



Written Submission

for the

Royal Society for the Protection of Birds

2 November 2020

Planning Act 2008 (as amended)

In the matter of:

**Application by Ørsted Hornsea Project Three (UK) Ltd for an Order
Granting Development Consent for the**

Hornsea Project Three Offshore Wind Farm

**Planning Inspectorate Ref: EN010080
Registration Identification Ref: 20010702**

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1. Key recommendations regarding the Hornsea Project Three compensation measures

- 1.1 The RSPB has reviewed the additional information submitted by the Applicant regarding compensation measures for potential adverse effects on kittiwakes from the Flamborough and Filey Coast SPA (FFC SPA). Whilst we appreciate the substantial additional information presented by the Applicant and the constructive discussions held, the RSPB considers there remain significant uncertainties with regards to the proposed compensation package, which remains experimental in nature. The number of further agreements, consents and permissions that will be required to deliver the proposed compensation measures post-consent remains profoundly worrying, as there is no certainty that those can be agreed or granted. Consistent with our views expressed on other offshore wind farm compensation proposals, it is therefore not clear that sufficient information is available to be confident ecologically, financially¹ nor legally that all necessary compensation measures will be secured in order to maintain the overall coherence of the Natura 2000 network.
- 1.2 Notwithstanding our concerns, should the Secretary of State decide to approve the Development Consent Order including the proposed approach to delivery and maintenance of the compensatory measures put forward by the Applicant, the RSPB makes the following recommendations for changes to the Applicant's proposals.

Recommendations for changes to the draft Development Consent Order conditions

The RSPB strongly recommends that the Secretary of State adopts the RSPB's proposed changes to the draft DCO conditions set out in Table 3, including but not confined to the following:

- To address uncertainties associated with artificial nesting structures as a compensation measure;

¹ Although we do note within the Funding Statement (Response to the Secretary of State's Minded to Approve Letter Appendix 4: Compensation Measures Funding Statement)

[https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010080/EN010080-003242-HOW03_30Sep_Appendix_4_Funding%20Statement%20\(06543689_A\).pdf](https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010080/EN010080-003242-HOW03_30Sep_Appendix_4_Funding%20Statement%20(06543689_A).pdf) provided the Applicant states "This Funding Statement has been submitted to demonstrate that the costs associated with implementing the compensation measure will utilise the same financing arrangements in place to finance the construction of the Hornsea Three windfarm." And therefore there may be financial certainty for provision of the proposed compensation measures since investment of the application will include these measures and therefore one will not happen without the other. Please note we do not intend to comment further on this aspect, just to flag that in accordance with several pieces of key guidance (as helpfully listed on page 1 of the Applicant's Funding Statement), financial feasibility must be considered.

- To require the artificial nesting structures to be constructed at least four years prior to first operation of any wind turbine generator comprised in Work No. 1;
- To explicitly require consultation on the Kittiwake Implementation and Monitoring Plan with the Offshore Ornithology Engagement Group;
- To include key elements in the Kittiwake Implementation and Monitoring Plan that have been omitted including:
 - An implementation timetable in relation to the first impact of the project and the ongoing time needed for the compensation measure to be in place beyond the wind farm lifetime to allow for recovery of the Flamborough and Filey Coast Special Protection Area;
 - detailed compensation objectives, success criteria, reporting and review periods, the nature, role and governance of the proposed Offshore Ornithology Engagement Group, the length of time the compensation measures should be in place beyond the lifetime of the wind farm, protocols to agree remediation of compensation and any further compensation measure.
- To require robust monitoring and review linked to implementation of remediation measures and, if monitoring shows the compensation is failing, alternative compensation
- To set out the consultation requirements in relation to draft conditions 2(9) and 2(10).

Other recommendations

Implementation of compensation in relation to timing of impacts

We recommend the Secretary of State seeks clarification on when the Applicant intends the offshore windfarm to become partly as opposed to fully operational in order to understand the proposed timing of compensation measures delivery in relation to the impacts.

Length of time compensation required

The RSPB strongly recommends that the compensation be explicitly required by the Secretary of State to be provided beyond the lifetime of the wind farm for the reasons set out in its response, including until such time as it is predicted the Flamborough and Filey Coast Special Protection Area will have recovered from the scheme's impacts. The Applicant's cost estimates will need to be revised accordingly.

Scale of compensation

Due to the natural variability in demographic rates, the RSPB recommends that, at this time, the Applicant's estimated population required to recruit 73 birds per annum is treated as indicative until more detailed site-specific information is available. This should be presented in the Kittiwake Implementation and Monitoring Plan.

Addressing uncertainties associated with compensation location, scale, likelihood of colonisation and timescale to achieve the required population levels

We recommend that a meta-population analysis is carried out to clarify dynamics between potential purpose-built artificial nest sites and SPA and other colony populations to elucidate the feasibility of the establishment of the colonies. Furthermore, it would investigate the consequences of such colony establishment on the populations of other colonies, in particular that of the Flamborough and Filey Coast Special Protection Area.

Site selection criteria

The RSPB strongly recommends the detailed site selection criteria be required to include collision risk with offshore wind farms and that this is factored into the detailed assessment of the population needed to recruit the required number of breeding adults into the Eastern Atlantic population.

Compensation design

The RSPB recommends additional design issues be addressed in the Kittiwake Implementation and Monitoring Plan.

Consent for platforms and landowner agreements, use of compulsory purchase powers

We strongly recommend that the Secretary of State require that landowner agreements need to comply with the ecological requirements set out in Kittiwake Implementation and Monitoring Plan and should be drafted in a way that does not undermine successful delivery of compensation measures.

We recommend the Secretary of State should require that the Applicant sets out in the Kittiwake Implementation and Monitoring Plan the cut-off point for securing landowner agreement before the Applicant deploys its compulsory purchase powers to acquire land required.

Monitoring and review

We recommend the monitoring programme be expanded to include the RSPB's proposals as part of a robust monitoring and review programme to be set out in the Kittiwake Implementation and Monitoring Plan with agreed objectives for each review period. Among other things, it should be designed to demonstrate whether the measure has provided the "additionality" required to succeed as compensation.

Adaptive management (remediation)

We recommend that the initial list of adaptive management (remediation) measures is refined to include only those where there is a high level of confidence that benefit would be provided.

2. Introduction

Overview

- 2.1 The RSPB is grateful for the opportunity to make submissions in response to the Secretary of State for BEIS request for comments on Orsted Hornsea Project Three's ("the Applicant") reply to the Secretary of State's "minded to approve" letter of 1 July 2020. In this, the Secretary of State:
- Confirmed he was unable to rule out an adverse effect on the integrity of the kittiwake feature of the Flamborough and Filey Coast Special Protection Area ("FFC SPA") arising from Hornsea Three in-combination with other plans and projects. This arose from the project's predicted potential collision mortality contribution of 65-73 kittiwakes killed per annum over the lifetime of the project;
 - Found that there are no alternative solutions to the development and that there are imperative reasons of overriding public interest for the development; but
 - That, at that stage, the necessary compensation measures had not been proposed to ensure the overall coherence of Natura 2000 sites for kittiwakes.
- 2.2 The Secretary of State requested the Applicant to provide a detailed compensation plan which gives confidence that any compensatory measures *"will be sufficient to offset the impact to the kittiwake feature of the Flamborough and Filey Coast SPA and thereby maintain the coherence of the network of SPAs designated, at least in part, for kittiwake"*.
- 2.3 The Applicant has now responded to the Secretary of State's "minded to approve" letter, setting out its revised compensation proposals in respect of kittiwakes. These submissions follow consultation with stakeholders, including the RSPB. We welcome the Applicant's decision not to pursue island restoration as a compensation measure for this species, as there was no evidence it would be effective.
- 2.4 The RSPB welcomes the new information provided by the Applicant and is grateful for the opportunity to contribute to two workshops held during August 2020.
- 2.5 This submission sets out the RSPB's response to those revised proposals. Please note that the RSPB has not had time to respond to the full range of information provided by the Applicant and have concentrated our response on the most substantive points.

2.6 It should be read alongside our comments set out in the following documents:

- Hornsea Project Three: RSPB written submission (14 February 2020);²
- Hornsea Project Three and Norfolk Vanguard: RSPB written submission (22 April 2020)³:
with particular reference to the following:
 - Table 5: Criteria for designing compensatory measures (including the RSPB's additional commentary);
 - Paragraph 209: setting out the detailed work required to assess options to determine if the compensation measure is the most appropriate and has a reasonable guarantee of success;
 - Kittiwakes, Flamborough and Filey Coast SPA:
 - Table 6: summary of the conclusions on potential kittiwake compensation measures considered by Hornsea Three and Norfolk Vanguard with the RSPB's comments;
 - Table 8: the RSPB's review of the Norfolk Vanguard kittiwake compensation measures: artificial nesting structure;
 - Annex A (kittiwakes) short summary of the main breeding ecology requirements for a successful colony.

2.7 As we state in section 1 above, notwithstanding our concerns, should the Secretary of State decide to approve the Development Consent Order including the proposed approach to delivery and maintenance of the compensatory measures put forward by the Applicant, the RSPB has set out its comments, concerns and recommendations in this and sections 3 and 4 to identify issues that would need to be resolved in the grant of any consent.

Summary of key compensation requirements

2.8 EC guidance⁴ sets out criteria for designing compensatory measures. The RSPB broadly agrees with the Applicant's summary of these criteria at paragraph 3.1 of Appendix 2 Kittiwake

² [Hornsea Project Three: RSPB written submission \(14 February 2020\): Response to the Secretary of State's September Consultation](#)

³ [Hornsea Project Three and Norfolk Vanguard: RSPB written submission \(22 April 2020\): RSPB response to the Secretary of State's Consultation](#)

⁴ 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.

Compensation Plan. Further detail with RSPB commentary can be found in the RSPB's April 2020 submission at Table 5 and paragraph 180 (the latter on the Defra guidance) including:⁵

- The need for consents for the compensation to be secured before consents are given to the proposal to commence (Defra guidance paragraph 35);
- Decisions on the location of compensation need to more fully taken account of pressures and impacts on the achievability of the proposed compensation measures e.g. prey availability, collision risk;
- No irreversible damage to the Natura 2000 sites must occur before the compensation is in place. This relates directly to the RSPB's concerns on the timing and timescale of the proposed compensation measures (see below).

What needs to be compensated for

2.9 Based on the Secretary of State's conclusions in his "minded to approve" letter, the Applicant has set out what needs to be compensated for in several places. At paragraph 6.6 of Appendix 1 Compensatory Measures it describes the requirement as follows:

"...over the life time of the project, produce additional breeding adult birds into the Eastern Atlantic regional kittiwake population to offset as a minimum the potential annual collision mortality of 65-73 kittiwakes from Hornsea Project Three."

2.10 This is refined at paragraph 3.10 of Appendix 2 Kittiwake Compensation Plan:

"For the compensation to be effective it should deliver 73 adult (breeding age) kittiwake into the regional (East Atlantic) population per annum..."

2.11 The RSPB supports the thrust of this approach – to ensure any compensation measure produces sufficient additional adult breeding birds into the regional (East Atlantic) population each year in order to offset as a minimum the potential collision impacts of Hornsea Project Three on kittiwakes from the FFC SPA. The Applicant has based its approach on 73 breeding adults, the upper part of its predicted range using Natural England's approach to collision risk modelling.

2.12 However, before setting out more detailed comments in section 3 below, the RSPB sets out three major concerns regarding the approach taken by the Applicant relating to the following:

- The size of the compensation population required;
- The length of time the compensation is required;

⁵ [Hornsea Project Three and Norfolk Vanguard: RSPB written submission \(22 April 2020\): RSPB response to the Secretary of State's Consultation](#)

- The inherent uncertainty as to whether artificial nesting structures will succeed.

The size of the compensation population required

- 2.13 The Applicant has carried out a modelling exercise to set a population increase required to offset the predicted impact of Hornsea Three on an annual basis. Their calculation suggests that 404-467 additional pairs are required to compensate for the predicted 73 birds lost annually. While the calculation itself is reasonable, it does not take into account the considerable variability in the demographic rates used to generate these values, notwithstanding the considerable uncertainty inherent in the calculation of mortality arising from the project (c.f. 65-73 birds versus Natural England's request to base the calculation on 104 bird lost per annum as the worst case scenario)⁶. The only demographic rate which is presented with any degree of variability is the natal dispersal, which is given as either 0.770 or 0.890. There is likely to be considerable variability in all the rates, depending on local, regional, abiotic and biotic conditions (see also comments on productivity levels in paragraph 3.12 below). This creates a spurious sense of precision in the estimate. In particular, there remain unanswered questions as to the rate of recruitment into the new colony in the initial years. As such, the values for the number of pairs needed to offset the predicted impacts must be viewed with a large degree of caution and considered only as indicative of the broad scale of population increase required.
- 2.14 **Due to the natural variability in demographic rates, the RSPB recommends that, at this time, the Applicant's estimated population required to recruit 73 birds per annum is treated as indicative until more detailed site-specific information is available. This should be presented in the Kittiwake Implementation and Monitoring Plan (KIMP).**

The length of time the compensation is required

- 2.15 The Applicant sets a cut-off point for provision of compensation measures at the end of life of the development i.e. 30 years. For example, the proposed DCO conditions effectively state in several places that the proposed compensation measure (artificial nesting structures) will be maintained in place and retained "...during the operation..." of the wind farm.

⁶ See page 2 of Natural England letter to Applicant dated 24 September 2020: Calculation of nest provision contained in [Appendix 5: Record of Consultation](#). Natural England state that it cannot be assumed that there will be no impact above 73 kittiwake per annum, based on the impact range set out in the SoS Habitats Regulations Assessment report.

2.16 **The RSPB strongly disagrees with this approach and strongly recommends that the compensation be explicitly required by the Secretary of State to be provided beyond the lifetime of the wind farm. The Applicant's cost estimates will need to be revised accordingly.**

2.17 There are two key factors that require the compensation to be provided beyond the lifetime of the wind farm:

- Time lag in the colony reaching the necessary population size meaning there is likely to be a significant delay before the required population is reached (based on the Applicant's own evidence this could be c.15-20 years, despite a separate assertion that it will produce the required population within 5 years, see paragraphs 3.19-3.29 below);
- The time taken for the kittiwake population at FFC SPA to recover from the accumulated annual losses of breeding adults over 30 years once the wind farm has ceased operation. The development's impact on the FFC SPA will go substantially beyond the lifetime of the development.

2.18 The RSPB set out its concern regarding recovery of the FFC SPA population in the "Long-term implementation" section of Tables 7 and 8 of its April 2020 submission:⁷

"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."

2.19 Unless these issues are acknowledged and addressed, the RSPB is seriously concerned that that compensation will fail to meet its objective stated at paragraph 3.10 of the Kittiwake Compensation Plan to "*deliver 73 adult (breeding age) kittiwake into the regional (East Atlantic) population per annum*".

2.20 **We strongly recommend the compensation measures be required to be in place until such time as it is predicted the FFC SPA will have recovered from the scheme's impacts (see sections 3 and 4 below).**

The inherent uncertainty as to whether artificial nesting structures will succeed

2.21 The RSPB recognises that the provision of artificial nesting structures is the main option immediately available as a compensation measure for breeding kittiwakes impacted by Hornsea Project Three. However, despite the Applicant's confident statements that the compensation

⁷ [Hornsea Project Three and Norfolk Vanguard: RSPB written submission \(22 April 2020\): RSPB response to the Secretary of State's Consultation](#)

measures will achieve the objectives, it is readily apparent that substantial uncertainties remain in respect of key success criteria regarding artificial nesting structures e.g.:

- Whether the selected location will have access to a good food supply;
- Whether the artificial nesting structures will be colonised;
- In relation to the impacts of the development on FFC SPA:
 - When the artificial nesting structures will be in place in relation to the first impacts compared to the impacts arising from full operation of the wind farm;
 - When the target population will be reached in relation to the impacts of the development;
- Whether and over what timescale they will achieve the target population and recruitment of breeding adults into the Eastern Atlantic population;
- Whether the selected location will be exposed to additional pressures e.g. collision risk from current and planned offshore wind farms.

2.22 For these reasons, **we recommend amendments to the proposed DCO conditions to help address uncertainties associated with artificial nesting structures as a compensation measure** (see section 4).

3. The RSPB's comments on the Applicant's revised compensation package for adverse impacts on kittiwakes from the Flamborough and Filey Coast SPA: artificial nesting structures

Introduction

3.1 This section provides a résumé of the RSPB's assessment of the Applicant's proposed compensation measures against the criteria set out in the EC guidance *Managing Natura 2000*.⁸

3.2 Below, we summarise our position against each criterion based on material provided by the Applicant and also provide an overall conclusion on the extent to which we think the criteria have been met. Our comments below complement our assessment of whether the requirement to secure the compensation measures has been met, which we set out in Section 4 below.

- A brief summary of the Hornsea Three revised compensation proposal for kittiwakes;
- The RSPB's summary analysis of the compensation proposals;
- Additional commentary on specific aspects of the compensation proposals including:
 - Potential southern North Sea locations: productivity levels and population declines (Ecological Evidence);
 - Site selection criteria, including BRAG criteria (Securement document);
 - Identification of coastal areas for deploying artificial nest sites (Ecological Evidence);
 - The post-consent timeline (Kittiwake Compensation Plan);
 - Comments on design of artificial nesting structures (Ecological Evidence);
 - Measures to enhance chances of initial colonisation (Ecological Evidence);
 - Monitoring of compensation measures (Ecological Evidence);
 - Adaptive Management Measures (Kittiwake Compensation Plan);
- A brief note on Hornsea Three's supporting evidence for kittiwake prey resource.

Brief summary of the Hornsea Three revised compensation proposal for kittiwakes

3.3 The main details of the Applicant's compensation proposal for kittiwakes are set out in its Kittiwake Compensation Plan document and can be summarised as follows:

- Establish and maintain four artificial nesting structures at two broad locations on the east coast of England (two structures to be located at each broad location) to reduce risk.

⁸ 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.

- The artificial nesting structures should support sufficient population to deliver 73 adult (breeding age) kittiwake into the regional (East Atlantic) population per annum.
- The Applicant has estimated this would require the nesting structures to support a population of between 404-467 breeding pairs. Each structure would have sufficient space to support this number of breeding pairs. The Applicant considers provision of four nesting structures represents over-compensation.
- The indicative timeline suggests the nesting structures would be constructed and in place 4-5 years before the windfarm becomes fully operational.
- The nesting structures would only be required to be in place for the duration of operation of the generation station (wind farm).
- Two broad locations are identified to secure (consents, landowner agreements etc) sites for the nesting structures. No sites have yet been secured:
 - North East Zone: Tees Estuary to south of Seaham coastline;
 - East Anglia Zone: Lowestoft to Sizewell.
- Establish an Offshore Ornithology Engagement Group (OOEG) to be chaired and convened by the Applicant. Membership would include: relevant Statutory Nature Conservation Bodies, the RSPB and any delivery partner(s). Terms of Reference would be agreed between the parties. The OOEG would be consulted on the proposed Kittiwake Implementation and Monitoring Plan (KIMP). The OOEG would help define success criteria to be included in the KIMP.
- The KIMP would set out, among other things:
 - Detailed designs for the artificial nesting structures;
 - An implementation timetable;
 - Proposals for:
 - Monitoring;
 - adaptive management;
 - reporting on effectiveness of the nest structures;
 - maintenance of the nest structures.
- The KIMP would be submitted to the Secretary of State for approval no later than 12 months prior to commencement of the authorised project.
- Land to host the nesting structures would be secured by voluntary agreement by preference, but the Applicant reserves the right to exercise its compulsory purchase powers if necessary.

3.4 In addition, the Applicant's Funding Statement⁹ includes a commitment to fund the works associated with development of the compensation measures up to £2 million. The RSPB very much welcomes this commitment.

3.5 We welcome the focus on onshore provision and rejection of offshore artificial nesting structures for the reasons set out in our 22 April 2020 submission in respect of Norfolk Vanguard's proposals.

The RSPB's summary analysis of the proposed compensation measures for kittiwake from the Flamborough and Filey Coast SPA

3.6 We set out in Table 1 below our summary view of the Applicant's proposed compensation measures for impacts on kittiwakes from the Flamborough and Filey Coast SPA against the criteria set out in the EC guidance *Managing Natura 2000*.

3.7 The RSPB very much welcomes the additional information provided by the Applicant in the key documents:

- Appendix 1: Compensatory Measures;¹⁰
- Appendix 2: Kittiwake Compensation Plan;¹¹
 - Annex 1: Outline Implementation and Monitoring Plan;¹²
 - Annex 2: Nest provisioning Ecological Evidence;¹³
 - Annex 3: Site selection and pathway to securement;¹⁴
- Appendix 3: Supporting Evidence for kittiwake prey resources;¹⁵

⁹ The Applicant's Response to the Secretary of State's Minded to Approve Letter Appendix 4: Compensation Measures Funding Statement, [https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010080/EN010080-003242-HOW03_30Sep_Appendix_4_Funding%20Statement%20\(06543689_A\).pdf](https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010080/EN010080-003242-HOW03_30Sep_Appendix_4_Funding%20Statement%20(06543689_A).pdf)

¹⁰ [https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010080/EN010080-003237-HOW03_30Sep_Appendix%201%20Compensatory%20Measures%20\(06543712_A\).pdf](https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010080/EN010080-003237-HOW03_30Sep_Appendix%201%20Compensatory%20Measures%20(06543712_A).pdf)

¹¹ [https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010080/EN010080-003246-HOW03-30Sep_Appendix%202%20Kittiwake%20Compensation%20Plan%20\(06543754_A\).pdf](https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010080/EN010080-003246-HOW03-30Sep_Appendix%202%20Kittiwake%20Compensation%20Plan%20(06543754_A).pdf)

¹² [https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010080/EN010080-003240-HOW03_30Sep_Appendix_2_Annex%201%20Outline%20KIMP%20\(06543759_A\).pdf](https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010080/EN010080-003240-HOW03_30Sep_Appendix_2_Annex%201%20Outline%20KIMP%20(06543759_A).pdf)

¹³ [https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010080/EN010080-003241-HOW03_30Sep_Appendix_2_Annex_2%20Ecological%20Evidence%20\(06543000_A\)%20combined%20\(06543760_A\).pdf](https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010080/EN010080-003241-HOW03_30Sep_Appendix_2_Annex_2%20Ecological%20Evidence%20(06543000_A)%20combined%20(06543760_A).pdf)

¹⁴ [https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010080/EN010080-003238-HOW03_30Sep_Appendix%202_Annex%203%20Site%20Selection%20and%20Pathway%20to%20Securement%20\(06543753_A\).pdf](https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010080/EN010080-003238-HOW03_30Sep_Appendix%202_Annex%203%20Site%20Selection%20and%20Pathway%20to%20Securement%20(06543753_A).pdf)

¹⁵ <https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010080/EN010080-003239->

- Appendix 4: Funding Statement.¹⁶

3.8 Notwithstanding the additional information and the Applicant's positive approach and tone, the RSPB notes there remains considerable uncertainty over key matters that would be able to provide a reasonable guarantee of success in respect of the use of artificial nesting structures as a compensation measure. We set these out below. For these and the detailed reasons set out in the rest of this document, we consider the proposed measures must be considered experimental and unlikely to demonstrate their level of effectiveness for at least 10 years. For this reason, we caution against the suggestion at paragraph 5.7 in *Appendix 1 Compensatory Measures* that there might be the opportunity to share the benefits with other offshore wind farm projects i.e. sell kittiwake credits. This appears unlikely and certainly not feasible for Round 3, Project Extension and Round 4 projects. Further work with all stakeholders, led by BEIS, is required to explore whether a more strategic approach to the provision of compensation measures for in-combination impacts is possible and for which Natura 2000 sites/feature combinations.

3.9 The matters referred to above include:

- **Design:** the Applicant recognises that the nature of a successful physical design for a new artificial nesting structure is unclear and details of the proposed design are currently absent. including aspect, height above sea level, shelter from sun/prevaling wind, predators. At least three of the five artificial nesting structures described by the Applicant as successful (Table 3.2, Ecological Evidence) exhibit signs of partial or complete failure e.g. Lowestoft wall (abandoned), Tyne kittiwake tower (not fully occupied, issues with predation). See further comments below;
- **Location:** we acknowledge and support the decision to chose two different locations to guard against risk of failure, given the inherent uncertainties in this measure (see section 2 above). However, while two broad zones have been identified for nesting structures, the precise location of the compensation measures remains unknown. This is a fundamental issue that has not yet been resolved and which, despite the additional information provided, lacks critical analysis for each location e.g. on the availability of an adequate food

[HOW03_30Sep_Appendix%203%20Supporting%20Evidence%20for%20Kittiwake%20Prey%20Resource%20\(06543668_A\).pdf](#)

¹⁶ [https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010080/EN010080-003242-HOW03_30Sep_Appendix_4_Funding%20Statement%20\(06543689_A\).pdf](https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010080/EN010080-003242-HOW03_30Sep_Appendix_4_Funding%20Statement%20(06543689_A).pdf)

supply and impacts of additional threats such as collision risk from current and planned wind farms;

- **Scale of compensation required:** in section 2 above we set out why, despite the additional information provided, we consider the calculations presented to estimate the colony size that will deliver c.73 breeding adult kittiwakes into the regional population each year are inadequate and that further work is required (see also Table 1 (Extent) below). The currently presented methodology fails to account fully for the variation in the known population parameters in the evidence base, as well as the timescale over which that population level would be required to be maintained beyond the lifetime of the development;
- **Likelihood of colonisation:** despite the confident statements made by the Applicant, this remains a significant area of uncertainty. Even if located adjacent to a currently successful colony, it is not clear whether any colonisation would simply be of birds from an existing colony (by encouraging a shift in local distribution) rather than adding additional birds into the overall breeding population. For example, Hartlepool is identified as part of the Tees coastline preferred area because it is considered a successful colony. However, Seaham, just 15 miles along the coastline, is rejected because of unknown limiting factors such as prey availability. No explanation is given as to why prey availability is not a problem for the Hartlepool colony but might be for the Seaham colony, which is well within the 100km radius used by the Applicant as part of its search criteria;
- **Timescale to achieve the required population levels:** in section 2 above, we set out why we consider the evidence presented by the Applicant suggests that there will be a significant time lag between implementation and achievement of the Applicant's target population (assuming the measure proves successful). References to over-compensation in this context need to be treated with caution and speculative. Simply multiplying capacity in the nest structure to address uncertainty over the rate of population growth and the scale of population likely to be achieved risks giving a false level of confidence. Key questions that arise include whether the provision of more nest sites will increase the chances that birds will:
 - Colonise;
 - Breed successfully to enable the colony to grow and reach the required level;
 - Recruit the requisite numbers of breeding birds into the population; and
 - Achieve and maintain the required population level and other population parameters e.g. productivity, survival.

3.10 In order to address these uncertainties, **we recommend that a meta-population analysis is carried out to clarify dynamics between potential purpose-built artificial nest sites and SPA and other colony populations.** Due to immigration from other colonies being required for recruitment into the artificial colonies, conventional population analysis, which are based on closed populations are not suitable. A method for the theoretical quantification of connectivity between colonies has been described by Miller (2020)¹⁷ and Miller *et al* (2020)¹⁸ for the Shetland meta-population of kittiwake, and a similar method for a regional meta-population of East Atlantic would elucidate the feasibility of the establishment of the colonies. Furthermore, it would investigate the consequences of such colony establishment on the populations of other colonies, in particular that of the FFC SPA.

Table 1: Review of proposed measures and appropriateness as a compensation measure for impacts on kittiwakes from the Flamborough and Filey Coast SPA

EC criteria/additional consideration	RSPB comment
Additionality	<p>If successful, the measure would be additional to other measures already required under Article 6, as it is not currently a necessary conservation measure. However, the RSPB's comments from its April 2020 submission remain (in respect of Norfolk Vanguard's equivalent proposals) and apply equally here, in particular the challenge in any onshore or offshore location to securing a sustainable food supply and avoiding vulnerability to collision risk.</p> <p>We support the framing of the compensation objective as one of recruiting breeding adult birds in to the regional (East Atlantic) population. This avoids the temptation to focus on providing compensation measures that benefit the adversely affected SPA. That has been the traditional approach in respect of damage to estuarine European sites. However, in this particular case we consider it would be flawed for the following reasons:</p> <ul style="list-style-type: none"> • The Flamborough and Filey Coast SPA kittiwake population has undergone severe decline and correctly has a restore objective. The scale of that loss means it will be extremely difficult to demonstrate that the compensation measure has increased the numbers of adult kittiwakes recruited into the SPA. Therefore, it will not be possible to demonstrate the additionality of the compensation measure; • In the absence of the necessary site management measures to secure adequate food supply and reduce collision risk as per Natural England's site conservation objectives, any such birds

¹⁷ Miller, J.A.O. (2020) *Regulation and risk: developing models to assess the dynamism of seabird populations and their risk from anthropogenic mortality*. PhD thesis, University of Glasgow

¹⁸ Miller, J., Furness, R., Trinder, M & Matthiopoulos, J. 2020. - Estimating connectivity and vulnerability in a seabird metapopulation, Presentation to MASTS conference, 7th October 2020.

EC criteria/additional consideration	RSPB comment
	<p>recruited into the SPA would themselves be vulnerable to the same pressures and risks. Therefore, until such time as the Government has secured those site management measures, there must be questions over the sustainability of this as an objective.</p> <p>For the compensation to be effective, it needs an appropriate colony size (based on agreed calculations) that will deliver the agreed number of breeding adult kittiwakes into the regional population each year. Working out the appropriate colony size requires careful assessment of likely productivity and adult survival of birds reared at the new colony. This would allow the success of any new colony to be measured in its own right.</p> <p>In respect of the possibility the Applicant chooses a location for an artificial nesting structure at Lowestoft, we draw the Secretary of State's attention to the situation at Sizewell Rigs on the Suffolk coast. This man-made structure is a County Wildlife Site and currently hosts a breeding kittiwake population. The structure is due to be removed by 2023 as part of the Sizewell A decommissioning. It is the RSPB's understanding that under the decommissioning licence issued in 2006, the operator (Magnox Limited) has agreed to provide additional nesting sites at the Lowestoft colony. Notwithstanding our concerns over the evidence base on the installation of such new structures, we note this long-standing commitment and that it complicates matters in respect of demonstrating additionality at this location.</p>
Targeted	<p>The measure is targeted at breeding kittiwakes.</p> <p>However, the two key difficulties referred to above and the ongoing uncertainties elsewhere in this submission highlight weaknesses in respect of whether the measure addresses fully the ecological functions and processes required for successful breeding.</p>
Effective	<p>Given the ongoing uncertainties in this measure acknowledged by the Applicant, the RSPB continues to consider the measure must be regarded as experimental at this time.</p> <p>Based on the current evidence base, we cannot be confident that the provision of artificial nesting structures would be effective and able to demonstrate the necessary additionality.</p>
Technical feasibility	<p>The RSPB accepts that construction of an artificial nesting structure per se is likely to be technically feasible. However, the Applicant has acknowledged ongoing uncertainties as to what would comprise a successful artificial nesting structure.</p> <p>Therefore, for the reasons set out elsewhere in this table and submission, we consider there remain serious doubts as to the</p>

EC criteria/additional consideration	RSPB comment
	<p>scientific evidence that such a structure would have a reasonable guarantee of success on its own terms.</p> <p>Demonstrating (as opposed to assuming) access to a good, reliable food supply and avoidance of current and planned offshore wind farms remain key issues that have not been fully addressed.</p>
Extent	<p>As noted above, we acknowledge the additional information presented by the Applicant to calculate the population levels required to compensate for the damage caused by Hornsea Project Three to the Flamborough and Filey Coast SPA. We are concerned about some of the underlying assumptions made by the Applicant in making its calculations, for example:</p> <ul style="list-style-type: none"> • The Applicant uses the productivity figure of 0.8 fledged chicks per nest as the number required to maintain a stable population. This figure is highly disputed and one of the lowest in the literature, which is not a precautionary approach in this context. The RSPB suggests that a higher figure is used (e.g. 1.5 chicks per nest (Cook & Robinson 2010)); • Colonisation is not certain, and if colonisation occurs it would then take several years for a new structure to be fully occupied. If colonised by new recruits, it is likely that productivity would be lower in the first few years after colonisation than in later years. Therefore, it would be many years before the projected productivity could be achieved from any new structure. The lower productivity in the early years must be accounted for; • There is also a need to account for additional mortality due to cumulative collision risk in these calculations of the proportion of fledglings that will become adults (as the demographic rates that these calculations are currently based on were largely gathered in the absence of significant numbers of wind turbines); • A more appropriate approach might be to calculate the number of fledglings required for a stable population (1.5 according to Cook & Robinson 2010; 0.8 according to Coulson 2017 (the Applicant's chosen figure); 1.5 is the precautionary estimate of the two), and count any fledglings over and above this figure as surplus fledglings available to the wider metapopulation of which the Flamborough and Filey Coast SPA forms a part. <p>Therefore, at this point we cannot agree with the calculations as presented. Agreement needs to be reached on how these calculations are carried out. This must build in the potential variation on the extent of compensation required, depending on which population parameters are used and describe the level of confidence in the results of those calculations.</p>
Location	<p>As set out above, while two broad zones have been identified for nesting structures, the precise location of the compensation measures</p>

EC criteria/additional consideration	RSPB comment
	<p>remains unknown. This is a fundamental issue that has not yet been resolved and which, despite the additional information provided, lacks critical analysis for each location, preventing any ability to evaluate its likely success.</p>
Timing	<p>The RSPB welcomes the Applicant's commitment to ensure the artificial nest site(s) be constructed and available for use prior to first operation of any wind turbine generator (condition 2(5)).</p> <p>This is welcome but insufficient in terms of minimising impacts and the risk of time lags in the compensation functioning properly.</p> <p>There are two issues: lack of clarity on the timeline in relation to first impact and the inherent experimental nature of the compensation.</p> <p>With regard the timeline, we note below in our detailed comments that the indicative timeline suggests the nesting structures will be provided c.4 years before <u>full operation</u> of the wind farm. This is not the same as c.4 years before the point of first impact i.e. operation of the first wind turbine generator.</p> <p>Therefore, we have recommended that clause 2(5) be reworded to ensure the artificial nest sites are constructed and available to use c.4 years before the operation of the first wind turbine generator to better align with the Applicant's claim to have built in more appropriate lead-in times in relation to impacts.</p> <p>With respect to the experimental nature of the measure, there is no guarantee of successful colonisation (especially in advance of the wind farm becoming operational) and thereby the cumulative adverse effect predicted may not be offset. There remains a high risk that the structure(s) could fail to attract any breeding kittiwakes, the anticipated capacity of any structure(s) may not be met, or it/they will not result in additional recruitment into the breeding population.</p>
Long-term implementation	<p>The RSPB's comments remain as stated in its 22 April 2020 submission, with particular reference to:</p> <ul style="list-style-type: none"> • The length of time the compensation measure 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. This can be determined by appropriate population modelling. This work has not yet been carried out, nor has it been set as a compensation objective; • Lack of a specific proposal means that it is not possible to evaluate whether site specific constraints exist that could undermine confidence in the long-term implementation of the proposal.

EC criteria/additional consideration	RSPB comment
SUMMARY and RECOMMENDATION	<p>The RSPB's summary position is that the ability to create successful artificial nesting structures for kittiwakes with a reasonable guarantee of success is unproven and would be experimental.</p> <p>Without prejudice to our position set out in section 2 above, we have recommended changes to the draft DCO conditions below to address our concerns.</p>

Additional commentary on specific aspects of the compensation proposals

- 3.11 In addition to our summary analysis presented above, we have additional comments on the following specific aspects of the compensation proposals.

Potential southern North Sea locations: productivity levels and population declines (Ecological Evidence)

- 3.12 Following Coulson (2017), the productivity required to maintain a stable population is given as to be 0.8 fledged chicks per pair per year. However, this value is highly disputed and contradicted by the Applicant's own evidence. In Table 4.2 the declining population at Coquet Island is shown to have an average 5-year productivity of 1.07, and in Table 4.2, several colonies have greater than 0.8 productivity over 10 years but are still in decline. Other population studies have found more chicks are required to maintain a stable population. Fredrickson *et al.*, 2004¹⁹ reported 1.17 chicks fledged was required to sustain the Isle of May population and Cook and Robinson 2010^[1] suggested a productivity around 1.5 was required for population stability. Both these studies used much more sophisticated modelling procedures than Coulson (2017). Considering our limited knowledge of some of the main parameters that require an accurate prediction (e.g. juvenile/immature/adult survival, and the spatial variability in these parameters), and the likely variability in these parameters, not only between colonies but annually within colonies, it is difficult to say which one is more accurate and a precautionary approach should be taken. This precaution is crucial given the likelihood that overall kittiwake productivity will drop further over the coming years due to diminishing food supplies.

¹⁹ Frederiksen, M., Wanless, S., Harris, M. P., Rothery, P., & Wilson, L. J. (2004). The role of industrial fisheries and oceanographic change in the decline of North Sea black-legged kittiwakes. *Journal of Applied Ecology*, 41(6), 1129-1139.

^[1] Cook, A.S.C.P. & Robinson, R.A. 2010. How representative is the current monitoring of breeding seabirds in the UK? BTO Research Report No. 573. BTO, Thetford, UK.

Site selection criteria, including BRAG criteria (Securement document)

3.13 We consider the Black/Red/Amber/Green (BRAG) criteria require tightening up in a number of places. If consent is granted, this should be a priority for the detailed site selection work. Specific issues which require attention include:

- Local prey availability (Green): the definitions should be clarified of what is meant by “stable or increasing productivity” as this could be from a low level. See comments immediately above on productivity levels;
- Nature conservation – designated and non-designated sites (Red): this should specifically include statutory designated sites for kittiwakes as there would be no additionality;
- Other infrastructure and development – offshore wind farms: this should include reference to any Project Extension or area selected for Round 4.

3.14 Our primary concern however is that the risk of birds colonising and fledging from the artificial nest structures colliding with current and planned offshore wind farms has not been treated as a significant criterion in comparison to others. While not as critical as ensuring a good food supply, it is a substantial risk that needs to be fully factored in, including in the assessment of the population size needed to recruit the required number of breeding adults into the Eastern Atlantic population. This is especially the case for the East Anglia Zone (Suffolk coast) where the density of current and planned wind farms is high, especially when the Project Extensions and Round 4 are factored in.

3.15 There will be a certain level of collision risk even if structures are placed away from windfarms (e.g. on the coast) due to birds foraging in or commuting through the area. However, the probability of an interaction and therefore the risk reduces by multiple magnitudes with distance and we therefore strongly advise against purpose-built artificial nesting structures within or in immediate proximity to the active or planned wind farms.

3.16 **The RSPB strongly recommends the detailed site selection criteria be required to include collision risk with offshore wind farms and that this is factored into the detailed assessment of the population needed to recruit the required number of breeding adults into the Eastern Atlantic population.**

Identification of coastal areas for deploying artificial nest sites (Ecological Evidence)

3.17 We agree with the proposed to establish nesting structures in two or more different areas to help ensure success in buffering against localized events.

3.18 More precision is required in defining what is “proximity” to existing colonies in decline or where nesting failure is generally occurring. This is critical to ensuring appropriate site selection. This points to the need for any post-consent monitoring of colonies in potential locations to encompass more than just the colonies in the immediate vicinity of the selected locations. This is illustrated by the case study of Hartlepool (preferred area) and Seaham (rejected) referred to above: Seaham is just 15 miles from Hartlepool but is not considered suitable due to unknown limiting factors such as prey availability. Understanding this slightly wider context may prove critical.

The post-consent timeline (Kittiwake Compensation Plan)

3.19 We have reviewed the indicative outline programme in Table 1.2 of the Kittiwake Compensation Plan. In general terms, we consider the outline programme is logically sequenced. However, we have a number of concerns which we set out below against the relevant activity/milestone and, where necessary, reflect these comments in our proposed amendments to the DCO conditions (see section 4). Our comments understandably do not take account of any impacts Government regulations and guidance on dealing with Covid-19 may have on the proposed actions.

Table 2: RSPB comments on Table 1.2, Kittiwake Compensation Plan: indicative outline programme comments

Year	What happens	RSPB Comment
2020 (Q4)	Consent granted	
2021		
2021 (Q1-2)	Consult on evidence gaps, nesting platforms design and locations	<p>Critical and intensive phase, extends into Q3 and Q4 to finalise KIMP.</p> <p>See RSPB recommendations for additional work required during this phase e.g. metapopulation analysis</p> <p>There should be specific reference to monitoring package design and specification. This should be explicitly referenced as it will take time to design and agree for inclusion in KIMP.</p>

Year	What happens	RSPB Comment
2021 (Q2)	Preferred colony location monitoring	<p>This implies that the preferred locations will be agreed with the nascent OOEG in Q1 2021 (3 months).</p> <p>It is not clear how ambitious this timescale is based on the limited information available about the possible detailed locations being considered by the Applicant.</p>
2021 (Q3-4)	<p>Finalise nest design & location of compensation</p> <p>Planning application</p>	
2021 (Q4)	Submit KIMP to SoS for approval	A clearer indication should be given on when the Secretary of State's approval of the KIMP is expected.
2022		
2022 (Q1-2)	Final engineered solution for nesting structures	
2022 (Q2)	Preferred colony location monitoring	
2022 (Q3)	Consent for platforms and landowner agreement	<p>We strongly recommend that the Secretary of State require that landowner agreements need to comply with the ecological requirements set out in KIMP and should be drafted in a way that does not undermine successful delivery of compensation measures.</p> <p>We recommend the Secretary of State should require that the Applicant sets out in the KIMP the cut-off point for</p>

Year	What happens	RSPB Comment
		<p>securing landowner agreement before the Applicant deploys its CPO powers to acquire land required. This needs to be set out in the KIMP in order to increase the Secretary of State's confidence that compensation will be secured and implemented well in advance of first impacts occurring.</p> <p>We suggest that key questions for the Secretary of State to consider are the implications of any delays (in securing planning consent or CPO) for:</p> <ul style="list-style-type: none"> • Timing of construction of nesting platform in relation to impacts occurring; and thereby • decisions to delay operation of OWF until compensation is functioning on the required timescales.
2022 (Q3-4)	Construct nesting platforms	This is the earliest possible date. May be later if planning consents not obtained and/or CPO powers required.
2022 (Q4)	Commence (onshore) works (indicative)	
2023		
2023	Nest structure commissioned and "colonisation begins"	We consider colonisation in year 1 to be a major assumption and unlikely to occur.
2024 onwards		
2024 onwards	Monitor nest uptake and productivity	

Year	What happens	RSPB Comment
2028	Time by which 1 st chicks reach breeding age	<p>For reasons set out in detail elsewhere, we consider this to be a major assumption as it assumes birds colonise in years 1 and 2 and breed successfully.</p> <p>Evidence is that inexperienced breeders are not successful in first few years of breeding.</p> <p>Even if fully successful, the population at the colonies will not reach the required level for an unknown number of years.</p> <p>This creates a shortfall and timelag in reaching the required population levels and recruitment objective.</p>
2028	First full operational year of OWF	<p>4-5 years after compensation implemented.</p> <p>The clear implication here is that the wind farm will be partly operational in the years leading up to 2028, meaning the impacts of the scheme on FFC SPA kittiwakes will already be taking place.</p> <p>We recommend the Secretary of State seeks clarification on this point in order to understand the proposed timing of compensation measures delivery in relation to the impacts.</p>

3.20 We fully support the Applicant's efforts to provide a lead-in time before impacts associated with full operation of the windfarm occur. As stated in previous submissions, it is the RSPB's view that compensation measures should be fully functional at the time the potential adverse effects

are likely to occur in order to protect the overall coherence of the Natura 2000 network: this is in line with EC Guidance (see section 2 above). However, despite the Applicant's efforts, this will not be case here as confirmed by the indicative timeline.

3.21 First, there is no clarification that the wind farm will not be partly operational at the time the compensation measure is installed. Second, assuming successful first breeding by initial colonists, the first few breeding adult birds recruited into the regional population will be at the point the wind farm becomes fully operational i.e. is predicted to kill 65-73 breeding adult kittiwakes i.e. there will likely be only partial compensation at the point of full operation.

3.22 Based on the Applicant's own evidence review:

- The average number of pairs establishing a new colony is approximately 23 pairs. Even assuming this occurs at all four nesting sites, the resulting population will be only a quarter of the required size predicted by the Applicant;
- There is no certainty the proposed target population of 404-467 pairs will be achieved;
- The rate of growth of new colonies to reach their natural plateau can be somewhere between 15-20 years e.g. to reach 100 pairs, Coquet Island took c.15 years and North Shields c.20 years (see Figure 9.1, Ecological Evidence). Even assuming the Applicant's predictions in terms of the measure succeeding are correct, if this is repeated for the compensation measures it would be between half to two thirds of the way through the operation of the wind farm before the required population level is reached, with a corresponding delay in the recruitment in the required number of breeding adults.

3.23 Therefore, it is misleading for the Applicant to state at paragraph 3.10 of the Kittiwake Compensation Plan that it has:

"...factored in the necessary lead in time such that the compensatory measure will deliver the appropriate number of adult (breeding age) kittiwake into the regional population to offset the impact, thereby maintaining the coherence of the Natura 2000 network"

3.24 It is equally misleading for the Applicant to state at paragraph 8.12 of the Ecological Evidence that:

"It can also be seen that, once breeding has successfully commenced, the required additional population will be produced within approximately five years."

- 3.25 This implies by the first year of wind farm operation it will be reach the 404-467 pairs required to produce the 73 breeding adults required each year to compensate for the predicted losses. Based on the Applicant's own review of the scientific literature this will not occur.
- 3.26 At best and assuming the platforms are colonised in year 1 (of the compensation measures being implemented) and inexperienced birds breed successfully in their first couple of years, only a handful of breeding adults will enter the regional population at the point the wind farm becomes operational and is predicted to kill 65-73 adult breeding birds each year for 30 years.
- 3.27 As a consequence, this means that the for an unspecified number of years (likely at least 10 years), the compensation objective (see section 2 above) will not be met. This is because there will be a shortfall in recruitment of breeding adults into the regional population against the stated objective until the required breeding population level is met, if indeed it is met.
- 3.28 This underlines the experimental nature of the compensation and the inherent uncertainty it will succeed.
- 3.29 **Therefore, we strongly recommend that the DCO conditions require robust monitoring and review linked to implementation of remediation measures and, if monitoring shows the compensation is failing, alternative compensation.**

Comments on design of artificial nesting structures (Ecological Evidence)

- 3.30 In addition to the design elements identified by the Applicant, based on experience of work on the Tyne colonies in urban settings, **the RSPB recommends the following design issues be addressed in the KIMP:**
- Dealing with faecal deposition – avoid location and design where this likely to give rise to community objections;
 - Proximity to noise sources as well as the colony as a source of noise pollution to urban residents;
 - Proximity of structure to flight path of existing colonies to increase chances of it being located;
 - Accessibility for monitoring must be designed to avoid disturbance to nesting birds

- Public awareness to develop community support for and understanding of the compensation measure.

3.31 In addition, the RSPB reinforces the following design issues mentioned by the Applicant:

- Full consideration of maintenance requirements of the structure and the environment in which it will be located;
- We agree with the proximity to water. This can include a clear access route to water;
- Minimising predation risk should include avoiding locating the structure near known or likely predator perches e.g. trees. In this context, we caution against over-reliance on the use of spikes to deter large gulls from nesting in urban settings as these have not always proven successful.

Measures to enhance chances of initial colonisation (Ecological Evidence)

3.32 In section 5 of the Ecological Evidence report, the Applicant outlines three possible measures to enhance chances of initial colonisation: playback, decoys and “fake” nests. Based on the Applicant’s own review of the evidence, we consider there is no evidence any of these measures work and, in the case of decoys and “fake” nests, that the limited evidence points to them failing. Therefore, these measures cannot be relied upon to enhance chances of initial colonisation.

Monitoring of compensation measures (Ecological Evidence)

3.33 The Applicant has outlined a proposed monitoring package (section 11, Ecological Evidence document) comprising:

- Whole colony counts;
- Productivity monitoring using photography (to record nest sites) and weekly visits between May and August to record numbers of eggs and chicks present;
- Empirical testing of different design features used;
- Diet and adult survival using:
 - ringing studies to monitor survival/return rates to contribute to the Retrap Adult Survival study on kittiwakes coordinated by the British Trust for Ornithology;
 - analysis of diet based on samples taken from the colony.

3.34 The RSPB supports these proposals. In addition, a robust monitoring package must include the following:

- Regular checks of nest sites without disturbance should be carried out to record breeding progression (including chick survival) and adult changeover rates, from which trip durations and a proxy of chick provisioning rate can be calculated. A plan should be established to ensure egg-laying, hatching, fledging and possibly failure dates can be derived from the data as accurately as possible. Consideration of whether this can be carried out remotely should be integrated into any plans for artificial structures;
- As part of the ringing studies, an appropriate sample of birds should be ringed with a unique combination of colour-rings or darvic rings with alpha-numerical codes. For the colour rings, a re-sighting programme should be established. The facility to capture birds safely and with minimum disturbance should be integrated into the design of any artificial structure;
- A programme of biotelemetry should be established whereby birds are fitted with tags, under license. The specifics of these tags will depend on the species, but an aim should be to gather GPS locational data, behavioural data (via accelerometers) and flight altitude (via altimeters). The facility to capture birds safely and with minimum disturbance should be integrated into the design of any artificial structure;
- The design of a monitoring and research project to understand prey availability for each location selected. This should be explicitly linked to the proposed tracking work above to identify linkage between preferred foraging locations and prey availability. It should consider the implications of colonies demonstrating resource partitioning in relation to foraging locations. For example, RSPB research at the FFC SPA has demonstrated that birds from Filey are more likely to forage towards Dogger Bank than birds from Flamborough, which were also found to be foraging as far south as the area of the Norfolk offshore wind farm developments (Wischnewski *et al.* 2018²⁰).

3.35 **We recommend the monitoring programme be expanded to include the RSPB's proposals as part of a robust monitoring and review programme to be set out in the KIMP with agreed**

²⁰ Wischnewski, S., Fox, D.S., McCluskie, A. & Wright, L.J. 2018. Seabird tracking at the Flamborough & Filey Coast: Assessing the impacts of offshore wind turbines. Pilot Study 2017. RSPB Centre for Conservation Science Report to Ørsted. RSPB, Sandy, UK.

objectives for each review period. Among other things, it should be designed to demonstrate whether the measure has provided the “additionality” required to succeed as compensation.

Adaptive management measures (Kittiwake Compensation Plan)

- 3.36 Table 1.1 in section 3 of the Kittiwake Compensation Plan outlines additional adaptive management (remediation) measures that could, following monitoring and review processes, be considered by the OOEG with the aim of improving the effectiveness of the proposed compensatory measures.
- 3.37 We consider some of these should properly be considered detailed design issues e.g. designing out the risk of avian or mammalian predation, ensuring no unauthorised human access or human disturbance.
- 3.38 Others are, based on the Applicant’s own evidence, are not of any proven benefit e.g. decoys, playback, decoy nests.
- 3.39 The evidence on supplemental feeding relied upon by the Applicant is limited and based on short-term studies. As such, it should be treated with caution and not considered a reliable measure.
- 3.40 **We recommend that the initial list of adaptive management (remediation) measures is refined to include only those where there is a high level of confidence that benefit would be provided.**

A brief note on Hornsea Three’s supporting evidence for kittiwake prey resource

- 3.41 We agree with the overall conclusions of *Appendix 3: Supporting Evidence for kittiwake prey resources*. Specifically, that increasing prey availability can neither be secured nor delivered by the applicant, cannot be recommended as compensation under Article 6(4), and that a government-led approach to managing the sandeel fishery is the most feasible route to address kittiwake prey availability in the long-term. Furthermore, we welcome the applicant’s proposal to fund research (subject to DCO award) to inform a new science-led approach to the setting of catch limits that meets the prey requirements of kittiwakes. This is an area of considerable interest to the RSPB and we would welcome further dialogue on this matter with all interested parties. We note however that in the short-term this initiative will not address the shortcomings clearly evident in the current management of the fishery. Notwithstanding the political challenges (not least the as yet unresolved UK-EU trade negotiations) it is our view that in lieu of an effective ecosystem model to set-aside a proportion of sandeel biomass in ICES advice, UK governments should use the tools available to them as soon as possible to strengthen the

management of sandeel fishing in UK waters (noting in particular the new objectives and powers in the UK Fisheries Bill).

4. Summary of the RSPB's position regarding the approach to securing compensation, including the proposed DCO conditions

- 4.1 This section sets out the RSPB's general comments on the correct approach to securing compensation necessary to protect the overall coherence of the Natura 2000 network, as required under regulation 68 and regulation 36 of the terrestrial²¹ and offshore²² Habitats Regulations respectively. We then make specific comments on the draft DCO conditions relating to kittiwakes from the Flamborough and Filey Coast SPA. Finally, we draw some overall conclusions on how confident the Secretary of State can be that the necessary compensation measures have been secured.

The RSPB's general comments on the issue of securing compensation

- 4.2 As set out above in detail there are many different requirements that all need to be confirmed before, in our view, compensation proposals can be deemed acceptable. In summary, these are to ensure they are ecologically (including technically), financially²³ and legally feasible and secured. Whilst we appreciate the draft DCO conditions suggested (discussed in more detail below) including the clauses that construction cannot begin until all required details of the compensation are agreed and confirmed, we remain of the view that it is not appropriate to leave so much detail for post consent considerations.
- 4.3 As well as our ecological concerns set out above, the RSPB does not think on the basis of the information before him, the Secretary of State can be confident that there are "compensatory measures... to ensure that the overall coherence of Natura 2000 is protected", nor be certain and confident at this stage that these can be secured in the future.

Examples of our concerns and the reasons for them

- 4.4 In section 3 of the document Compensatory Measures reference is made to Defra Guidance and the EU Commission's Managing Natura 2000 Article 6 Guidance²⁴. Reliance is also placed on the Secretary of State's decision for the Able Marine Energy Park application²⁵ (see paragraph 3.50

²¹ Conservation of Habitats and Species Regulations 2017. 2017 No. 1012.

²² Conservation of Offshore Marine Habitats and Species Regulations 2017. 2017 No. 1013.

²³ Please note our comments within footnote 1 above in relation to financial security.

²⁴ Guidance on the application of Article 6(4), published by DEFRA in August 2012 (the DEFRA Guidance); Managing Natura 2000 sites – the provisions of Article 6(3) of the 'Habitats' Directive 92/42/EEC (2000) ("MN 2000") first published by the EC in 2000 but updated in November 2018 (the EC Guidance).

²⁵ Department for Transport (2013) DCO and certificates under section 127 for the Able Marine Energy Park: <https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/TR030001/TR030001-002225-SoS%20Decision%20letter%20with%20annexes.pdf>

in Appendix 2 Kittiwake Compensation Plan and the correspondence between BEIS and Orsted on the matter of “securing”).

- 4.5 However, what is not explained is that the Secretary of State originally granted a *mindful to grant* AMEP Decision stating that consent could be granted:

“...subject to receiving satisfactory evidence of the following:

(1) in relation to the “*substantial risk*” identified by Natural England that the ecological compensation measures will not work, confirmation from the applicant that:

(a) reasonable additional measures can be implemented to reduce that risk, or

(b) developments since the Panel examination have increased Natural England’s confidence in the effectiveness of the compensation proposals such that they no longer consider the risk to be “*substantial*” ...”

- 4.6 Following further compensation proposals being added on land that was already owned by the Applicant, Natural England confirmed it could change its position from *substantial risk* to *residual risk* due to considering these additional measures were ecologically possible and would provide some further ecological functions.

- 4.7 Therefore, despite the risks associated with the main compensation proposal (a regulated tidal exchange) partly due to whether such an untried and tested scheme would be effective, the additional measures proposed were enough to reduce the overall *substantial* risk that the compensation would not deliver ecologically to merely a *residual* risk. This enabled the Secretary of State to reach the final conclusion of (as set out in Annex 1 of the Decision letter):

“12. The Secretary of State agrees... that the AMEP development is likely to have a significant adverse effect.... on the internationally important population of Black Tailed Godwit (“BTG”) are of particular concern given that during the period of the autumn moult they make use of the inter-tidal mudflats ... in their thousands (....representing 66% of the SPA population) [and]....the nearby [site] as a secure roost, which are likely to be lost if the associated feeding areas are lost. The Secretary of State therefore agrees that the compensatory measures necessary to satisfy the requirements of the Habitats Regulations must include **the provision of suitable nutritional resource for BTG and a roost site in proximity to that nutritional resource**...(emphasis added)

....

18. The [SoS] has considered the Panel’s assessment...**of what is necessary and appropriate by way of compensation** to satisfy the obligation in article 6(4) of the Habitats Directive and regulation 66 of the Habitats Regulations to protect the overall coherence of Natura 2000.

...

20. The Secretary of State accordingly agrees... protecting the overall coherence of Natura 2000 in the context of the AMEP development means replacing the critical ecological function that would be lost ... that this would be protected if the compensation site were designed with the specific objective of meeting the feeding needs of BTG during the autumn passage.”

- 4.8 In our view the Secretary of State was only able to satisfy the *overall coherence of the Natura 2000 network* requirement due to the information available to him at that point. But he was clear that the Expert Steering Group and feedback loop mechanism (comprising requirements to monitor the compensation, review monitoring data gathered to consider whether the compensation proposals were effective and adequate from an expert steering group and, should this not be the case, provide more) was necessary due to the residual risks:

“34. The Secretary of State attaches considerable weight to developments since the close of the examination – in particular the applicant’s conclusion of legal agreements with Natural England and the Environment Agency and the granting of planning permission for the Cherry Cobb Sands Wet Grassland Site. In the light of these developments he is confident that there are **robust and reliable mechanisms in place (particularly the Ecological Monitoring & Management Plans] EMMPs²⁶** to ensure that the mitigation and compensatory measures will be delivered. He notes also Natural England’s view...that the risk in relation to implementation of the compensation measures has been mitigated. The Secretary of State has accordingly concluded that any residual risk associated with the delivery mechanisms is acceptable.”

- 4.9 Therefore, as mentioned above we question how on the basis of the information before him currently, the Secretary of State can be satisfied that *the overall coherence of the Natura 2000 Network will be protected?*
- 4.10 The language of the legal test in our view is key. Reg 68 Conservation of Habitats and Species Regulations 2017 (as amended) states:

²⁶ [https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/TR030001/TR030001-001705-121123_TR030001_Able%20Humber%20Ports%20Ltd%20\(Compensation%20EMMP\).pdf](https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/TR030001/TR030001-001705-121123_TR030001_Able%20Humber%20Ports%20Ltd%20(Compensation%20EMMP).pdf)

“68 Where in accordance with regulation 64—

(a) a plan or project is agreed to, notwithstanding a negative assessment of the implications for a European site or a European offshore marine site, or

(b) a decision, or a consent, permission or other authorisation, is affirmed on review, notwithstanding such an assessment,

the appropriate authority **must secure** that **any necessary compensatory measures are taken to ensure** that the overall coherence of Natura 2000 is protected. (emphasis added).”

4.11 It is that ability *to secure* that we question, especially if further work is required into possible methods and their effectiveness before compensation proposals can be finalised and therefore again our concern that not even possible measures are known now.

4.12 Whilst groups such as the OOEG and feedback loop mechanisms are very important and can assist with continuing the requirement to ensure the overall coherence of Natura 2000 is protected, they are not the complete solution to the issue of lack of effective measures that can be evaluated in detail now.

4.13 The number of further agreements, consents and permissions required is worrying, as there is no certainty now that those can be agreed or granted.

The Proportionality Principle

4.14 Finally, the Applicant suggests that the requirement to provide *any necessary compensation* (at paragraph 3.7, Appendix 1 Compensatory Measures) includes consideration of what is proportionate:

“The principle of proportionality is a fundamental principle of EU law contained in Article 5 of the Treaty on the Functioning of the European Union and is to be applied generally. The use of the word "necessary" imports proportionality into the Habitats Directive.”

4.15 The Proportionality Principle “...regulates how the European Union exercises its powers. It works in much the same way as the principle of subsidiarity. The proportionality principle means that, to achieve its aims, the EU will only take the action it needs to and no more. The principle is enshrined in the Treaty on European Union under Article 5, which states: ‘the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties’.”²⁷

²⁷ https://ec.europa.eu/regional_policy/en/policy/what/glossary/p/proportionality

4.16 Therefore, the RSPB questions whether it is relevant to the Secretary of State's compensation considerations. And even if it were relevant, it should only be considered alongside any requirements for the application of the Precautionary Principle, as well as the key aspect of what compensation is necessary. As set out in Section 3 of our April 2020 submission (e.g. paragraphs 33 to 34 on the issues of uncertainty and the precautionary approach) the intensity and extent of potential adverse effects is far from clear. This is partly due to modeling assessments having to be used in the absence of sufficient robust data as to the impacts of wind turbines on birds. Also, if the effectiveness of compensation measures is not certain then more should be provided to reduce risks, but only where it makes ecological sense.

[Specific comments on the draft DCO conditions relating to compensation measures for kittiwakes from the Flamborough and Filey Coast SPA](#)

4.17 Without prejudice to the RSPB's position on the correct approach to securing compensation measures under the Habitats Regulations, the RSPB sets out in Table 3 below its detailed comments on the draft conditions proposed by the Applicant. Any suggested changes to condition wording use the following format

- ~~Strikethrough~~ for deletion;
- Underline for insertion.

Table 3: RSPB comments on the proposed Hornsea Three DCO conditions relating to compensation measures for kittiwakes from the Flamborough and Filey Coast SPA.

(Taken from section 2 of the Kittiwake Compensation Plan)

Draft condition	RSPB comments
<p>1 <i>In this Schedule -</i></p> <p><i>“the Flamborough and Filey Coast SPA” means the site designated as the Flamborough and Filey Coast Special Protection Area in accordance with the Conservation of Habitats and Species Regulations 2017;</i></p> <p><i>“kittiwake compensation plan” means the document certified as the kittiwake compensation plan by the Secretary of State for the purposes of this Order under article 36 (certification of plans and documents etc.);</i></p>	None
<i>Kittiwake implementation and monitoring plan</i>	
<p>2.—(1) <i>Subject to sub-paragraph (10) no later than 12 months prior to the commencement of the authorised project a kittiwake implementation and monitoring plan must be</i></p>	None but please see comments below on sub para (10)

Draft condition	RSPB comments
<p><i>submitted to the Secretary of State for approval, in consultation with the MMO, the relevant planning authority and the relevant statutory nature conservation body.</i></p>	
<p><i>(2) The kittiwake implementation and monitoring plan must include details of the design, location, and number of artificial nest structures to be provided, an implementation timetable for delivery of the artificial nest structures, and proposals for monitoring, adaptive management and reporting on the effectiveness of the artificial nest structures. The kittiwake implementation and monitoring plan must also include proposals for maintenance of the artificial nest structures for the duration of the operation of the generating station comprised in Work No.1.</i></p>	<p>The RSPB welcomes the general approach taken in this condition but considers key details are omitted in relation to:</p> <ul style="list-style-type: none"> • The implementation timetable in relation to the first impact of the project and the ongoing time needed for the compensation measure to be in place beyond the wind farm lifetime to allow for recovery of the FFC SPA; • Other key elements required in the Kittiwake Implementation and Monitoring Plan including detailed compensation objectives, success criteria, reporting and review periods, the nature of the proposed Offshore Ornithology Engagement Group, the length of time the compensation measures should be in place, protocols to agree remediation of compensation and any further compensation measures that may be required following periodic review. <p>Therefore, the RSPB recommends the Secretary of State re-words draft condition 2(2) as follows:</p> <p><i>(2) The kittiwake implementation and monitoring plan must include details of the <u>compensation aims and objectives, success criteria</u>, design, location, and number of artificial nest structures to be provided, an implementation timetable for delivery of the artificial nest structures <u>at least four years prior to first operation of any wind turbine generator comprised in Work No.1, the minimum length of time the compensation measures will be secured beyond the duration of the operation of the generating station comprised in Work No.1, and proposals for monitoring, adaptive management and reporting on the effectiveness of the artificial nest structures including the frequency of review periods and protocols to agree any necessary further and/or remediation measures to be approved by the Secretary of State under</u></i></p>

Draft condition	RSPB comments
	<p><i>2(8) below. The kittiwake implementation and monitoring plan must also include proposals for maintenance of the artificial nest structures for the duration of <u>their lifetime</u>. the operation of the generating station comprised in Work No.1.</i></p> <p>We consider serious consideration should be given either to adapting this condition or including a new condition with regard to the establishment of the proposed “Offshore Ornithology Engagement Group”. Responsibility for this group should preferably be given to the relevant regulator, as opposed to the Applicant.</p> <p>The condition could incorporate some of the wording suggested above (e.g. regarding review periods, protocols to agree further measures) and should require the Applicant to submit the following for approval by the Secretary of State at the same as the KIMP:</p> <ul style="list-style-type: none"> • Terms of Reference of the OOEG; • The membership of the OOEG; • Frequency of meetings, reporting and review periods; • A dispute resolution mechanism. <p>We note the ongoing discussion between the Applicant and Natural England regarding prey resource management as an alternative compensation measure should artificial nesting structures prove ineffective and the Applicant’s commitment to consult with the OOEG on this and other possible alternative compensation measures (see paragraph 25 of the Kittiwake Compensation Plan).</p> <p>The RSPB recommends this be made an explicit requirement of the OOEG through a DCO condition.</p>
<p><i>(3) The kittiwake implementation and monitoring plan must accord with the principles set out in the kittiwake compensation plan relating to the authorised development’s contribution to in-combination impacts on the black-legged kittiwake feature at the Flamborough and Filey Coast SPA.</i></p>	<p>The condition references “principles” contained in the Kittiwake Compensation Plan. The RSPB has studied this document carefully and can see no explicit list of “principles” beyond a short section relating to initial site selection work, which we consider cannot be what is intended here. Therefore, the condition is ambiguous and imprecise in this critical respect and creates uncertainty.</p>

Draft condition	RSPB comments
	<p>A revised Kittiwake Compensation Plan should be required to be submitted to the Secretary of State with a clear articulation of the principles referred to. Given the importance of such principles in shaping the critical Kittiwake Implementation and Monitoring Plan, the RSPB recommends that any such revised document is subject to further public consultation. This may require amendment to the DCO conditions to ensure such a consultation takes place.</p> <p>For the record, we note that Appendix 1 Compensatory Measures contains a section entitled “principles” which is itself a summary version of that produced in a 14 February 2020 submission. However, as neither of these are included in the Kittiwake Compensation Plan they could not be relied upon for the purpose of properly interpreting this DCO condition.</p>
(4) <i>The kittiwake implementation and monitoring plan must be carried out as approved.</i>	None
(5) <i>The artificial nest structures detailed in the kittiwake implementation and monitoring plan must be constructed prior to first operation of any wind turbine generator comprised in Work No.1, unless otherwise specified in the kittiwake implementation and monitoring plan.</i>	<p>In line with our proposed amendment to clause 2(2) above, we recommend this condition be amended as follows:</p> <p><i>(5) The artificial nest structures detailed in the kittiwake implementation and monitoring plan must be constructed prior <u>at least four years prior to first operation of any wind turbine generator comprised in Work No.1</u> to first operation of any wind turbine generator comprised in Work No.1, unless otherwise specified in the kittiwake implementation and monitoring plan.</i></p>
(6) <i>The artificial nest structures must be retained during the operation of the generating station comprised in Work No.1, unless otherwise approved in writing by the Secretary of State.</i>	<p>For the reasons set out elsewhere in this document, we consider this timescale for retention of the artificial nesting structures is too short and would mean the structures failed as a compensation measure.</p> <p>Therefore we propose an amendment in line with that suggested for condition 2(2) above:</p> <p><i>(6) The artificial nest structures must be retained <u>for the period set out under condition</u></i></p>

Draft condition	RSPB comments
	<p>2(2) above during the operation of the generating station comprised in Work No.1, unless otherwise approved in writing by the Secretary of State.</p>
<p><i>(7) Prior to the submission of the kittiwake implementation and monitoring plan to the Secretary of State for approval, the undertaker must carry out pre-application consultation in accordance with that set out in the kittiwake compensation plan.</i></p>	<p>This condition should be more precisely specified through cross reference to the Kittiwake Compensation Plan.</p> <p>The RSPB assumes it refers to the commitment at paragraph 1.15 of the Kittiwake Compensation Plan to consult with the OOEG. Therefore, we recommend that it explicitly states this. Our proposed amendment is set out below:</p> <p><i>(7) Prior to the submission of the kittiwake implementation and monitoring plan to the Secretary of State for approval, the undertaker must carry out pre-application consultation with the <u>Offshore Ornithology Engagement Group</u> in accordance with that set out in the kittiwake compensation plan.</i></p>
<p><i>(8) The kittiwake implementation and monitoring plan approved under this Schedule includes any amendments that may subsequently be approved in writing by the Secretary of State.</i></p>	<p>None.</p>
<p><i>(9) Any amendments to or variations from the approved kittiwake implementation and monitoring plan must be in accordance with the principles set out in the kittiwake compensation plan and may only be approved in relation to immaterial changes where it has been demonstrated to the satisfaction of the Secretary of State that it is unlikely to give rise to any materially new or materially different environmental effects from those considered in the kittiwake compensation plan.</i></p>	<p>See comments on draft condition 2(3) above. This condition requires amendment in line with changes required to that condition.</p> <p>In addition, we think that the same requirements as are in place for the original plan should be included here too namely:</p> <p><i>“in consultation with the MMO, the relevant planning authority and the relevant statutory nature conservation body.</i></p>
<p><i>(10) The requirement in sub-paragraph (1) shall not apply if, on application by the undertaker pursuant to this sub-paragraph, the Secretary of State concludes that the extent of the authorised project the undertaker will construct and operate (which may include a reduction in</i></p>	<p>As mentioned directly above this further provision excludes the important requirements to consult namely:</p> <p><i>“in consultation with the MMO, the relevant planning authority and the relevant statutory nature conservation body.”</i></p>

Draft condition	RSPB comments
<p><i>the number of wind turbine generators from the number comprised in Work No.1) or the nature of its operation will not have an adverse effect on the integrity of the Flamborough and Filey Coast SPA.</i></p>	<p>It is vital that these requirements are included.</p> <p>In addition due to proposed project changes and the complexity of assessment modelling used, it is simply not appropriate to consider a change in turbine type/number would not require further consideration of the assessment undertaken or additional assessment being required to ensure that the claimed reduced or removed potential adverse effect on the integrity of SPAs will actually occur.</p> <p>Therefore, in line with Environmental Impact Assessment regulations we strongly recommend as a minimum further consultation should be required with at least those actively involved in the application including the RSPB. (arguably a full public consultation would be required if additional environmental information is submitted and the ES updated/changed etc.)</p>

4.18 The RSPB strongly recommends that the Secretary of State adopts the RSPB's proposed changes to the draft DCO conditions set out in Table 3.

5. Conclusions

5.1 As currently presented, it is the RSPB's view that the Applicant has:

- Provided evidence that artificial nesting sites might be used by kittiwakes;
- Specified:
 - broad rather than precise locations for artificial nesting structures;
 - the possible magnitude of population level required to compensate for the predicted impacts.

5.2 The Applicant is not yet able to or has not:

- Provided the evidence that the artificial nesting structures would be used;
- Specified a design guaranteed to succeed;
- Specified the precise locations of the compensatory measures;
- Be confident on the scale required and factored in:
 - delays in colony establishment to reach required level;
 - address need to extend compensation provision to the post-operational phase to allow for FFC SPA recovery.

5.3 These uncertainties comprise a mixture of matters some of which:

- need to be resolved before consent is granted;
- could be resolved as part of post consent negotiations;
- cannot be resolved and depend on whether the measure succeeds or fails.

5.4 As set out above, in addition to our detailed ecological concerns, the RSPB does not think, on the basis of the information provided that the Secretary of State can be confident that there are "compensatory measures... to ensure that the overall coherence of Natura 2000 is protected", nor be certain and confident at this stage that these can be secured in the future. Nevertheless, on a without prejudice basis, we have sought to suggest changes to the draft DCO conditions in order to address our concerns.