Comments on RIES

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1 **THE INTEGRITY STANDARD** We note with interest that the ExA has decided to focus the RIES on a particular and dominant aspect of European Sites' "implications", namely the question of site "integrity". We assume this is in part, at least, a reflection of the developer's asessment of no likely significant impacts on the many itemised regulated nature assets in the designated impact zones, as well as, by extension, site integrities. We welcome the approach. And, the publication of Annexes 1 & 2.

2 **SITE INTEGRITY & ENHANCEMENT** Given that the principle of site integrity is defined by sites' qualifiying features and also that enhancement provision is likely to be expressly recorded alongside protection and preservation/conservation duties, we suggest that EDF's appraisals of sustainability should be scrutinised for engagement with the principle of enhancement where any action arising from impacts is involved. Even where enhancement may not be express, it is our understanding that the enhancement principle has an overarching regulatory weight under statutary cover and other underpinnings (the Environment Bill, its Brexit precursors, and practically the established doctrine of BNG and its Metrics 1/2/3 etc). And we note that BNG and enhancement are not the same.

The particular relevance of our interest in this aspect of HRA is that it should be applied to any sites/species which the developer might propose as a result of the ExA's recommendation to consider changes to their mitigation prospectus (RIES 7.2.6). We comment further on this ExA invitation below.

Of established concern is also the impact on the Sizewell Marshes SSSI, and the permanent loss of part of it. The ISH narratives about

compensatory land and restored wet woodland appear to us as inconclusive, so we ask whether this issue might not have been reported on in the RIES since the SSSI - as we understand the matter - is covered by the Europa 2000 commitment in the UK. The UK Government is on record through Brexit legislation and the Environment Bill *(see also above)* as accepting nature enhancement obligations on the basis of nature sites' *potential* to qualify for SAC/SPA and eqivalent status. We therefore challenge the developer view at 6.0.2. because it does not embrace an enhancement duty. (We note here, incidentally, a missing RIES Footnote 1).

3 THE PRECAUTIONARY PRINCIPLE & A WIDER SPECTRUM OF MITIGATIONS Our comment arises from the ExA's suggestion that the developer might wish to consider extending the list of impacted species, which seems to us to be a relevant conclusion arising from RIES (7.2.6). We note the same gesture in relation to alternatives (5.1.)

Re the precautionary principle, the developer has concluded that only one species – the marsh harrier – is likely to be impacted to a level requiring mitigation, but even this is unclear (6.1.1) in the statement that an "AEoI could not be excluded", justifying this as an example of the precautionary principle. We suggest this principle should only be relied on when there is assessed evidence for the uncertainty, which would require an account of the reasoning and evidence. Further, the precautionary principle at 6.0.4 on site integrity seems to us to be difficult to apply other than in a full and prohibitive way given the international importance and uniqueness of Minsmere. How could any assessment not be precautionary? Separately, we wonder why this view is taken "despite" the precautionary assessment – should this not be a "because" ?

The developer has also decided that IROPI is required under HRA because of the absence of detailed alternatives to avoid the loss of (some) foraging for the breeding MHs through four of the five construction phases. There are two points here.

Firstly, there is the question of alternatives. While we look further at this principle and its application below, for the moment we question whether the search for alternatives is not justified in the foraging compensation narrative since the the proposed substitute foraging site(s) at Abbey Farm and Westleton might well be regarded as mitigations. They seem to offer a proprortionate prospect of substitute foraging. This view, if accepted, would obviate the need to proceed under the mitigation hierarchy to consider alternatives, and in consequence remove the IROPI trigger. In putting this line of argument, we recognise that should the developer revise and substantially widen their HRA prospectus, they may find other bases for IROPI.

Notwithstanding this view, we are not pursuaded that adequate assessment has been carried out about the sufficiency of the foraging compensation proposed, or recognition that the foraging substitute(s) need to cover a construction period of considerabe longevity (8-10-maybe 15 years) plus a prefatory rewilding period and a post-construction monitoring overspill of maybe 3 years as proposed on other matters.

The assessments need to be of an acute localised quality foraging source for the breeding season. This is the burden of the literature we have looked at (Entech Reports from 2009/11 already notified from ISH 10).

4 ARABLE RE-WILDING LAND QUALITY We further note from the developer's expert paper citation on a similar harrier breed – the Montagu Harrier in Europe - that the *quality* of compensatory land for foraging is crucial to breeding and survival rates. There may be other similar references in the extensive harrier literature. Our presentation at ISH 1 of the Entech Reports could be seen as supportive of this particular finding. On Montagu's Harrier, the example used by the developer, the Animalia website is a standard reference. A notable distinction between the Montagu and the Marsh Harrier is population numbers, the Marsh Harrier's being very low as shown in the Entech reports.

Specifically, arable land residues might be an issue, especially with long exposure, depending on assessment. The research paper cited by the developer to support the suitability of rewilded arable land as foraging

terrain for an equivalent harrier species notes this concern about chemical fertiliser residues on arable land. A brief look at the European Court case Dutch Hydrogen, which we cited from a BEIS source, suggests that there may be a broader authority for this concern, and we therefore ask whether the developer has assessed this risk. Considerations raised during the ISH about the length of time for arable land to suitably rewild are welcome and in line with our concern.

5 **ALTERNATIVES – NARROW AND/OR BROAD DEFINITION ?** Drawing on the MH case, we consider the developer's approach to alternatives as narrow and restrictive (Ref 5.0.6). Their approach can be seen as in sharp contrast – and maybe also innovatory - in comparison to IROPI literature, guidance and the outcome of the Wylfa DCO, where the base reference is to whole project alternatives. The developer's IROPI trigger is not even a general disturbance question.

The only presumably properly assessed alternatives issue is that MH foraging cannot be mitigated for.

Our first point here is at the same 'high level' as the developer's recital of an urgent need for the project under NPS1 & 6. Here we recall simply that Sizewell was just one of 8 sites when the original Government policy required no more than 7 new nuclear stations, leaving throughout the expected sequence at least one altenative should a particular site not be able to meet regulatory standards. In short, there would always be one alternative site available to an appropriate developer. That is, the consideration of alternatives is a general principle and duty applicable to all HRA circumstances needing to be applied at each site. So we suggest there is a primary argument to be examined about whether there are any alternatives to this project at Sizewell. We suggest that there is good reason for a whole site assessment of alternatives.

As time has passed, while the aspirational/theoretical 7 out of 8 formula has remained in place, it has seen substantial underdelivery, leaving at present 6 other sites as alternatives to Sizewell. The policy needs have also been refined and despite initial setbacks at Wylfa and Moorside,

there are now three credible alternatives in the offing, two at Wylfa and one at the previously un-nominated site of Trasfynnyd in North Wales.

There is also an alternatives precedent to be considered of IROPI being requested but not resulting in planning approval, despite NPS1 & 6 considerations. This is the Wylfa DCO which we understand was rejected because, in HRA respects, a species of protected sea birds could not either be mitigated or presumably compensated for. The principle of likely whole project and deployable alternatives obviously had some force.The overarching issue of inadequate project design in the Wylfa DCO can be seen as referencing the nature protection issue.

6 THE SPECIFICITIES OF IROPI We suggest that the SZC developer's pursuit of IROPI is that it believes it will reinforce its NPS1 & 6 arguments. A broader menu of unmitigatable nature issues might have served this purpose well, so there is a question about why it has chosen an IROPI triggered by a very narrow MH foraging issue and a lack of construction design alternatives.

We offer some observations, starting with the view that little to do with IROPI has been tested in the courts, but also in the light of the IROPI codification by Hickinbottom JL and Jackson Jl in the 'red kites' case – Mynnyd Y Gwynt - to which we have previously referred. We also have in mind the Clapham Omnibus test of reasonableness, which is at the heart of the IROPI doctrine, and therefore question whether the developer's cumulation of 'no detailed AEoIs' would pass this test.

Secondly, there is a primary question about whether this MH challenge is too narrow and too insecure to be the basis for invoking IROPI. It depends on an application of the mitigation process which we have suggested does not appear to accord with legal authorities requiring full and separate assessment of each stage of the HRA regulatory process.

Thirdly, the developer's view of IROPI envisages it as much less than the 'high hurdle' referred to in case law commentary. It's view might be described as seeing IROPI as an open door for its own version of public policy.

Fourthly, the IROPI requirement of consequential compensation for damage to protected nature species and sites might not, in any case, be achievable. What compensation is envisageable for damage to Minsmere ? Here the developer's strategic approach – a very narrow IROPI trigger - can be seen as designed to access IROPI without incurring arguably very large scale IROPI compensation obligations or risking being, because they have recognised large scale impacts, unable to persuade the SoS of their reasonableness and maybe practicability. This would mean the project would fail.

Fifthly, on the precautionary principle, we suggest that its correct application should carry great weight, even special weight, in the circumstances of a DCO for this type of project which once started would be difficult and unlikely to be stopable or modifiable. Perhaps it will come to be seen, if tested, as also a high hurdle designed to protect nature assets and environmental standards.

Against this background of understanding, our view is that developer regards IROPI as an opportunity to reinforce its NPS case for the project, and not, as we understand it, more correctly, to be a special, last resort provision for protecting nature assets through the full and proper application of HRA processes as from time to time revised by policy (currently under way) and, over many years, by court authorities.

We therefore support the ExA view in the RIES that the developer may wish to update its IROPI case. We would welcome the opportunity to be be able to comment on this before closure of the public examination.

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