

**Appendix I
Examining Authority's
Rule 17 Request dated 15 November 2012
Response by the
Royal Society for the Protection of Birds**

23 November 2012

Planning Act 2008

In the matter of:

**Planning Application for construction of the Able Marine Energy Park on the
South Bank of the River Humber at Immingham, North Lincolnshire**

**Planning Inspectorate Ref: TR030001
Registration Identification Ref: 10015550**



THE RSPB RESPONSE TO THE EXAMINING AUTHORITY'S RULE 17 REQUEST

1. The Examining authority requested on 15 November 2012 from Natural England, the Environment Agency, the Marine Management Organisation, the Applicant and the RSPB:

“Would the parties please give their views on how the protection of the ‘overall coherence of Natura 2000’ [Article 6(4) of the Habitats Directive 92/43/EEC] should be interpreted and applied in the present case?”

SPA and SAC

2. The RSPB wishes to remind the Examining Authority that it is only covering SPA issues in this examination and hence its focus on issues relating to the Humber Estuary SPA and its designation species. This is being raised again now as there is a difference between the requirements for the SPA network and the SAC network.
3. The SAC requirement is to designate a network that is representative of the Habitats Directive¹ habitats and species and there is no requirement to designate all qualifying areas. This is why there are qualifying areas which are not protected and why therefore a new SAC can be classified to compensate for one that is lost.
4. As highlighted in Defra draft Guidance on the Habitats Directive on the application of Article 6(4) page 5, para 21 (and its accompanying footnote 4) SAC can be compensated by way of a new site being classified since as set out above the requirement for SAC *species* is not that all the most suitable territories have to be classified but instead that a representative network of those species is created.

SPAs

5. However, the Birds Directive² requires that the ‘most suitable territories’ be designated and therefore if an area is a ‘most suitable territory’ it should already be designated as an SPA.

¹ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (consolidated).

² Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (codified version).

6. Article 4(1) and (2) state (as transposed in Regulation 12A of the Conservation of Species and Habitats Regulations 2010 (as amended) (**the Habitats Regs**)):

“4(1) The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat **in order to ensure their survival and reproduction in their area of distribution.**

In this connection, account shall be taken of:

- (a) species in danger of extinction;
- (b) species vulnerable to specific changes in their habitat;
- (c) species considered rare because of small populations or restricted local distribution;
- (d) other species requiring particular attention for reasons of the specific nature of their habitat.

Trends and variations in population levels shall be taken into account as a background for evaluations.

Member States **shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species in the geographical sea and land area** where this Directive applies.

4(2) **Member States shall take similar measures for regularly occurring migratory species not listed in Annex I, bearing in mind their need for protection in the geographical sea and land area where this Directive applies, as regards their breeding, moulting and wintering areas and staging posts along their migration routes.**” (emphasis added)

7. This duty to identify and designate the ‘most suitable territories’ for Annex I and migratory birds, is to deliver an ecologically coherent network of SPAs. The EU Commission needs to be able to satisfy itself that the UK SPA network forms a coherent whole that meets the protection requirements of Annex I and migratory species in the geographic sea and land area where the Birds Directive applies (Article 4(3) of Birds Directive).
8. However it is worth noting that not only due to the SAC being affected by the Applicant’s proposals but also due to article 6(3) and 6(4) also being applied to SPAs (please see article 7 Habitats Directive) all aims and objectives of both Directives need to be considered as a result of the new regulation 9 the Habitats Regs which states:

“9.— Duties relating to compliance with the Directives

- (1) The appropriate authority [the SoS in this case], 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** [Birds and Habitats] **Directives.**

- (2) Paragraph (1) applies, in particular, to functions under the following enactments—

.....

the Natural Environment and Rural Communities Act 2006,
the Planning Act 2008,
the Marine Act, in particular any functions under Parts 3, 4, 5 and 6 of that Act (marine planning, marine licensing, nature conservation and management of inshore fisheries, respectively), and
these [Habitats] Regulations.

- (3) Without prejudice to the preceding provisions, a competent authority [the Examining Authority due to having to report to the SoS and the SoS in this case], in exercising any of their 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.”

Article 4 obligations and SPA boundaries

9. Within the UK there are no sufficiently clear, precise, targeted or binding special conservation measures as an alternative mechanism to SPA designation to meet its Article 4 obligations and therefore SPA designation is the sole means by which the UK meets those obligations to “secure the survival and reproduction of [Annex I and migratory] species in their area of distribution”.
10. In addition in the UK SPAs are designated with extremely tight boundaries and no buffer zones (unlike for example Holland where there are buffer zones around all their SPAs) meaning therefore that every area within the UK SPAs has been included due to it contributing to the integrity of the site and that site’s designation species. Due to this and the requirement that all the most suitable territories are designated if any part loses its ecological function (directly or indirectly) then needs to be fully/entirely replaced to ensure SPA network maintained.
11. We wish to highlight the RSPB’s response (dated 1 November 2012) to the Examining Authority’s Rule 17 Request dated 23 October 2012 where the international, European and national importance of the Humber Estuary SPA and North Killingholme Marshes is set out (paras 1.4 to 1.6 and 1.9):
- “1.4 By comparison, from the latest published WeBS figures (2009-10) (Annex I attached, page 3) the GB maximum population (i.e. 5 year mean peak) is 34,977 and Northern Ireland maximum population is 1,748 meaning that the UK maximum population is 36,725).

- 1.5 The top five sites for black-tailed godwits (please see EX 28.3 part 2 Table 1-6) are (based on 5 year mean peak:

The Wash	9,265
Thames Estuary	5,737
Dee Estuary (England & Wales)	4,811
Ribble Estuary	4,453
Humber Estuary	4,180
Total	28,466

- 1.6 So there is 82% of GB maximum population found at just 5 sites, with 92.38% of GB population on the top 7 sites (Annex I attached, page 4). The Humber Estuary alone supports 12% of the GB population.

.....

- 1.9 The relatively simple implementation of conservation measures on existing sites contrasts with the difficulties associated with attempting to replicate these sites' ecological function on new compensation sites. North Killingholme Marshes holds 5.4% of the international population of the Icelandic race of black-tailed godwits, and North Killingholme Haven Pits over 8% (Annex B2 of RSPB's Written Representations, 29 June 2012, Dr Prater's proof of evidence, page 3, para 3.1). The important of the ecological functions provided by these two sites is clearly shown by the densities of black-tailed godwits that use them and cannot be easily recreated, as the RSPB has demonstrated in its criticisms of the compensation measures to date."

12. As we have already set out in the RSPB's Summary of its oral case presented³ it is inappropriate to suggest there is space within this SPA to absorb displaced birds (please see paras 37-46) due to spare carrying capacity and therefore we will not repeat this point here.

EU Guidance on Article 6(4)

13. Whilst we appreciate that extensive reference from all sides has been had to the EU Guidance⁴ we recommend that consideration is also given to pages 10 to 18.
14. For example the box on page 11 where it clearly states that:

"The compensatory measures constitute measures specific to a project or plan, additional to the normal practices of implementation of the "Nature" Directives. They aim to offset the negative impact of a project and to **provide compensation corresponding precisely to the negative effects on the species or habitat concerned**. The compensatory measures constitute the "last resort". They are used only when the other safeguards provided for by the directive are ineffectual and the decision has been taken to consider, nevertheless, a project/plan having a negative effect on the Natura 2000 site." (emphasis added)

³ Submitted 20 November 2012.

⁴ EU Commission Guidance on Article 6(4) of the Habitats Directive, January 2007.

15. And on page 12 under the subheading *Overall coherence of the Natura 2000 Network*:

“Having said this, it is clear that the importance of a site to the coherence of the network is a function of the conservation objectives of the site, the number and status of the habitats and species found within the site, as well as the role the site plays in ensuring an adequate geographical distribution in relation to the range of species and habitats of species concerned.”

16. We have made extensive submissions on the importance of North Killingholme Marshes (and “the package” with North Killingholme Haven Pits).

17. The guidance goes on:

“Art. 6(4) requires to “protect” the overall coherence of Natura 2000. Thus, the Directive presumes that the “original” network has been coherent. If the exception regime is used, the situation must be corrected so that the coherence is fully restored.

With regard to a plan or project, the compensatory measures defined to protect the overall coherence of Natura 2000 network will have to address the criteria mentioned above. This would mean that compensation should refer to the site's conservation objectives and to the habitats and species negatively affected in comparable proportions in terms of number and status. At the same time the role played by the site concerned in relation to the biogeographical distribution has to be replaced adequately.

.....

The *‘Birds’ Directive* does not provide for bio-geographical regions, or selection at Community level. However by analogy, it could be considered that *the overall coherence of the network* is ensured if:

- compensation fulfils the same purposes that motivated the site's designation in accordance with Article 4(1) and 4(2) of the Birds Directive;
- compensation fulfils the same function along the same migration path;
- the compensation site(s) are accessible with certainty by the birds usually occurring on the site affected by the project.”

18. The box on page 13 states:

“In order to ensure the overall coherence of Natura 2000, the compensatory measures proposed for a project should therefore: a) address, in comparable proportions, the habitats and species negatively affected; b) provide functions comparable to those which had justified the selection criteria of the original site, particularly regarding the adequate geographical distribution. Thus, it would not be enough that the compensatory measures concern the same biogeographical region in the same Member State.

The distance between the original site and the place of the compensatory measures is not necessarily an obstacle as long as it does not affect the functionality of the site, its role in the geographical distribution and the reasons for its initial selection.”

19. Under the subheading 1.5 Criteria for designing compensatory measures, 1.5.1 Targeted compensation (page 16):

“...Once the biological integrity likely to be damaged and the actual extent of the damage have been identified, the measures in the compensation programme must address specifically those effects, so that the elements of integrity contributing to the overall coherence of the Natura 2000 network are preserved in the long term. Thus, these measures should be the most appropriate to the type of impact predicted and should be focused on objectives and targets clearly addressing the Natura 2000 elements affected. This requires that measures clearly refer to the structural and functional aspects of the site integrity, and the related types of habitat and species populations that are affected.

.....

.....in designing compensation, clear objectives must be established:

- Identify the total numbers of species affected
- Identify the principle species affected and the broad proportion of the total population(s) that these occur in;
- Identify the principle function(s) of the habitats that will be adversely affected that the species depend on e.g. feeding, roosting, etc;
- Identify the likely populations of species and the habitat functions at favourable conservation status;
- Identify the measures needed to offset the damage to the habitat functions and species affected so that they are restored to a state that reflects the favourable conservation status of the area affected.

Any uncertainty over the precise nature and/or magnitude of the adverse effects should be thoroughly tested. Where appropriate, a precautionary approach should be adopted and the assessment of adverse effect based on a worse-case scenario.”

20. 1.5.2. Effective *compensation* (which is already in Applicant’s summary below para 19). And on page 17 under heading 1.5.4. Extent of compensation:

“The extent required for the compensatory measures to be effective has a direct relationship to the quantitative and qualitative aspects inherent to the elements of integrity (i.e. including structure and functionality and their role in the overall coherence of the Natura 2000 network) likely to be impaired and to the estimated effectiveness of the measures.

Consequently, compensation ratios are best set on a case-by-case basis and must be initially determined in the light of the information managed during Article 6(3) assessment and ensuring the minimum requirements to meet ecological functionality. The ratios may then be redefined according to the results observed when monitoring the effectiveness, and the final decision on the proportion of compensation must be justified.

There is wide acknowledgement that ratios should be generally well above 1:1. Thus, compensation ratios of 1:1 or below should only be considered when it is demonstrated that with such an extent, the measures will be 100% effective in reinstating structure and functionality within a short period of time (e.g. without compromising the

preservation of the habitats or the populations of key species likely to be affected by the plan or project).”

Conclusions

21. In order to be able to allow development to harm a SPA then compensation measures must be secured to enable the coherence of the network to be maintained. Since all of the most suitable territories need to be designated the loss of any one of them or any part of them needs to be fully and entirely replicated in order to maintain the coherence of the SPA network.
22. Allowing development to occur despite its adverse effects on a SPA is only permitted if compensation measures are proposed that will *compensate* for the impacts resulting from the development. Reliance on re-distribution of species within the remaining part of the SPA is not compensation and is impermissible in principle.
23. In this regard it is worth noting that application of regulations 62 and 66 of the Habitats Regs are actually fairly limited and since 2001 there have been only approximately 15 project applications that have had regulations 62 and 66 considered for them (this excludes all the Environment Agency projects for - for example coastal protection projects, flood defence works etc). The facts here are of the direct loss of a key habitat for a key species on the SPA.