. Furthermore, the Applicant claims birds from several colonies winter in the English Channel and this is again to overstate the evidence. Guillemot from Canna on the west coast of Scotland, and razorbill from Whinnyfold in Aberdeenshire were recorded in the English Channel. Guillemot from Treshnish islands, on the Scottish west coast, were present in the Celtic Sea in the winter. However, no guillemot from East coast colonies were recorded in the Channel Islands.
- 3.17. Indeed, the data from guillemot show that the east coast birds tend to remain relatively close to and directly east of the source breeding colony during both the post-breeding moult and winter periods. This fits with evidence that, at some colonies, birds will continue to attend the colony in the winter (Harris and Wanless, 2016<sup>8</sup>). As such we would expect the majority of guillemot from the Flamborough and Filey Coast SPA to remain in the North Sea east of the colony rather than moving south, and this is borne out by the high density of birds seen in the moulting period in the Hornsea 4 footprint. Razorbill do not show this tendency for colony distinct winter distribution, instead aggregating in the middle of the North Sea.
- 3.18. To clarify these points we reproduce the maps of kernel densities from Buckingham *et al.*, (2022) below. These show the core distributions of birds from the colonies where tagging took place in the period of post breeding moult (Figure 2) and the winter (Figure 3). It should also be noted that during Issue Specific Hearing 6, the Applicant's consultant considered that this paper "is not considered to be a reliable source for assessment purposes for this project."

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<sup>8</sup> Harris MP, Wanless S (2016) The use of webcams to monitor the prolonged autumn attendance of guillemots on the Isle of May in 2015. *Scott Birds* 36: 3–9.



Extracts from Buckingham et al (2022): Core distributions during the period of post-breeding moult (Figure 2) and winter (Figure 3)

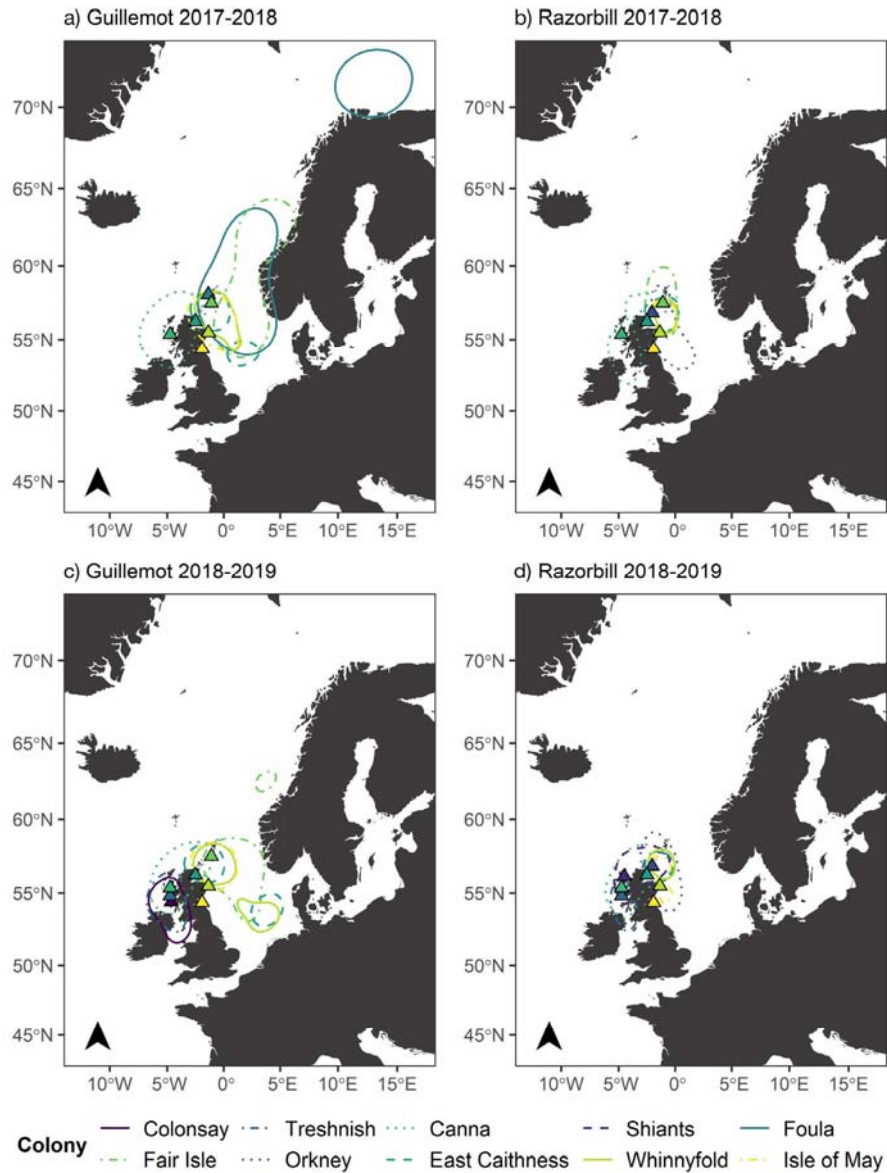


Fig. 2. Core colony distributions (50% kernel density contour outlines) of common guillemots and razorbills during post-breeding moult (16 August–15 September). Colony locations are depicted by triangles, with colours matching the distributions

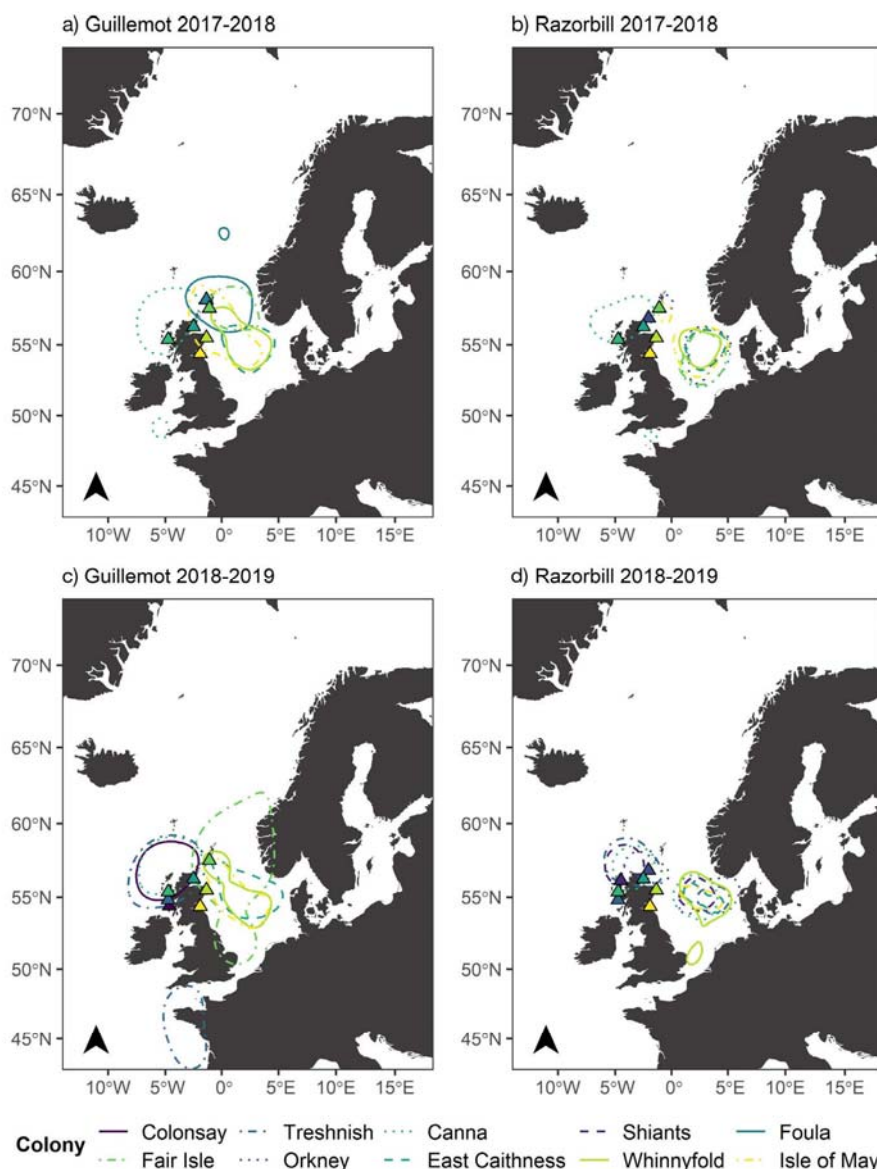


Fig. 3. Core colony distributions (50% kernel density contour outlines) of common guillemots and razorbills during mid-winter (6 December–5 January). Colony locations are depicted by triangles, with colours matching the distributions

- 3.19. The other source of information used to provide evidence of connectivity by the Applicant is ringing recoveries. Again, the Applicant overstates the evidence to support connectivity, particularly, as acknowledged, there are no data from the Flamborough and Filey Coast SPA. In addition, the Applicant fails to make the distinction between, and often conflates, ring recovery and recapture. Ring recovery is most commonly from bird carcasses, whereas recapture is of live birds, e.g. via mist netting. This distinction is particularly crucial for marine species, whose carcasses can be washed ashore huge distances from where they were tagged. Recovery at such a location therefore does not provide evidence that that is the location where mortality occurred. Ringing does provide valuable data, but it is wrong to

suggest that it demonstrates connectivity of the Flamborough and Filey Coast SPA with the English Channel and Channel Islands

- 3.20. In conclusion, while the evidence reviewed by the Applicant shows there is potential for connectivity between the Flamborough and Filey Coast SPA and the English Channel, there is no direct evidence either for the existence, or the extend of, such connectivity.

*Connectivity and the quantum of compensation required*

- 3.21. Understanding the strength of any connectivity between each compensation measure is essential to determining the scale of benefit to the relevant UK SPA network. Therefore, we agree with the following comments by Natural England in REP4-056:

*“...for the compensation to deliver sufficient benefit to the National Site Network (i.e. commensurate to the level of impact at FFC SPA, a key site in the network for these species) it follows that an appropriately large number of fledglings needs to be produced, given that a substantial number of these will either recruit into the natal colony or disperse to non-National Site Network colonies” (paragraph 3, page 2);*

*“...If an equivalent number of recruits into the National Site Network to those impacted at FFC SPA is not produced, it is hard to see how the National Site Network could be considered maintained” (paragraph 3, page 2);*

*“...This then poses the challenge of identifying the level of compensation that will deliver sufficient recruits to the biogeographic population to achieve this. This is very difficult to quantify, but it seems clear that the proposed ratio of 2:1 is unlikely to achieve an appropriate level of reinforcement” (paragraph 3, page 2).*

- 3.22. For the reasons set out above, we do not support the Applicant’s claim that there is a sufficient scientific evidence base to conclude the proposed compensation measures for guillemots and razorbills will directly benefit their UK SPA network populations, in particular that of the Flamborough and Filey Coast SPA. In many respects, there is simply no direct evidence currently available e.g.:

- There are no studies demonstrating that guillemots and razorbills reared in the Channel Islands definitively recruit into the respective UK SPA networks, rather than more locally; and conversely the extent to which the birds encountered in the English Channel will have connectivity with the UK SPA network, in particular the Flamborough and Filey Coast SPA;
- There is scant evidence demonstrating the location of the natal colonies of non-breeding birds in the English Channel in general, and more critically, the as yet unspecified locations where the Applicant proposes to implement its bycatch reduction measures. This is complex as it would need to distinguish between breeding adults and immature birds encountered in the English Channel as these would exhibit different behaviour during the breeding season. Based on Buckingham *et al.*, 2022 it would appear that breeding adult guillemot at individual colonies have distinct non-breeding season spatial strategies.

- 3.23. In the absence of this evidence, it is difficult to come to any conclusions as to what scale of compensation measures would be required to accomplish sufficient recruitment into the SPA populations. This is not only because of uncertainty around the degree of connectivity,

but also the still unresolved issues around baseline characterization and subsequent conclusions on AEOI.

### Monitoring

3.24. The RSPB agrees with Natural England that it is the Applicant's responsibility to monitor the success or otherwise of any required compensation measures i.e.:

- *"it appears to suggest that Natural England will be responsible for monitoring the success of compensation delivery in relation to FFC SPA. We do not consider it appropriate to rely on SNCBs to monitor the impact of a development or the effectiveness of compensatory measures. We highlight that our role in "assessing the effectiveness of interventions" relates specifically to management measures. It is for the Applicant to demonstrate through their monitoring of the measure that the compensation delivery has been successful in its purpose of maintaining the coherence of the National Site Network. This aspect of the proposals therefore needs clarification."* (paragraph 3, page 3).