

# Outer Dowsing Offshore Wind

## Madsen and Searle Papers (Further Commentary)

### Deadline 5

Date: March 2025

Document Reference: 23.7

Rev: 1.0

Company:		Outer Dowsing Offshore Wind		Asset:		Whole Asset	
Project:		Whole Wind Farm		Sub Project/Package:		Whole Asset	
Document Title or Description:		23.7 Madsen and Searle Papers (Further Commentary)					
Internal Document Number:		PP1-ODOW-DEV-CS-REP-0283		3 <sup>rd</sup> Party Doc No (If applicable):		N/A	
Rev No.	Date	Status / Reason for Issue	Author	Checked by	Reviewed by	Approved by	
1.0	March 2025	Deadline 5	Shepherd & Wedderburn	Outer Dowsing	Outer Dowsing	Outer Dowsing	

## Table of Contents

1	Introduction .....	4
2	Statutory Context .....	5
3	Case Law Interpretation .....	7
4	Conclusion .....	10

# 1 Introduction and Executive Summary

1. At Issue Specific Hearing 6 (ISH6), the Examining Authority (ExA) requested that copies of two papers referred to by the Royal Society for the Protection of Birds (RSPB) in the RSPB's submissions were submitted into the Examination: Madsen et al (2015) 'Renewable energy developments in an uncertain world: the case of offshore wind and birds in the UK' and Searle et al (2023) "A framework for improving treatment of uncertainty in offshore wind assessments for protected marine birds" (the Papers).
2. The Applicant provided copies of the Papers in response to Hearing Action Point 4 from Issue Specific Hearing 6 (ISH6), alongside some high level comments on the content of the Papers (REP4a-120). The Applicant also noted that it would provide further commentary as appropriate at Deadline 5.
3. The Applicant reaffirms the response previously given within REP4a-120 and maintains that it has applied an appropriate level of precaution throughout the assessments, proportionate to the level of uncertainty in those assessments.
4. To recap, the Papers identify causes of uncertainty in assessment and advocates for next steps to be taken in reducing the level of uncertainty in assessments to improve decision-making. The Applicant does not dispute that there are uncertainties in the assessments – this is an inherent feature of environmental assessments. Where the Applicant disagrees with Natural England and the RSPB is on the level of precaution which should be applied in order to address these uncertainties.
5. The further commentary provided in this Note relates the observations on the use of the precautionary principle as set out in the Papers to the standard that is required by the precautionary principle, as set out in law and advised by guidance.
6. The Applicant maintains that it has conformed to and followed the requirements of the precautionary principle.
7. A detailed technical description of the levels of precaution used in the assessment was presented under document 19.8 'Levels of precaution in the assessment and compensation calculations for offshore ornithology' (REP2-057) and this note sets out the legal context to that technical analysis.
8. In summary, the Applicant acknowledges the crucial role that the precautionary principle plays in the assessment of environmental effects. However, the considerable amounts of case law which explore the precautionary principle set the parameters for its application. The precautionary principle is not intended to be a substitute for achieving absolute certainty, but rather a proportionate response, erring on the side of caution, to address a risk that is plausible and real.
9. The ExA and the Secretary of State can have confidence that, by adopting the Applicant's approach to assessment, a decision can be taken that incorporates an appropriate level of precaution in line with the applicable law and guidance.

## 2 Statutory Context

10. The precautionary principle has its origins in UK law from the 1992 Rio Declaration, to which the UK is a signatory. From the Declaration, the principle is set out as Principle 15, which defined the principle as "*where there are threats of serious or irreversible environmental damage, a lack of scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.*"<sup>1</sup>
11. Implementation of the principle was continued through the UK's membership of the European Union, with the precautionary principle being established as a statutory principle underpinning all Union policy on the environment through Article 191 of the Treaty on the Functioning of the European Union.<sup>2</sup>
12. Following its adoption, the European Commission sought to provide further guidance as to the interpretation of the precautionary principle, highlighting that the overarching precautionary principle is underpinned by three specific principles:
  - a. the fullest possible scientific evaluation, the determination, as far as possible, of the degree of scientific uncertainty;
  - b. a risk evaluation and an evaluation of the potential consequences of inaction; and
  - c. the participation of all interested parties in the study of precautionary measures, once the results of the scientific evaluation and/or the risk evaluation are available.<sup>3</sup>
13. The European Commission stressed that "*the precautionary principle may only be invoked in the event of a potential risk and that it can never justify arbitrary decisions*".<sup>4</sup>
14. Additionally, the European Commission highlighted five general principles of risk management as being applicable to the precautionary principle as follows:
  - a. proportionality between the measures taken and the chosen level of protection;
  - b. non-discrimination in applications of the various risk management measures;
  - c. consistency of the measures with similar measures already taken in similar situations or using similar approaches;
  - d. examination of the benefits and costs of action or lack of action; and
  - e. the review of the measures in light of scientific developments.<sup>5</sup>

---

<sup>1</sup>Rio Declaration on Environment and Development, Jun. 13, 1992. 31 ILM 874 (1992)

<sup>2</sup> Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ 115/47 Article 191

<sup>3</sup> Commission, 'Communication from the Commission on the precautionary principle' COM (2000) 0001

<sup>4</sup> *ibid*

<sup>5</sup> *ibid*

15. Although the UK has since exited the European Union, an agreement to maintain the precautionary principle within national law exists between the two parties through Title XI Article 356 of the UK-EU Trade and Co-operation agreement.<sup>6</sup> Section 29 of the European Union (Future Relationship) Act 2020 gives effect to the UK-EU Trade and Co-operation Agreement.
16. The precautionary principle is inherent in the application of the Conservation of Habitats and Species Regulations 2017 and the Conservation of Offshore Marine Habitats and Species Regulations 2017 (the Habitats Regulations), in that, in light of the conclusions of the appropriate assessment (emphasis added): “*the competent authority may agree to the plan or project **only** if it has ascertained that it **will not** adversely affect the integrity of the European offshore marine site or European site (as the case may be).*”<sup>7</sup> These provisions embody the precautionary principle and make it possible effectively to prevent adverse effects on the integrity of protected sites as a result of the plans or projects being considered, subject to a derogation case being made out.<sup>8</sup>
17. The precautionary principle continues to be enshrined in UK law following the UK’s exit from the European Union, most recently through the Environment Act 2021, which requires the Secretary of State to prepare a policy statement on Environmental Principles, including the precautionary principle.<sup>9</sup> This creates a positive duty through Section 19 on a Minister of the Crown to have due regard to the policy statement when making relevant policy.<sup>10</sup> See further discussion of the application of the guidance set out in the Environmental Principles Policy Statement at section 4 below.

---

<sup>6</sup>Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, Title XI Article 356

<sup>7</sup> Regulation 28(5), Conservation of Offshore Marine Habitats and Species Regulations 2017 and Regulation 63(5), Conservation of Habitats and Species Regulations 2017

<sup>8</sup> Case 127/02 Landelijke Vereniging tot Behoud van de Waddenzee and another v Staatssecretaris van Landbouw and another (Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij UA, intervening), para 58

<sup>9</sup>Environment Act 2021 s17

<sup>10</sup>Ibid, s19

### 3 Discussion of the precautionary principle in key cases

18. The use of the precautionary principle has been considered in a wealth of case law and further defined by the courts. The cases outlined below draw out the relevant key themes.

#### *C127/02 Waddenzee*

19. The case of *C127/02 Waddenzee*<sup>11</sup> considered the position of the precautionary principle in relation to its application to appropriate assessments within the Habitats Directive. The judgment in *Waddenzee* continues to apply to the interpretation of the Habitats Regulations in the UK post-Brexit as assimilated EU case law. It finds that the principle is applicable,<sup>12</sup> and requires a high standard of investigation, but conversely stresses that the principle of proportionality must also be taken into account. As Advocate General Kokott explains in *Waddenzee*, a measure is only proportionate where it is both appropriate and necessary; and not disproportionate to the objective pursued.<sup>13</sup> In each particular case the action associated with the protective measures must be proportionate to the assumed risk.<sup>14</sup>
20. Proportionality encompasses three elements: a measure must be necessary and appropriate to achieve its aim, must not be more restrictive or onerous than is necessary to do so, and the disadvantages caused by the measure must not be out of proportion with the aim pursued.
21. The role of the proportionality principle is therefore key in identifying the correct level of precaution to apply to resolve residual uncertainty in assessment. The selection of the most precautionary approach to an assessment parameter to account for uncertainty without considering whether that approach gives rise to a disproportionate result would therefore be an inappropriate application of the precautionary principle.
22. Furthermore, the Court in *Waddenzee* discussed the role of certainty within the precautionary principle. In doing so, it held that certainty is not to be taken as absolute, but rather, the competent authority must be "*satisfied that there is no reasonable doubt as to the absence of adverse effects on the integrity of the site concerned*".<sup>15</sup> It follows that competent authorities can find themselves certain that there will be no adverse effects even if objectively there is no absolute certainty.
23. The aim of the application of the precautionary principle is therefore not to be a substitute for the impossible standard of absolute certainty, but rather a proportionate, balanced response to err on the side of caution where uncertainty remains. The amount of precaution adopted in the Applicant's approach to ornithological assessments achieves this aim.

#### *Pfizer Animal Health SA v Council of the European Union T-13/99*

---

<sup>11</sup> Case 127/02 Landelijke Vereniging tot Behoud van de Waddenzee and another v Staatssecretaris van Landbouw and another (Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij UA, intervening) [2005] C.M.L.R. 31

<sup>12</sup> Ibid, para 102

<sup>13</sup> AG104

<sup>14</sup> at AG100

<sup>15</sup> AG108

24. In *Pfizer* the Court of First Instance discussed the application of the precautionary principle and highlighted the limitations of its application:

*“a preventive measure cannot properly be based on a purely hypothetical approach to the risk, founded on mere conjecture which has not been scientifically verified... Rather, it follows from the Community Courts' interpretation of the pre-cautionary principle that a preventive measure may be taken only if the risk, although the reality and extent thereof have not been 'fully' demonstrated by conclusive scientific evidence, appears nevertheless to be adequately backed up by the scientific data available at the time when the measure was taken.”*<sup>16</sup>

25. It therefore follows that, whilst in the context of appropriate assessment under the Habitats Regulations, an adverse effect on integrity must be ruled out beyond reasonable scientific doubt, the application of additional layers of precaution must also be supported by evidence to avoid the precautionary principle being applied speculatively.

*Preston New Road Action Group v Secretary of State for Communities and Local Government*<sup>17</sup>

26. The specifics of this case involved a challenge to whether the Secretary of State had failed to properly apply the precautionary principle and therefore acted irrationally. This case highlighted that the remit for reasonableness falls within the purview of the decision-maker and where "appropriate respect" is being given to the decision of a statutory environmental regulator, the court will be reluctant to intervene. The Court held that the "*existence of 'uncertainty in [relevant] scientific knowledge' ... does not render unlawful the approach*"<sup>18</sup> as long as the decision-maker is satisfied that the relevant regulatory controls in place would operate to prevent harm to the environment. Such an approach was found to be consistent with the precautionary principle. In the specifics of this case, as there was no identified risk that was likely to be a significant effect on the environment that was ignored or unassessed, then it must follow that there was no breach of the precautionary principle.

27. Drawing on the conclusions from the *Preston New Road Action Group* case, it would be entirely reasonable and consistent with the application of the precautionary principle for the ExA and the Secretary of State to prefer and adopt the Applicant's approach and conclusions of Chapter 12 of the Environmental Statement (REP4a-011) and the Report to Inform Appropriate Assessment (7.1). The Applicant has carried out comprehensive assessments applying the precautionary principle and no risk has been identified of there being an environmental harm missing from that assessment.

*Regina (Wyatt) v Fareham Borough Council*<sup>19</sup>

---

<sup>16</sup> *Pfizer Animal Health SA v Council of the European Union* T-13/99, paras 143-144

<sup>17</sup> *Preston New Road Action Group v Secretary of State for Communities and Local Government* [2018] EWCA Civ 9

<sup>18</sup> *Ibid* para 94

<sup>19</sup> *Regina (Wyatt) v Fareham Borough Council* [2022] EWCA Civ 983

28. This judgment reaffirms that any assessment has to be carried out in accordance with the precautionary principle and that, where the Habitats Regulations are engaged, a project can only be authorised where it was beyond reasonable doubt that there would be no adverse effects.
29. However, adherence to this principle does not mandate absolute certainty or a consideration based upon a worst-case scenario. The court held that such an approach is not the only manner in which the precautionary principle could be applied and requires an exercise of judgment by the decision-maker.
30. The court also noted that the application of the precautionary principle in assessment methodology is not taken on whether each individual figure represents "*best scientific knowledge*" but rather a holistic approach has to be taken as to the assessment methodology as a whole.<sup>20</sup>
31. This is a critical principle for scenarios such as the assessment of effects on ornithology features in which uncertainty can be present in the assessment in a number of different aspects. The application of a worst case scenario in an attempt to apply precaution to each aspect of the assessment individually departs from the need to take a holistic approach to the assessment methodology as a whole and a decision being taken on whether the appropriate level of precaution has been applied to that assessment in the round.
32. The judgment stresses that the assessment of scientific evidence and whether there was reasonable doubt in a particular case would always be matter of judgment, in particular finding that, were it to be the case that "*reasonable scientific judgments in undertaking an appropriate assessment could only be reached through arithmetical calculation would be to take too narrow a view of rational enquiry*"<sup>21</sup>.

---

<sup>20</sup> Ibid para 59

<sup>21</sup> Ibid para 5

## 4 Guidance on the precautionary principle

33. The UK Government's Environmental Principles Policy Statement, as last updated 31 January 2023 (the Environmental Principles Policy Statement), sets out the approach to the application of the precautionary principle in developing relevant policy. Whilst the Environmental Principles Policy Statement is clear that the duty to have regard to its terms strictly applies to policy, rather than to individual decisions, it can be read as useful guidance as to how the precautionary principle ought to be considered given the application of the same principle in the context of decision-making.
34. The Environmental Principles Policy Statement sets out the following description of the precautionary principle (emphasis added):
- "The precautionary principle...assists the decision-making process **in the face of a lack of scientific certainty**. The principle helps policymakers deal with risks which may not be precisely calculable in advance. The UK government's **risk-based, or science-based**, approach to the precautionary principle seeks to manage the likelihood and severity of environmental harm occurring based on exposure to a specific hazard. This is distinct from an approach that solely considers hazards that can cause environmental harm."*
35. The Environmental Principles Policy Statement is clear that the precautionary principle is engaged in order to deal with scientific uncertainty. This aligns with the overarching theme of the Papers, i.e. that there are various causes of uncertainty in environmental assessments for offshore wind and that steps should be taken to reduce that uncertainty. In this respect, the Applicant agrees. It is accepted that there is inherent uncertainty in assessments of effects in the marine environment. However, decisions on Critical National Priority Infrastructure, such as the determination of the application for the Project require to be taken in the short term. Those decisions cannot wait for the uncertainty gaps to be filled, given the resulting delay to the deployment of Critical National Priority Infrastructure. Therefore, the question arises of how the precautionary principle is applied to address that uncertainty.
36. The Environmental Principles Policy Statement emphasises the UK government's "*risk-based, or science-based*" approach to the application of the precautionary principle. The Applicant has set out the evidence base for adopting its position across the suite of documents submitted into the Examination, most notably in Levels of precaution in the assessment & confidence calculations for offshore ornithology (REP2-057); Consideration of bioseasons in the assessment of guillemot (REP2-058); and Rates of displacement in guillemot and razorbill (REP2-059). The ExA and the Secretary of State can therefore have confidence that, by adopting the Applicant's approach to assessment, a decision can be taken that incorporates an appropriate level of precaution in line with the science-based approach that is advocated by the Environmental Principles Policy Statement.

37. The Environmental Principles Policy Statement goes on to explain that the precautionary principle is applicable: *“where there is plausible evidence of a risk that a particular policy could cause serious or irreversible damage to the environment, alongside a lack of scientific certainty about the likelihood or severity of this damage. The precautionary principle supports policymakers in their management of that risk.*
- In applying the principle, the policymaker needs to make a reasonable assessment, using the best available scientific evidence, of the risk. Risk in this case should be understood as a combination of the likelihood of the environmental damage occurring and its severity.”*
38. The level of precaution to be applied is to be determined on the basis that the level of uncertainty determines the acceptable level of risk. Where the risk of serious damage is greater, the level of certainty required before action is taken to address that risk reduces. In all situations, this has to be taken on the basis of sufficient evidence that the risk of serious or irreversible damage is plausible and real and that the options for prevention are cost-effective.
39. The Environmental Principles Policy Statement also highlights the role of the parallel principle of proportionality (see further in the discussion of *Waddenzee* at paragraph 19 above). The Environmental Principles Policy Statement highlights that, as set out in section 19(2) of the Environment Act 2021, *“ministers are not required to take action or refrain from taking action where there would be ‘no significant environmental benefit, or the action would be disproportionate to the environmental benefit’”*.

## 5 Conclusion

40. The Applicant acknowledges the crucial role that the precautionary principle plays in the assessment of environmental effects. However, the considerable amounts of case law which explore the precautionary principle set the parameters for its application. The precautionary principle is not intended to be a substitute for achieving absolute certainty, but rather a proportionate response, erring on the side of caution, to address a risk that is plausible and real.
41. The Applicant has set out the evidence base for adopting its position across the suite of documents submitted into the Examination, most notably in Levels of precaution in the assessment & confidence calculations for offshore ornithology (REP2-057); Consideration of bioseasons in the assessment of guillemot (REP2-058); and Rates of displacement in guillemot and razorbill (REP2-059). The ExA and the Secretary of State can therefore have confidence that, by adopting the Applicant's approach to assessment, a decision can be taken that incorporates an appropriate level of precaution in line with the applicable law and guidance.