

## Response of the environmental NGOs to Horizon's Deadline 9 Tern Compensation Package [REP9-028]

Wylfa Newydd Development Consent Order EN10007

Interested Parties North Wales Wildlife Trust (20011639)

National Trust (20010995)

The Royal Society for the Protection of Birds (20011586)

### Introduction

- 1.1 The following comments represent the views of the environmental NGOs (the eNGOs; North Wales Wildlife Trust – NWWT, National Trust and the Royal Society for the Protection of Birds – RSPB).
- 1.2 These comments are made on the Deadline 9 Tern Compensation Package submitted by Horizon [REP9-028], which it is understood has been adjusted following discussions outside the Examination with Natural Resources Wales (NRW) and subsequent to NRW's submitted comments at Deadline 8 [REP8-080].
- 1.3 The eNGOs submitted comments [REP7-015] on the earlier draft of the compensation package [REP5-046]. It would appear that substantive changes to the Compensation Package have been limited in light of either NRW's or the eNGOs' comments.
- 1.4 The eNGOs do not agree that the Compensation Package is adequate and consider that the draft Requirement and the proposed additions to the Main Site and Marine Sub-Codes of Construction Practice (sub-CoCPs) are not sufficient to secure effective compensation should the Secretary of State (SoS), as competent authority, deem that there is no alternative solution and the DCO represents imperative reasons of over-riding public interest (IROPI).
- 1.5 As identified in the eNGOs' representations, the evidence of success in establishing new breeding colonies is low ([REP2—348]<sup>1</sup> Appendix 4 ∞ 3.1 case studies and [REP7-015]) and consequently a three-staged approach has been recommended. The eNGOs' recommended approach focuses greater effort on supporting displaced terns within existing breeding sites, which the available evidence suggests are likely to be favoured over new sites<sup>2</sup>.
- 1.6 Disappointingly, the advocated approach of the eNGOs has not been adopted by Horizon, despite clear justification and mechanisms for achieving additionality and increased carrying capacity at existing sites having been identified within the eNGOs' representations ([REP2-348] Appendix 4, [REP2-318] and [REP2-368]). Furthermore, the eNGOs' advice [REP7-015] regarding demonstration of the legal control of and establishment of conservation objectives for the compensation package also appears to have been disregarded by the Applicant.

<sup>1</sup> See also [REP2-318] National Trust and [REP2-360] the RSPB

<sup>2</sup> As observed during the 2017 colony abandonment ([REP2-348] Appendix 4 ∞ summary, [REP2-318] NT and [REP2-368] the RSPB), only 47% of the Sandwich terns could be traced to alternative breeding sites - all of which were existing Irish Sea metapopulation breeding sites. Of this proportion only 12% (250 pairs) were observed to be successful in their second breeding attempts. The success of second breeding attempts was constrained and the eNGOs' identify measures which could be applied to overcome these constraints.

1.7 Therefore, the commentary below concentrates on and justifies the substantive problems with the submitted Deadline 9 compensation package, which in the eNGOs' collective view will limit its probability of success.

### Legally securing the compensation sites

1.8 The eNGOs' are of the firm view that Horizon should be required to demonstrate to the Examining Authority and the SoS that they have legally secured control of each of the compensation sites being brought forward before the close of the examination, in compliance with Regulation 68 of the Conservation of Habitats and Species Regulations (the Habitats Regulations) ([REP7-015], ISH Post Hearing Note – Joint statement of eNGOs on the Anglesey Terns SPA, 8 March 2019).

1.9 The fact that this has not occurred creates significant uncertainties about the delivery of the shortlisted sites, particularly if the Examining Authority and the SoS agree with the eNGOs regarding the need to deliver all four sites, leaving no contingency in place should it later transpire that legal control cannot be secured (see further commentary under paragraphs 1.13 and 1.14 below).

### Number of new sites to be established

1.10 Both NRW [REP8-080 ∞ Annex A, 1.1.4] and the eNGOs [REP7-015] have advised Horizon that all four<sup>3</sup> compensation sites should be brought forward for preparation and establishment. There are a number of reasons for this advice: -

- Firstly, as discussed above, the evidence of successful establishment of new breeding colonies is very low.
- Secondly, the ecological breeding requirements for the different tern species varies markedly ([REP2-348] Appendix 4 ∞ 3.3<sup>4</sup>). Cemlyn Nature Reserve is highly unusual in providing breeding habitat for all three current breeding species (Sandwich tern, common tern and Arctic tern, see NRW [REP8-080] ∞ Annex A, 1.1.4]). Consequently, there is a high probability that interspecific competition will occur at the newly created compensation sites.
- Finally, Cemlyn Nature Reserve also supports two critical characteristics for successful Sandwich tern breeding: island habitat and the presence of a breeding black-headed gull colony. Both these features are identified within the literature as being prerequisites for breeding success ([REP2-348], REP2-318 and [REP2-360]). Yet this combination of features only occurs at one<sup>5</sup> of the four proposed compensation sites. The lack of these characteristics at the other three sites increases the challenges associated with establishing a new breeding colony of Sandwich terns, whether or not it is associated with either of the other two tern species.

1.11 Given these factors, and the need to apply a risk based approach, the eNGOs do not accept that it is disproportionate to expect four sites to be prepared and established. Consequently, the eNGOs do not agree with the wording of the Requirement WN[x](1).

1.12 It is of note that WN[x] "Tern Compensation Sites"<sup>6</sup>, as currently defined, separates Glan Mor Elias and Morfa Madryn, which could additionally allow the Applicant to claim that they have discharged their responsibility for two sites by preparing just this one co-joined site.

<sup>3</sup> Note that Glan y Mor and Morfa Madryn are considered as one site by all parties including Horizon [REP9-028 ∞ 1.3.5] and paragraph 1.12 (above).

<sup>4</sup> REP2-348 Appendix 4 ∞ 3.3 is Review of ecological parameters for establishing 'new' breeding colonies

<sup>5</sup> Glan y Mor Elias

<sup>6</sup> See also [REP9-028] ∞ 2.3.1 and 2.3.2

As indicated elsewhere in Horizon's Deadline 9 document, these should be considered as a single site [REP9-028  $\diamond$  1.3.5]. The eNGOs therefore suggest that this potential loophole is closed and that Glan y Mor and Morfa Madryn are listed as one site within the Requirement and at paragraph 2.3.1 for the sub-CoCP insertions.

- 1.13 Horizon's proposed sub-clause wording, should the SoS agree that all four sites are necessary, introduces a further potential loophole. The Requirement sub-clause [REP9-028] as proposed at paragraph 1.3.6, WN[x](2) is not acceptable to the eNGOs, as it could remove the Applicant's responsibility of providing four sites if, for example, one or more of the landowners simply change their mind before the site is brought forward.
- 1.14 As noted above, this issue highlights the importance of Horizon demonstrating that it has legal control secured in respect of each of the proposed compensation sites before the close of the examination. This should be demonstrated to the satisfaction of the Examining Authority and the SoS before the DCO proceeds.

### Timing of the preparation and establishment of the compensation sites

- 1.15 Both NRW ([REP8-08]  $\diamond$  1.1.7 and 1.1.10) and the eNGOs [REP7-015] consider that the compensation sites need to be available one full season in advance of the commencement of construction works and that they should be operational during the period when black-headed gulls return to establish their breeding colony (mid-March).
- 1.16 Given the very limited available evidence of even partially successful new tern colony establishment ([REP2-348] Appendix 4  $\diamond$  3.1, [REP2-360] and [REP2-318]), it is likely to take several seasons for the compensation sites to be discovered by displaced birds, if they are found at all. The eNGOs do not therefore agree with the flexibility that Horizon are proposing ([REP9-028]  $\diamond$  1.4.3 and 2.3.3) and the indication that they will "aim" to establish one site and "if possible" a second site a full breeding season before works commence on the WNDA.
- 1.17 Horizon claims that to implement the advice of NRW and provide the compensation sites at least one full breeding season ahead of the commencement of works, would constrain the start of construction too much. However, given the introduction of the new DCO Articles (March Issue Specific Hearings [REP7-001]), which requires notification to the SoS regarding the financial security of the scheme, it appears that there would be a period of time prior to commencement of DCO implementation for the submission and discharge of a number of Requirements and the establishment of precommencement works.
- 1.18 In the eNGOs' view there would consequently be sufficient time for compensation site establishment a full breeding season before construction begins. It is of note that Horizon have not provided any timescale triggers within the draft sub-CoCP insertions of when the establishment and management schemes would be submitted for agreement. This will further add to the lack of control for IACC and NRW over the compensation package.
- 1.19 Horizon indicate in the proposed inserts to the sub-CoCPs ([REP9-028]  $\diamond$  2.4.3) that attraction mechanisms will be deployed during the defined tern breeding establishment period. As discussed during the Examination ([REP2-348]  $\diamond$  3.52, [REP2-318], [REP2-360], [REP4-044] and [REP4-038]), the eNGOs do not agree with the definition provided by Horizon for the 'establishment period' within the sub-CoCPs ([REP9-013]  $\diamond$  11.6.4 of Marine sub-CoCP and [REP9-011]  $\diamond$  11.4.3 of Main Power Station site sub-CoCP). The time limiting of establishment purely to Sandwich tern nesting activity (starting mid-April) is not acceptable to the eNGOs. NRW also appear to assume that the use of compensation attraction mechanisms will coincide with the anticipated arrival of the sympatric black-headed gulls ([REP8-080]  $\diamond$  1.1.6 and 1.1.7). The eNGOs therefore do not agree with the definition "Tern breeding season" and "establishment period" within the Requirement and

the proposed sub-CoCP inserts and recommend that the definitions should be redefined to include mid-March.

- 1.20 We further note that Horizon now propose to exclude work no. 3 (Site Campus construction) from the list of operations that would require the prior establishment of tern compensation ([REP9-028] WN[x](4) and  $\infty$  2.3.3). However, it is clear from the evidence submitted to the Examination by the eNGOs and NRW that it is the combined construction (and, in the view of the eNGOs, operational) impacts that could lead to adverse effects on the integrity of the SPA.
- 1.21 This is exemplified within NRW's Deadline 9 response ([REP9-037]  $\infty$  Annex A, 3.1.1), where they indicate that their conclusions apply to "*the combined visual and noise stimuli from the whole construction works, including the activity on land and within the marine environment*". NRW do not differentiate between different elements/phases of Wylfa Newydd construction. It is therefore unclear what justification the Applicant considers there is for excluding work no. 3. As a result, the eNGOs disagree with the wording set out under WN[x](4).

### Site demobilisation

- 1.22 The eNGOs have indicated that the provision of the compensation sites should extend beyond Wylfa Newydd construction ([REP7-015]  $\infty$  eNGO Joint Position Statement) to address the uncertainties of cumulative impacts occurring during the operational phase. We further support NRW's view that any of the compensation sites that are utilised by the SPA terns should be secured long term (including via an extension to the SPA), regardless of the continued presence or otherwise of breeding terns at Cemlyn Nature Reserve.
- 1.23 Further detail has now been presented on the issue of demobilisation of the compensation sites by Horizon ([REP9-028]  $\infty$  2.7). Notwithstanding the joint eNGO position, the eNGOs do not consider that the proposed mechanisms and assurances provided are adequate.

### *Continued provision of the compensation sites in the event of abandonment or reduced breeding at Cemlyn Nature Reserve colony*

- 1.24 If, at the end of the construction phase, the terns are failing to breed at Cemlyn Nature Reserve in numbers sufficient to meet the SPA conservation objectives, the Applicant proposes that any of the compensation sites that have been utilised during construction will continue to be provided. However, the eNGOs consider that the continued provision of any compensation sites that have not been utilised up to that point should also be subject to review, to determine whether they should also continue to be provided, or alternative sites provided in their place, in order to protect the Natura 2000 network.
- 1.25 The eNGOs are further seriously concerned by the following proposed caveat ([REP9-028]  $\infty$  2.7.2) to the provision of sites following construction, which we consider could be open to interpretation and/or will be difficult to substantiate:
 

".... *This obligation [to continue to provide the compensation sites] will not be required if it can be demonstrated, following agreement with IACC in consultation with NRW, that the absence of terns from Cemlyn lagoon is not the result of the Wylfa Newydd DCO Project.*" (emphasis added)
- 1.26 It is the SoS's decision under the Habitats Regulations as to whether compensation is necessary. Therefore, its provision and/or decommissioning should not be cavedated by the further need to prove a causal link or otherwise between any manifested damage to the SPA and the DCO application. By virtue of making the decision, the SoS has indicated that the compensation is deemed necessary to ensure compliance with the relevant legislation.

- 1.27 The phraseology at 2.7.2, and similar wording in 2.7.5, could lead to considerable disagreement between the parties (IACC, NRW and any subsequent developer/operator) and we therefore consider it should be removed.
- 1.28 Notwithstanding this, if the SoS should agree to any such clause, the onus must be on the Applicant to prove beyond reasonable scientific doubt that the absence of the terns at Cemlyn Nature Reserve is not a result of the DCO Project. Given the challenges that the Examination has faced in determining the degree of confidence that can be placed on the AEOI (adverse effect on integrity) assessment of the project proposals in the first instance, the eNGOs consider that proving that any impacts to the Cemlyn tern colony are not linked to the DCO proposals is likely to be extremely difficult. This would be the case even with clear conservation objectives and a robust monitoring protocol in place for the compensation measures (see discussion below).

*Decline or abandonment of Cemlyn Nature Reserve and no compensation sites used for breeding*

- 1.29 Additionally, in the event that breeding terns decline at Cemlyn Nature Reserve and the terns do not colonise any of the compensation sites ( $\approx$  2.7.5), it is strongly suggested that a time trigger should be stipulated to require initiation of discussions between NRW and the Power Station operator on the further development of other compensation options. It is also advised that this section should outline what measures might be considered appropriate in this scenario, such as development of further new compensation sites, provision of additionality measures at other Irish Sea metapopulation sites etc.

*Continued provision of the compensation sites in the event of continued breeding at Cemlyn Nature Reserve colony*

- 1.30 The let-out clauses proposed at 2.7.3 and 2.7.4 provide no surety that Horizon (or subsequent Power Station operator) would supply sufficient funds and legal arrangements to either NRW or a third party to allow for an effective transfer of responsibility or sufficient control/resources to undertake long-term management of the compensation sites in the event that the terns continue to utilise one or more of these sites in addition to Cemlyn Nature Reserve.
- 1.31 This is particularly important where, for example, Horizon are intending to have only partial control over an area of land with temporary access rights (e.g. Dulas and Aber Menai) but is also important where austerity stressed statutory bodies have ownership (e.g. Local Authority ownership at Glan y Mor Elias and Morfa Madryn).

**Conservation objectives - including monitoring and review**

- 1.32 The lack of defined conservation objectives including a robust monitoring and review protocol is a substantive omission in the current compensation package ([D9-028]  $\approx$  2.6). The eNGOs highlighted this in their response ([REP7-015]  $\approx$  eNGO joint position statement) to the earlier Deadline 5 compensation package [REP5-046].
- 1.33 The development of the Applicant's 'without prejudice' compensation scheme has been left until the very last Examination deadline, leaving no time for agreement with NRW (or other Interested Parties) of key matters concerning the conservation objectives of the compensation sites including their delivery, duration, management and monitoring.
- 1.34 The omission of a monitoring protocol means there is little understanding on what conservation objective targets/triggers will apply (i.e. adults on nests/apparently occupied nests (AoN), productivity or both measures) and how the overarching figures for the SPA

three breeding colony figures<sup>7</sup> for common and Arctic tern would be applied to the Cemlyn Nature Reserve colony or at the compensation sites.

1.35 It is further unclear as to what other features might need to be monitored at the Cemlyn Nature Reserve colony or elsewhere to ensure that there is sufficient understanding about the dynamics of the tern breeding populations. This is important should additional measures need to be formulated (e.g. under [REP9-028] Decommissioning  $\infty$  2.7.5) or in order to develop/apply the proposed adaptive management practices. The eNGOs suggest that the monitoring scheme needs to encompass tern displacement activity (i.e. prospecting and relocation to alternative sites – either compensation sites or Irish Sea breeding sites) by both ringing and tracking mechanisms, in addition to measuring progress against agreed conservation objective figures.

1.36 The eNGOs are extremely concerned that this part of the Tern Compensation Package has not been sufficiently well developed to allow the Examining Authority to make a recommendation on its likely effectiveness, which is further exacerbated by the other issues that the eNGOs have highlighted. These matters would also hinder the SoS in drawing a conclusion regarding the compensation scheme's ability to discharge the derogation under the Habitats Regulations.

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<sup>7</sup> The SPA conservation objectives for common and Arctic tern are set across all three breeding sites of the Anglesey Terns SPA (The Skerries, Ynys Feurig and Cemlyn Bay).