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Habitats Regulations Appraisal (HRA) Derogations for Offshore Wind Projects in Scotland - Legal Framework for Decisions

April 2021 (Version 1.0)

BACKGROUND AND SCOPE

1. BACKGROUND

1.1 Offshore wind farms have the potential to impact populations of designated seabirds within Special Protection Areas (SPAs)[i] due to impacts including collisions and displacement. This remains the case where the offshore wind farm is located outside the SPA, because seabirds will forage outside the boundary of the designated habitat.

1.2 Crown Estate Scotland launched in June 2020 a new seabed leasing round for offshore wind in Scottish waters known as ScotWind. This broadly coincides with The Crown Estate Round 4 leasing round in England and Welsh waters, where awards were announced on 8 February 2021.

1.3 Under the relevant Habitats Regulations[iiiii], where adverse effects from a plan or project (which is likely to have a significant effect on an SPA either alone or in combination) on the integrity of the SPA cannot be ruled out following an Appropriate Assessment made in view of the SPA's conservation objectives[iv], the competent authority may only authorise it if satisfied that[v]:

- "*there being no alternative solutions*"[vi];
- the plan or project "*must be carried out for imperative reasons of overriding public interest (which […][vii] may be of a social or economic nature*)".

1.4 Where a plan or project is authorised in accordance with these 'derogation tests', there is a requirement that the appropriate authority[viii] shall:

- "*secure that any necessary compensatory measures are taken to ensure that the overall coherence of [the UK site network][ix] is protected.*"[x]

1.5 The 'competent authority' in relation to the derogation tests and the 'appropriate authority' in relation to the compensation duty is the Scottish Ministers for offshore wind projects[xi] in Scottish waters[xii] (although in other circumstances they could be different). This note focusses on the potential for impacts on SPAs from offshore wind farms in Scottish waters, so references will be to the Scottish Ministers rather than the competent authority or appropriate authority. In practice, the Scottish Ministers may act through the directorate Marine Scotland.

1.6 In Scotland, to date the derogation tests have not been engaged for an offshore wind project (in other words, there have not been any offshore wind farms where an adverse effect on the integrity of an SPA could not be ruled out). The Appropriate Assessment of October 2020[xiii] for the Scottish Sectoral Marine Plan for Offshore Wind Energy (the basis of ScotWind site selection) concluded at a plan level that, taking into account mitigation measures, it would be possible to avoid adverse effects on Natura 2000 features. However, the mitigation measures include project level HRAs, so the plan level HRA does not rule out the potential for adverse effects on SPAs arising from individual projects. The potential for impacts of offshore wind farms on SPAs has been the subject of considerable scrutiny, including by the Courts (notably a challenge by the RSPB to four offshore wind farms in the firths of Forth and Tay, which was eventually dismissed by the Supreme Court).

1.7 In England, the Hornsea Three project was granted consent on 31 December 2020, following satisfaction of the derogation tests and the securing of compensation[xiv] in relation to adverse effects identified on designated species (kittiwake) within the Flamborough and Filey Coast SPA (as well as the North Norfolk Sandbanks and Saturn Reef Special Area of Compensation and The Wash and North Norfolk Coast Special Area of Compensation). The HRA for Hornsea

Three identified kittiwake collisions per year as 65-73[xv]. It is noted for context that at a similar time, the HRA for Norfolk Vanguard concluded in relation to the same species and SPA that the potential loss of no more than 21 kittiwakes per year is *de minimis*, in that it will not have any material effect to predicted totals of in-combination impacts nor alter the significance or the likelihood of an adverse effect on the integrity of the SPA.[xvi]

2. SCOPE AND PURPOSE

2.1 The purpose of this note is to describe in neutral terms the legal framework for HRA derogation decisions. Where there is considered scope for differences in legal opinion, this is highlighted. Within the legal parameters there will be (often significant) scope for discretion by decision makers. This note also provides hypothetical examples for a Scottish offshore wind project which are considered to be legally robust, and also identifies relevant precedent, caselaw and guidance – it is hoped these will be useful tools to assist decision makers. It is expected this note will also be of interest to developers, SNCBs, and other stakeholders with an interest in offshore wind development in Scotland.

2.2 This note has been commissioned by the Scottish Offshore Wind Energy Council (**SOWEC**)[xvii]. The specific scope of this note as set by SOWEC is as follows:

2.3 **No Alternative Solutions Test (*Part A, page 4*):**

(a) "*An example of what an 'alternatives' ["No Alternative Solutions"] argument for an offshore wind project in Scottish waters (at least 500MW) would look like based on arguments presented in recent UK Decisions and current Scottish energy policy.*

(b) *Any recommendations where further policy development from Scottish Government might strengthen the case for the 'no alternatives' case, should Government wish to enable the industry in this regard.*"

2.4 **Imperative Reasons of Overriding Public Interest (IROPI) Test (*Part B, page 9*):**

(a) The scope does not request an opinion on IROPI matters, although we note some points of importance in considering the IROPI test which arise from our opinion on the No Alternatives Test and Compensation Duty.

2.5 **Compensation Duty (*Part C, page 16*):**

(a) "*A legal opinion on whether compensation for a site or species identified as being subject to an Adverse Effect on Integrity (AEoI) must be on a 'like-for-like' basis or whether a 'non-like for like' basis can be developed, through which geographic, site or species specific compensation can be developed. When considering this, inclusion of how an 'assemblage' that is part of a designation should also be considered.*

(b) *An opinion on whether a broader 'net-gain' approach can be adopted that considers the overall coherence of Natura 2000. Any available case law should be considered as part of this opinion.*"

2.6 **Recommendations (*Part D, page 23*)**

2.7 This note is the opinion of CMS on these matters and is shared on a non-reliance basis, no reliance may be placed on this note other than in accordance with the terms of an engagement or reliance letter agreed with CMS. You should seek your own legal advice in relation to specific projects and situations.

PART A: NO ALTERNATIVE SOLUTIONS TEST

3. THE LEGAL FRAMEWORK AND AVAILABLE GUIDANCE

3.1 The term "alternative solutions" is not defined in the Habitats Directive or the Habitats Regulations, and the Habitats Directive and the Habitats Regulations do not prescribe a framework for undertaking an assessment of alternative solutions.[xviii] The European Court of Justice has confirmed the principle that absence of alternative solutions must be demonstrated (*C-239/04 Commission v Portugal* (**Case C-239/04**)[xix], but has given limited practical or substantive guidance on how this should be done. Likewise, the Scottish Government does not currently have any specific guidance on the assessment of alternative solutions under the Habitats Directive or the Habitats Regulations.[xx]

3.2 There are a number of pieces of European guidance which provide some guidance on the assessment of alternative solutions. These comprise:

(a) Managing Natura 2000 Sites: The provisions of Article 6(3) of the 'Habitats' Directive 92/43/EEC (2000) published by the EC in 2000 but updated in November 2018 (**MN 2000**); and

(b) EC Methodological Guidance: Assessment of plans and projects significantly affecting Natura 2000 sites (the **Methodological Guidance**).

(c) Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC (**Article 6(4) Guidance**)

3.3 MN 2000 provides that:

(a) "*it must be documented that the alternative put forward for approval is the **least damaging** for habitats, for species and for the integrity of the Natura 2000 site(s), regardless of economic considerations, and that no other **feasible alternative** exists that would not adversely affect the integrity of the site(s)*"; and

(b) "*it is for the competent national authorities to ensure that all feasible alternative solutions that **meet the plan/project aims** have been explored to the same level of detail. This assessment should be made against the species and habitats for which the site has been designated and the site's conservation objectives.*" (emphasis added)

3.4 The Methodological Guidance largely reflects MN 2000, but it does provide a methodology for undertaking the assessment of alternative solutions and provides for three key steps in the assessment process. These are:

(a) identify and characterise the **key objectives** of the project or plan;

(b) identify all **alternative means** of meeting the objectives of the project or plan; and

(c) **assess** each alternative against the same criteria used in the appropriate assessment to assess the impact of the proposed project or plan on the conservation objectives of the site. (emphasis added)

3.5 In England, there is also the following relevant guidance:

(a) Habitats regulations assessments: protecting a European site, guidance published by DEFRA on 24 February 2021 (the **DEFRA Guidance**) (there was also previous guidance - Habitats Directive: guidance on the application of article 6(4), published by DEFRA in December 2012); and

(b) Planning Inspectorate Advice Note 10.

3.6 The DEFRA Guidance is broadly in line with MN 2000 and the Methodological Guidance and contains similar guidance in respect of the approach to alternative solutions.

3.7 In our opinion, the methodology set out in in the Methodological Guidance is an appropriate and best practice approach to undertaking an alternatives assessment in relation to the 'No Alternative Solution' test in Scotland.

3.8 The three steps are addressed in more detail in the following sections of this note.

4. STEP ONE - SETTING OBJECTIVES

What are the requirements for legitimate objectives?

4.1 Step one is to identify the key objectives for the proposed project. This is the approach that decision makers have taken on derogation cases to date in England, and has been confirmed as being lawful (see *Caselaw: Court of Appeal Judgement in the Heathrow Case* text box), and is supported by European Commission opinions.[xxi]

4.2 Objectives set the parameters to identify potential alternatives. In other words, the No Alternative Solutions test requires the Scottish Ministers to be satisfied there are no less damaging alternative solutions which achieve the identified objectives.

4.3 The Scottish Ministers have considerable scope and discretion to determine the specific objectives of a project, but they must use their judgement to ensure that objectives:

- are critical and genuine; and
- are not deliberately or unreasonably narrow.

4.4 In practice, this means that there is not one right answer and that there are likely to be a range of potential objectives, all of which could be critical and genuine. It would normally be expected that objectives would find support from, or be consistent with, existing policy. There is also a clear link between the objectives set and the IROPI test (i.e. are there imperative reasons of public interest which outweighs the harm), because the IROPI test must be considered for a plan or project in the context of the objectives it achieves. See also Part B: IROPI at paragraph 9 below.

4.5 Practically, in the first instance, project developers are likely to frame objectives for their projects. This may inform optioneering and may influence the development of their Rochdale Envelope. The objectives may be included in a 'shadow' derogation case, prepared by the developer at the time of submission of consent applications as a precaution in the event adverse effects on a site cannot be excluded. However, the ultimate responsibility for confirming the objectives of a project (in relation to the No Alternative Solutions test) rests with the Scottish Ministers. It should be recognised (by both developers and the Scottish Ministers) that the objectives may develop in time. A clear and stable energy and marine policy framework will help ensure that projects can be designed to achieve objectives which remain valid at the point a derogation case is determined, if required.

Caselaw: Court of Appeal Judgement in the Heathrow Case

In England, the Court of Appeal addressed objective setting in the recent case of Plan B Earth v Secretary of State for Transport [2020] EWCA Civ 214 (the Heathrow Case). The **Heathrow Case** relates to the designation of the Airports National Policy Statement (**ANPS**), which provides the policy framework for airport expansion in the South East of England by designating

a preferred scheme comprising the delivery of a third runway at Heathrow Airport. The Heathrow Case demonstrates how alternative solutions operate in practice, and the importance of setting objectives when they may need to be relied upon in a derogation case in due course.

In the decision under challenge in the Heathrow Case, the UK Government had concluded that there were no alternative solutions to the preferred scheme that would deliver the objectives of the ANPS. Critical objectives were to increase airport capacity in the South East and maintain the UK's hub status (what was called the hub objective). The Court of Appeal found that this was a lawful conclusion under the Habitats Directive. The hub objective had been a core objective as far back as 2012 when the Airports Commission had been established, and a potential scheme which threatened the hub objective could not properly be an alternative solution under the Habitats Directive. There was a clear and unassailable finding that: expansion at Gatwick would threaten the UK's global aviation hub status; and a scheme for the development of a second runway at that airport could not realistically qualify as an alternative solution under Article 6(4) of the Habitats Directive. The Court of Appeal made it very clear that this would be no solution at all.

This provides upper Court authority which shows the importance of correctly framing objectives at the outset. The Court of Appeal recognised that objectives should be genuine and critical, but that they are for the competent authority to assess and that the competent authority should use its judgement to ensure that the framing of such objectives is reasonable.

What are appropriate objectives for Scottish offshore wind projects?

4.6 This note provides at paragraph 7 a worked example of appropriate objectives for offshore wind projects in Scotland. Recognising there will be broad discretion on setting objectives, below are some high level comments on what we would consider to be an appropriate approach to objectives for Scottish offshore wind projects.

4.7 **Target and timescale based objectives (either quantitative or qualitative) would be appropriate.** The significant and time critical nature of climate change and net-zero targets mean that both the volume of offshore wind and the timing of its delivery are relevant to addressing the problem, and so relevant to the objectives of an offshore wind project.

4.8 In relation to the scale of the target, numerical targets or qualitative targets could be equally valid objectives. We suggest by way of example in paragraph 7 below that an appropriate objective could be to "*deliver a significant volume of offshore wind in Scottish waters in the 2020s*." This is consistent with Secretary of State's objectives for Hornsea Three (see *Example: Hornsea Three DCO* box below), allows for flexibility and is readily adaptable to our evolving understanding of climate change and revised legal or policy targets. Equally a numerical target could be appropriate, for example 11GW of offshore wind by 2030 as contained in the Offshore Wind Policy Statement, this may provide more certainty than a qualitative target but would require regular review given numerical targets are inherently less adaptable to evolving circumstances.

4.9 The timescale of the '2020s' aligns with the 2030 date set to achieve various ambitious offshore wind targets in relevant policy documents such as the Offshore Wind Policy Statement and the UK Energy White Paper, as well as interim net-zero targets.

4.10 **A Scottish focussed (rather than UK-wide) objective would be appropriate.** Our reasons for this suggestion are as follows:

(a) Scotland has distinct and ambitious targets set in the Climate Change (Emissions Reduction Targets) (Scotland) Act 2019 (flowing from the UK's international climate obligations). This commits Scotland to a net zero emissions target of 2045 (with a 75% reduction by 2030).

(b) The need for offshore wind in Scottish Waters is also supported by specific Scottish policy. This includes:

(i) the Sectoral Marine Plan for Offshore Wind Energy dated October 2020 (the **Sectoral Marine Plan**), which sets the framework for the continued growth of commercial scale offshore wind in Scotland and which notes: "*will be an essential feature of our future clean energy system and a potential key driver of economic growth*". The Sectoral Marine Plan sets out the spatial footprint for the current cycle of ScotWind leasing and identifies a maximum potential capacity under this leasing round of up to 10 GW;

(ii) the Scottish Energy Strategy: The future of energy in Scotland dated December 2017 (the **Energy Strategy**) which sets the 2050 vision, and which focuses heavily on the delivery of offshore wind;

(iii) the Offshore Wind Policy Statement, which identifies that as much as 11 GW of offshore wind capacity is possible in Scottish waters by 2030, and which notes that the Sectoral Marine Plan will set the course for this delivery, maximising deployment in Scottish waters whilst protecting marine users and our environment; and

(iv) the Sixth Carbon Budget: The UK's path to Net Zero dated December 2020 (the **CCC's 6th Carbon Budget Report**) which states: "*Where powers are reserved to the UK level, the devolved administrations have an important role in ensuring that the emissions reductions take place. In particular, the devolved administrations should focus on the following areas: Planning.*"[xxii]

(c) Whilst energy is a retained matter, the environment is a devolved matter. Practically, the decision makers (and statutory consultees) in relation to offshore wind in Scotland are distinct from the rest of the UK. The 'owner' of the seabed is also distinct from the rest of the UK (Crown Estate Scotland in Scotland compared with The Crown Estate in England & Wales).

(d) The UK Government's Energy White Paper from December 2020 sets a target of 40GW of offshore wind by 2030, including 1GW floating wind. This is powerful UK policy level support for the need for significant volumes of offshore wind in Scottish waters in the 2020s, to achieve this target on a UK level. The White Paper recognises that the proposals in it will be progressed in accordance with devolution settlements, so recognising there will be a degree of autonomy for the devolved administrations to deliver their contribution to these targets. A Scottish-specific offshore wind objective is therefore consistent with this suggested autonomy and with the wider UK energy policy.

4.11 **An objective in relation to the delivery of offshore wind (as opposed to other generation technologies or increased energy efficiency) would be appropriate.** Our reasons for this suggestion include:

(a) the specific policy objectives and targets for offshore wind (as described above);

(b) fundamental differences compared to onshore generation technologies (including onshore wind) resulting from its offshore location, including impacts, interactions, and potential for scale;

(c) fundamental differences compared to other offshore generation technologies (such as wave and tidal), including scale, available sites, maturity and viability; and

(d) fundamental differences compared to simply improving energy efficiency due to Scotland's current reliance on energy and the impacts and practical difficulties in relying on reducing energy consumption alone to meet legal and policy targets.

4.12 This approach to technology is consistent with DEFRA Guidance (applicable in England), which provides that alternative forms of energy generation are not alternative solutions to an offshore wind project and are beyond the scope of its objectives.[xxiii] Similarly, for port development the DEFRA Guidance provides that other forms of freight do not need to be considered.

Example: Hornsea Three DCO

The objective led approach is the approach that the Secretary of State took in making The Hornsea Three Offshore Wind Farm Order 2020 (the **Hornsea Three DCO**), which was made on 31 December 2020 and which came into force on 22 January 2021. The Secretary of State's conclusion was summarised as follows: "*The Secretary of State is satisfied that there are no alternatives to fulfilling the objectives of the Development*"[xxiv].

In relation to the Hornsea Three project, the project promoter identified 11 project objectives in its shadow HRA derogation case. In making the Hornsea Three DCO, the Secretary of State took the view that there were four genuine and critical objectives. These were the need to:

(i) generate low carbon electricity from an offshore wind farm in support of the decarbonisation of the UK electricity supply;

(ii) export electricity to the UK National Grid to support UK commitments for offshore wind generation and security of supply;

(iii) optimise generation and export capacity within the constraints of available sites and onshore transmission infrastructure; and

(iv) deliver a significant volume of offshore wind in the 2020s.

In making the Hornsea Three DCO, the Secretary of State confirmed that his assessment of alternative solutions did not include alternative forms of generation and was limited to a do-nothing scenario or alternative offshore wind farm projects.

Example: Lewis Wind Farm

An application for s36 consent was refused by the Scottish Ministers in 2008 for Lewis Wind Farm (an onshore wind farm), as it was not possible to exclude an adverse effect on the Lewis Peatlands SPA and the Scottish Minsters considered there were alternative solutions which could achieve the objectives of the project.

In the Lewis decision the developer initially framed the objectives narrowly (firstly economic benefit to the Western Isles, then onshore wind in the Western Isles). The Scottish Ministers broadened

this out to consider onshore wind throughout Scotland and Scottish / UK renewable energy targets to be achieved by 2011 and 2020. This is consistent with the approach set out in this note (Scotland-wide, technology-specific objectives). We note we consider there are important differences between this decision in 2008 and offshore wind in 2021, which could support different conclusions on the No Alternative Solutions test: (i) the legal and policy targets are more ambitious now than in 2008; and (ii) onshore wind has a more organic development trajectory (more, smaller projects in a more sustained pipeline) so the considerations are quite different in relation to whether an individual onshore windfarm is needed to achieve overall objectives.

What are inappropriate objectives?

4.13 Examples of inappropriate objectives include:

(a) **Unnecessarily high targets**: It would not be appropriate to set targets at an unnecessarily high level to ensure every project which comes forward is required in terms of meeting those objectives. This would circumvent the alternatives appraisal and would not be a critical or genuine objective.

(b) There is an inherent check on this in the derogation tests, because if a project is contributing to an unnecessarily high target, there would not be an imperative reason of public interest for that project capable of outweighing the harm (i.e. if it is not actually necessary to achieve the target, then the project may not needed). See also Part B: IROPI at paragraph 9 below.

(c) This is not to say ambitious targets are not appropriate objectives, so long as they are genuine and critical. Given the recognition in law and policy of the scale and importance of net-zero targets, it may be expected that targets for offshore wind will be high. The example objectives for Scottish offshore wind proposed at paragraph 7 provide an ambitious target in terms of "significant volume" in the 2020s (or alternatively 11GW by 2030 as per the OWPS). We consider such objectives would be justifiable and that a project contributing to that aim should be capable of passing an IROPI test (recognising that the final decision on IROPI will always be project specific because it requires a balance with the adverse effect).

(d) **Unreasonably narrow focus (e.g. only fixed foundations):** We consider that an objective limited to a sub-set or type of offshore wind, such as fixed or floating foundations, may be too narrow. It may be appropriate to have such an objective if there was a genuine, critical and reasonable policy imperative specific to one technology (such as in relation to floating to create scale and drive down costs). We are not aware of any current policy justification which would support a legitimate objective focussed only on the delivery of fixed foundation projects. See paragraph 6.10 below for a discussion of floating projects as an alternative to fixed.

(e) **Impractically broad:** We consider that an objective must not be so broad so as to render it practically impossible to deliver offshore wind in Scotland. See paragraph 4.10 above for reasons why we consider it appropriate to focus on offshore wind (as opposed to other generation technologies or indeed increased energy efficiency), and paragraph 4.7 on Scotland (as opposed to the UK).

(f) A UK-wide objective could also be appropriate (as noted above, there will be a range of objectives which are appropriate). However, this would necessitate a broader consideration of alternative solutions beyond those in Scottish waters.

5. STEP TWO – IDENTIFY POTENTIAL ALTERNATIVES WHICH MEET THE OBJECTIVES

5.1 Step two is to identify all alternative means of meeting the objectives of the project.

How are potential alternatives identified?

5.2 This step in the No Alternative Solutions test requires an assessment of all[xxv] feasible alternative solutions.[xxvi] It does not require an assessment of theoretical alternative solutions or unfeasible alternative solutions. However, potential alternatives whose feasibility cannot be ruled out should be assessed.[xxvii]

5.3 Following MN 2000 and the Methodological Guidance, the following key forms of alternative solutions may need to be considered:

(a) **Do Nothing/Zero Option:** MN2000 and the Methodological Guidance both identify that a do-nothing option should be considered as an alternative. Usually, this can be discounted on the basis that it does not meet the project objectives. The English Courts have recognised[xxviii] and stated that it is primarily a question for the IROPI test. However, a do-nothing option should be considered given the reference to it in pre-existing guidance and, in practice, decisions in England such as for the Hornsea Three project have considered this. Therefore, it is best practice to include this. By way of example, the European Commission has previously accepted Germany's position that a "zero" option would not meet the project criteria of linking Stuttgart and Bad Cannstatt stations and renovating the railway bridge over the River Neckar[xxix].

(b) **Different Scale & Design:** Alternative scale and design should be considered. This is one reason why specific objectives and HRA derogations should be considered at the optioneering and Rochdale Envelope stage of a project, because technical mitigation such as turbine height and minimum blade height will be relevant considerations at this stage of the alternatives appraisal.

(c) **Different Process:** Alternative processes should be considered. On the assumption that the objectives are limited to offshore wind, there would be no requirement to consider alternatives comprising onshore wind (or other onshore technologies) as these will not deliver the objectives. If broader objectives are set, emerging technologies may need to be included, for example tidal projects, to the extent that they begin to become viable on a more commercial scale.

(d) **Different Location:** Alternative locations should be considered. We are not aware of any basis to limit the assessment of alternative solutions to those actually available to the developer in question – such an approach would run counter to the 'public benefit vs environmental protection' at the heart of the derogation process, because both the public and the environment are neutral to the identity of the developer of a project.

5.4 In practice, if the objectives are linked to:

(a) Scottish waters, then the only alternative locations will be areas subject to leasing by Crown Estate Scotland (at this stage Scotwind, but potentially Scotwind 2 post-2023); or

(b) UK waters, then the alternative locations will be areas subject to leasing by Crown Estate Scotland and The Crown Estate (including Scotwind and potentially Scotwind 2 post 2023, but also including Round 3, Extension Rounds and Round 4 (plus any future rounds)).

6. STEP THREE – ASSESS THE IDENTIFED POTENTIAL ALTERNATIVES

6.1 The third step in the No Alternative Solutions test is to assess the identified potential alternatives.

6.2 In our view, for a possible alternative to be a genuine alternative for the purposes of the No Alternative Solutions test it must meet the objectives, be feasible and have a materially lower impact on the SPA.

Note: ECJ vs Commission

There is some inconsistency between MN 2000 and European case law on the approach to the assessment of alternatives and the conclusion that the assessment must reach. This is because:

(i) The ECJ has stated that: "*the choice **does not inevitably have to be determined by which alternative least adversely affects the site concerned**. Instead, the choice requires a balance to be struck between the adverse effect on the integrity of the SPA and the relevant reasons of overriding public interest*[xxx].; but

(ii) MN 2000 provides that "*it **must** be documented that the alternative put forward for approval **is the least damaging** for habitats, for species and for the integrity of the Natura 2000 site(s)*".

There are EC opinions which have undertaken the balancing exercise, and the Commission has concluded that adverse effects are justified in cases where the competent authority has concluded that: "*None of the alternatives would give rise to a significantly lower impact*" and "*The competent authorities therefore consider that the current proposed solution offers the best balance between ecological and economic objectives*"[xxxi].

In our view the ECJ is recognising that the No Alternative Solutions and IROPI tests do not operate in absolute isolation. Properly characterised, we consider that the balancing exercise falls in the identification of objectives (part of the No Alternative Solutions test), and then in deciding whether a project which plays a necessary role in achieving those objectives meets the IROPI test. We also consider that the ECJ is recognising that there must be an inherent degree of proportionality; to be a genuine alternative the reduction in impact must be material. If there were a feasible alternative solution that met the objectives and had materially less of an impact on the European site in question (and did not have similar adverse impacts on other European sites), we consider that there would be a risk of legal challenge if the Scottish Ministers proceeded to approve the project by undertaking a balancing exercise, because the project would not have satisfied the "*no alternative solutions*" test.

Will the potential alternatives meet the objectives?

6.3 It must be considered if any of the potential alternatives will meet the objectives without the proposed project itself.

6.4 The list of potential alternatives may include a combination of individual alternatives. For example, in relation to ScotWind an alternative solution to an individual project could be progressing with the other sites excluding that project. This is discussed at paragraph 7.3 below but in short we consider it could be appropriate to conclude all the ScotWind sites are required to meet the objectives (and so there would be no need to reach conclusions on the feasibility of the other ScotWind projects) but this is ultimately a matter for the judgement of the Scottish Ministers.

Example: Dibben Bay

An example of a project in England which failed the alternative solutions test is Dibden Bay. The Secretary of State was not satisfied that there were no alternative solutions to a proposed deepwater port project that would have had adverse effects on the integrity of a European site. In that case, there were three other projects in the South East (all at different ports) at early development stages that the Secretary of State considered were feasible projects that could meet the identified need in the short to medium term. That was sufficient to demonstrate that there were alternative solutions.

When is a possible alternative "feasible"?

6.5 We consider that it would be appropriate to discount a project on the basis that it is not financially, legally or technically feasible. MN 2000 does make it clear that the assessment of alternative solutions should be limited to "*feasible*" alternative solutions. In England, the DEFRA Guidance also makes it clear that a potential alternatives is only acceptable if it is: "*financially, legally and technically feasible*". Taking these in turn:

6.6 **Financial Feasibility**

(a) A potential alternative would not be financially feasible if the cost of that potential alternative would render the project unviable.

(b) The ECJ has previously stated that: "*it cannot be accepted that the economic cost of such measures alone may be a determining factor in the choice of alternative solutions under that provision*"[xxxii] . However, this principle must only extend so far as the alternative solution remains a viable (and therefore not a theoretical) alternative. If the economic cost of an alternative is such that it is not viable then we consider that it can be discounted as an alternative solution.

6.7 **Legal Feasibility**

(a) A potential alternative would not be legally feasible where there is a legal impediment, including from a legal or consenting perspective such as the lack of land /seabed rights, or if it would be unreasonably difficult or improbable that consent would be granted.

(b) In the offshore wind sector for example, an alternative which sits outside of a Crown Estate Scotland leasing zone (i.e. the sites identified in the Sectoral Marine Plan), or which has previously been considered and discounted on account of environmental impacts, may not be legally feasible.

6.8 **Technical Feasibility**

(a) A potential alternative would not be technically feasible where it is incapable of being implemented, technically unsound, unsuitable for deployment in the environment and/or would not meet industry safety and regulatory requirements.

6.9 Where there is doubt about feasibility, for example where a potential alternative is at an early stage, we consider an alternative should be reasonably likely to be viable in order to be considered a potential alternative.

Are floating foundation projects a "feasible" alternative to fixed?

6.10 Floating foundation projects have more flexibility in location than traditional fixed foundation projects, however, the technology is at an earlier stage in deployment. The UK Energy White

Paper targets 40GW of offshore wind by 2030, but only 1GW of floating (although we appreciate the Scottish Government's aspirations may be more ambitious).

6.11 The approach to considering whether or not floating foundation projects are an alternative solution to fixed is set out in the worked example No Alternatives Solutions appraisal for ScotWind in paragraph 7 below. In short:

(a) if it is determined that all of the ScotWind projects are required to meet the objectives then the floating projects within ScotWind would not be an alternative solution to a fixed project with adverse effects, because all projects are needed. It would need to be considered whether future leasing rounds could deliver sufficient volumes from other projects in the timescales of the objectives, but the fact alone that more floating foundation projects are theoretically possible in the future is not in our view enough to consider them legally or technically feasible alternatives at present.

(b) if it is determined that not all of the ScotWind projects are required to meet the objectives, then floating projects could be an alternative solution to a fixed foundation project with adverse effects, but only if it is reasonably likely that such floating projects are financially viable (this might involve consideration of relative costs if competitive subsidies such as a Contract for Difference are required) and technically viable to achieve deployment within the timescales of the objects (e.g. in the 2020s)

When is a possible alternative solution lower impact?

6.12 An assessment of potential alternative solutions should comprise an assessment of the adverse effects on the specific site in question, and feasible alternative solutions should be assessed in respect of their impact on that specific site. Impacts on other European sites and qualifying features should also be considered (see paragraph 6.16 below).

6.13 The impact should be materially lower in order for a potential alternative to be considered a genuine alterative for the purposes of the No Alternative Solutions test (*see EC vs Commission box*).

6.14 If it has been concluded that the (whole) project is required to meet the objectives, even taking account of the potential alternatives, then a smaller iteration of the project (e.g. fewer turbines) can be discounted. Although lower impact, it would make a lesser contribution and so would not achieve the objectives.

6.15 A design iteration which achieves the same capacity with lower impact and remains otherwise feasible (such as adjusting hub height) is likely to be a potential alternative.

What if a potential alternative impacts a different species or SPA?

6.16 We consider that a potential alternative which gives rise to a similar level of adverse effect on another European site (or a different qualifying feature) could be properly excluded as an alternative. We are not aware of caselaw on this point, but logically this must be correct, and the recent DEFRA guidance takes the same view[xxxiii]. Otherwise, if two projects with a common objective have different but equivalent adverse effects, they would constitute alternatives to each other, and so the No Alternatives Solutions test could never be passed – this would not achieve the purpose of the derogation provisions which is to balance public benefit with protection of the UK site network.

7. EXAMPLE ALTERNATIVES ASSESSMENT FOR SCOTWIND

Example Step One: Objectives for an offshore wind project in Scotland

7.1 Taking into account the distinct legal and policy position in Scotland, areas of devolved legislative competence, separate consenting bodies, separation of Crown Estate Scotland from TCE, practice in England (see *Example: Hornsea Three* text box) and fundamental differences between offshore wind and other technologies, we consider critical and genuine objectives could be limited to offshore wind in Scottish waters (Scotwind and future rounds of offshore leasing) and could include the need to:

(a) generate low carbon electricity from offshore wind farms in support of the decarbonisation of the Scottish electricity supply;

(b) export electricity to the Scottish electricity grid to support Scottish commitments for offshore wind generation and security of supply;

(c) optimise generation and export capacity within the constraints of available Scottish sites and onshore transmission infrastructure[xxxiv]; and

(d) deliver a significant volume of offshore wind in Scottish waters in the 2020s (note: an alternative to "significant volume" would be a quantitative target such as 11 GW as per the OWPS).

Example Step Two: Potential Alternative Solutions for an offshore wind project in Scotland

7.2 If the objectives are set at a Scotland-wide level and include offshore wind of all types (as we consider could be appropriate – see Section 4), then we consider the following potential alternatives should be considered. This follows the approach taken by the Secretary of State in Hornsea Three, other than ensuring that geographic location of the alternatives (Scotland-wide) matches the geographic focus of the objectives (Scotland-wide)[xxxv]:

(a) Offshore wind farms not in UK EEZ (which could be immediately discounted on the basis of objectives);

(b) Offshore wind farms in the UK EEZ but not in Scottish waters (which could be immediately discounted on the basis of objectives);

(c) Offshore wind farms within Scottish waters, including:

(i) within the leasing area in which the project is located (this will include alternative designs, such as increased hub height);
(ii) at other locations available to the developer;
(iii) within other leasing area let from Crown Estate Scotland to other developers; and
(iv) within other leasing zones which could have been let by Crown Estate Scotland under Scotwind (i.e. the areas identified in the Sectoral Marine Plan), and any future leasing rounds that may emerge.

Example Step Three: Assessment of Potential Alternatives for an offshore wind project in Scotland

7.3 Objectives met?

(a) Assuming the objectives and potential alternative solutions are as suggested in the examples at paragraph 7.1, the first (and perhaps most critical) decision for the Scottish Ministers would be whether or not all sites forming part of Scotwind are required to meet

the objectives. In particular, the proposed example objective to deliver a significant volume (or a quantitative target such as 11GW as per the OWS) of offshore wind in Scottish waters in the 2020s.

(i) **All required?** We consider it could be legitimate to conclude that all the sites awarded in ScotWind are required to meet the proposed example objectives. This is effectively the conclusion the Secretary of State reached in relation to Hornsea Three.[xxxvi] It would be necessary to consider the status and timing of future leasing rounds if they could also feasibly deliver in the timescale of the objectives. If this conclusion is reached, then it would not be necessary to consider the feasibility or impacts of the other individual sites in ScotWind – in other words the focus of the No Alternative Solutions test would be on other design iterations for the project itself (e.g. hub height (but not a reduction in capacity- see paragraph 6.14)). It would of course still be necessary to consider whether the IROPI test is passed for the project in the context that it is playing a necessary part in achieving this objective.

(ii) **Not all required?** If it is considered the full suite of ScotWind sites are not required to achieve the proposed example objectives, then it will be necessary to consider the extent to which the other projects within ScotWind (and future leasing rounds) are feasible and assess their impacts.

7.4 Feasible?

(a) *Financial feasibly*: is there a route to market? In particular, if some of the alternative sites or projects have/need floating foundations, is that financially and technically viable or reasonably likely to be within a timeframe which would achieve the objectives?

(b) *Legal feasibility*: is there a seabed lease or a route to a seabed lease within a timeframe which would achieve the objectives? If there is an objective to deliver within a defined timeframe (e.g. “in the 2020s”), then this may exclude sites without agreements for lease under previous leasing rounds or ScotWind.

(c) *Technical feasibility*: is a potential alternative technically feasible? In particular, if some of alternative sites or projects have/need floating foundations, is that technically viable or reasonably likely to be within a timeframe which would achieve the objectives? Would there be expected to be a natural attrition rate as the technical feasibility of sites is better understood? Are other design iterations for the project itself feasible, such as hub height increases?

7.5 Avoids adverse effects on European site?

(a) A potential alternative must not similarly adversely affect a European site to be a genuine alternative for the purposes of the No Alternative Solutions test. As explained in paragraph 6.16, in our view it need not be same impact (i.e. same site or same qualifying feature).

(b) If there was a material difference in the magnitude of adverse effects between alternatives, and not all were needed to achieve the objective, then the relative scale of the adverse effects would form part of the IROPI considerations.

7.6 For possible alternatives at an earlier stage of development without full assessments, it would be appropriate to exclude as an alternative a site which was also reasonably likely to give rise to adverse effects on a European site.

8. STANDARD OF LEGAL CHALLENGE

8.1 In England, the Court of Appeal held in the Heathrow Case that the standard of review in respect of Article 6(4) of the Habitats Directive is Wednesbury unreasonableness (equivalent to manifest error in EU law). A decision is Wednesbury unreasonable if it is so unreasonable that no reasonable person acting reasonably could have made it.

8.2 This is important in the context of the setting of objectives and the proportionate approach to assessment.

PART B: IROPI

9. LINKS BETWEEN THE IROPI TEST AND: (1) THE NO ALTERNATIVE SOLUTIONS TEST; AND (2) THE COMPENSATION DUTY

9.1 A detailed opinion on the IROPI Test is outside the scope of this note. However, we note the following:

(a) In our view there is a clear linkage between the No Alternative Solutions test and the IROPI test. The objectives which a project achieves (or plays a part in achieving), will clearly be relevant to assessing and weighing whether there is an imperative reason of public interest for that project which overrides the harm.

(b) As such, taken together, the No Alternative Solutions and IROPI tests provide an inherent check and balance in setting objectives. The less essential objectives are, the less likely it is that there really is an imperative reason of public interest for the project which could override the harm. This would be the case for unnecessarily high objectives (i.e. if it is not actually an imperative to achieve the target set in the objective) or unnecessarily narrow objectives (i.e. if it is not an imperative to achieve that objective at all). A project contributing to a genuine, critical and reasonable objective will have the best chance of satisfying the IROPI test. This gives us confidence that the Scottish Ministers enjoy a reasonably wide discretion in setting objectives, because the subsequent need to justify IROPI ensures there is no risk of a 'gap' which fails to achieve the purpose of the derogation tests: an informed balance between the public interest and environmental protection.

(c) The Secretary of State in Hornsea Three appeared to recognise the link between objectives and IROPI: "*Without Hornsea Three, it is very possible that delivery of the Sector Deal and the UK government's 2030 ambition will fall short*."[xxxvii]

(d) In relation to the compensation duty and IROPI, we note it may be relevant for the appropriate authority to consider the compensation options available in reaching its decision on imperative reason of overriding public interest – if no comparable compensation is likely to be available for a rare and high value natural asset this will be a relevant (and potentially very important) factor in the IROPI decision (which is necessarily a balancing exercise between public interest and harm). By way of recent analogous example, the Examining Authority in relation to the Wylfa Newydd Nuclear Power Station referenced consideration of compensatory measures in its assessment of the IROPI test in relation to an SPA.[xxxviii]

PART C: THE COMPENSATION DUTY

10. THE COMPENSATION DUTY

What is the compensation duty?

10.1 Where a plan or project is agreed to or consented in accordance with the derogation tests, there is a requirement that the appropriate authority[xxxix] shall:

- "*secure that any necessary compensatory measures are taken to ensure that the overall coherence of [the UK site network][xl] is protected.*"[xli]

10.2 The compensation duty is framed as a broad duty. It requires the Scottish Ministers to ask what measures are necessary to ensure there is an equivalently coherent UK site network viewed as a whole once the plan or project is implemented. Then to secure that such necessary measures are taken. It requires a broader focus than replacing and replicating the damage caused.

What does "overall coherence" mean?

10.3 The "*overall coherence*" of the UK site network must be considered in terms of the aims and objectives of the UK site network[xlii] and of the Habitats Regulations and Directives. Focussing on birds (as this note does):

(a) The objective of classifying SPAs is to ensure that the most suitable sites (in number and size) for: (a) the conservation of species listed in Annex 1 to the Wild Birds Directive naturally occurring in the UK's territory; and (b) the conservation of migratory species of birds not listed in Annex 1 naturally occurring in the UK's territory are classified as SPAs.[xliii] The Scottish Ministers must classify such sites as they consider necessary to ensure this objective, insofar as they consist of sites in Scotland.

(b) The criteria for classification and objectives for ongoing management of SPAs make reference to the aim of the Birds Directive for Annex 1 and migratory species "*to ensure their survival and reproduction in their area of distribution"* and to the Article 2 requirements that *"Member States shall take the requisite measures to maintain the population of [Annex 1 or migratory species] at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level*".[xliv]

10.4 These objectives are scientifically driven and aimed at conservation of the Annex 1 and migratory species which naturally occur in the UK's territory, with conservation aimed at ensuring the survival and reproduction of these species in their area of distribution. There is no legal obligation in relation to "favourable conservation status" for SPAs, as there are for SACs, however, we note that a common statement by the UK's SNCBs on Favourable Conservation Status (FCS)[xlv] suggests that the Article 2 objectives of the Birds Directive is "*increasingly interpreted as being equivalent to FCS.*"

10.5 FCS is viewed as a positively oriented objective which goes beyond avoiding extinction or habitat loss and "*describes a situation in which individual habitats and species are maintaining themselves at all relevant geographical scales and with good prospects to continue to do so in the future*" (quote taken from a joint statement by the SNCBs on FCS).[xlvi] The important point for this note is that both the Birds Directive Articles and FCS focus on the collective purpose of designated sites - designated sites should each contribute[xlvii] to the broader collective goal

of habitats and species that thrive in the long-term in their natural area of distribution / range (indeed the network of UK sites may only be contributing to a wider biogeographic area).

10.6 The EU Article 6(4) Guidance states that the requirement to "protect" the overall coherence "presumes" the original network was coherent and, if a derogation case is made out, then the "*situation must be corrected so that the coherence is fully restored*." This is a useful rule of thumb, although it's important to recognise that this statement is not a complete expression of the legal duty as it applies in every circumstance. The Compensation Duty is not focussed solely on the site impacted.[xlviii] The SNCB joint statement explains that it is important to distinguish between *favourable condition* (of a defined area of habitat or population e.g. within a protected site) and the wider concept of FCS. The language of the Compensation Duty requires ensuring the overall coherence of the UK site network (rather than a narrower duty like specifically returning the impacted site to its previous condition, albeit this might be the simplest and most appropriate aim of compensation where possible). This is consistent with the fact that the UK site network is evolving – e.g. through management interventions, adaptation of the UK site network[xlix] or designation of new sites. As such, compensatory measures could be more broadly focussed than the site impacted, for example, the same qualifying feature at a different SPA if this was the most appropriate available compensatory measure in light of the overall coherence of the UK site network. In theory, in our opinion compensatory measures could also be more broadly focussed than the qualifying feature impacted if there were circumstances where measures focussed on that specific feature were not available, or may not be required if the contribution a site was making to conservation / FCS was no longer necessary for the overall coherence of the UK site network (however in practice we expect such cases to be very rare[l] and for the current purposes not relevant because the range of compensation options identified by Macarthur Green each focus on the specific qualifying feature impacted).

10.7 In light of the above it must be understood that, **the Compensation Duty (in the SPA context) is a legal duty to secure compensatory measures necessary to ensure that, following implementation of the project and such measures, there remains a UK site network which viewed as whole offers an equivalently coherent suite of sites aimed at achieving conservation / FCS of Annex 1 and migratory species within their area of distribution.** In doing so it will be necessary to consider the current overall coherence of the UK network as a whole, the contribution the impacted site makes to that coherence, and the scale of impact of the project on that contribution.

Must compensation be like for like?

10.8 In our view the Habitats Regulations stop short of requiring 'like for like' compensation, instead the focus is on ensuring 'overall coherence' (see paragraphs 10.6 and 10.7). However, compensation which is as similar (i.e. replicating and/or replacing the adverse effect caused) as practicable will usually be the most appropriate where available.

10.9 We consider that references to 'like for like' in policy or guidance may not be helpful, at least without a clear definition, as arguably the nature of ecology means truly 'like for like' compensation is never possible[li] – hence why the Habitats Regulations prioritise avoidance and mitigation over compensation. For example, compensatory measures targeting the same qualifying feature at a different SPA may be the most appropriate to ensure the overall coherence of the UK site network but are arguably not like for like (because geographically different). So if defining or using the term like for like, it will be important not to suggest such

options are excluded. If used, the term may be most useful in setting an aim for compensatory measures, rather than to describe a strict legal requirement for such measures.

10.10 It is important to note that the compensation duty is triggered sequentially once a plan or project with a risk of an adverse effect is agreed to or consented by the competent authority (i.e. it is satisfied the project must proceed because there are no alternative solutions and imperative reasons of overriding public interest). The compensation duty (as is common[lii]) requires the appropriate authority to ask what compensation must be secured and then ensure such compensation measures are taken, it is not strictly speaking a third pass/fail test prescribing that project consents must be refused if like for like compensation (or compensation meeting some other test) is not available.[liii] We do note, however, that the likely compensation available could be a relevant consideration in deciding whether the IROPI test is met (see paragraph 8.1.4).

10.11 As discussed at paragraph 11 below, in relation to Scottish offshore wind farms it seems that compensation which is similar to the potential impacts would be available if needed (by effectively replacing the reduction in populations at the impacted SPA and/or other SPAs hosting the same qualifying feature). Such measures might all be described as like for like or closely like for like, depending on the definition. The Scottish Ministers will have broad discretion in determining what is required to ensure the overall coherence of the UK site network is protected, but this discretion must be exercised reasonably so a good reason would be needed for opting for compensatory measures which are less similar to the impact if compensatory measures which are more closely like for like are practicable.

How to identify suitable compensation measures?

10.12 There could often be a broad range of compensatory measures which will satisfy the Compensation Duty in any given situation. So, in the offshore wind context, the Scottish Ministers will have broad discretion in the scope of compensatory measures to secure. The following will be relevant considerations in identifying compensatory measures (in line with EU guidance[liv]), and ensuring discretion is exercised reasonably: the purpose and function of the designated site, the function it performs, the likely effectiveness, and ensuring compensation is proportionate to the loss. Taking each in turn:

(a) **Function and Purpose:** identifying appropriate compensation to ensure that the overall coherence of UK network remains (as discussed in detail at paragraph 10.4 above) will require asking what role does the impacted site play in contributing to the overall conservation / FCS of the qualifying features hosted? In considering the function of the site, Article 10 of the Habitats Directive explains that, in the context of improving ecological coherence of the Natura 2000 network, features of major importance for wild fauna and flora are those which (because they are linear and continuous such as rivers, or function as stepping stones) are essential for the migration, dispersal and genetic exchange of wild species. Clearly in considering compensatory measures, the starting point will be to focus on the function of the site within the UK network and consider the overall role it plays – does the adverse effect have a wider impact on the UK site network beyond the immediate loss? If yes, then the implications of such wider impact on the coherent functioning of the UK site network must be considered in fulfilling the compensation duty. The Article 6(4) Guidance explains: "*it is clear that the importance of a site to the coherence of the network is a function of the conservation objectives of the site, the number and status of the habitats and species found within the site, as well*

as the role the site plays in ensuring an adequate geographical distribution in relation to the range of species and habitats of species concerned." (emphasis added).

(b) We see no reason to treat compensation for an adverse effect on a seabird assemblage comprising a qualifying feature of an SPA any differently to compensation for an adverse effect on an individual species which is a qualifying feature of an SPA in its own right. Note that care would need to be taken that constituent parts of an assemblage are appropriately treated as part of the assemblage as a whole, and their status not conflated with individual species which qualify as a designated feature in their own right.

(c) **Proportionate:** the compensation duty requires that compensatory measures secured are not disproportionate to the adverse effect caused. So, even if the UK site network has sites not in favourable condition, or FCS is not being achieved, or otherwise coherence could be improved, compensatory measures should remain proportionate to the adverse effect caused. Likewise, if the adverse effect is caused in-combination, then the compensatory measures should be proportionate to the contribution to the adverse effect resulting from the plan or project itself.

(d) We consider that the techniques of biodiversity net gain or environmental net gain may be of assistance in identifying the amount of compensation which is proportionate. By analogy with compensation in compulsory purchase, the compensatory measures should aim for 'equivalence' in value. The Scottish Ministers will have discretion (to be exercised reasonably) to judge equivalence. We consider it may be appropriate to secure proportionately more compensation where the compensatory measures secured have a degree of uncertainty in effectiveness or a degree of dissimilarity to the adverse effect (see also paragraph 10.26 below on timing). This would be in order to account for the inherent uncertainties in environmental value, and to ensure full compensation is secured taking a precautionary approach. This also helps ensure practically that compensation options as close to the adverse effect as possible are likely to be preferred.

(e) Where a range of different compensatory measures are possible, the cost to the developer of delivering such measures will be a relevant consideration in deciding what approach is most appropriate.

(f) **Effectiveness:** the Habitats Regulations require that compensation must "ensure" that the overall coherence of UK site network is protected, and the UK site network offers the highest level of protection, so there would need to be a reasonably high degree of certainty that the proposed compensation measures would be effective to discharge this duty. This stops short of requiring that compensation must be 'proven' to be effective. We consider this is too high a bar. On the basis that true like for like is rarely, if ever, possible then there will always be some uncertainty as to whether any proposed compensation truly compensates for damage. It's also the case that the future, even of protected sites, is not certain – site protection undoubtedly improves the prospects but cannot guarantee the success of the species hosted. So, it is not a certain future which needs to be compensated for. However, as noted in (d) above applying the precautionary principle, the greater the degree of uncertainty with proposed compensation, the greater the amount of compensation likely to be required.

Must compensation be in addition to measures which otherwise occur?

10.13 It would not usually be appropriate to deliver, as compensation, a measure which was going to happen anyway. There are a number of broad duties under the Birds and Habitats Directives

(and Regulations), but it also seems that in their wording and in practice, there is a degree of discretion on which measures are taken pursuant to those broad duties. So, there might be a broad range of things which could be done under broader duties but a much narrower range of things which must be done. An example of where a particular measure must be done might be where a court has declared that a particular measure is required to comply with a broad duty (unlikely to occur often). However, if a particular measure has already been committed to, or there is otherwise a reasonable prospect it will occur anyway, then that measure cannot be compensation.

10.14 We consider a sensible test would be: is it reasonably likely that the proposed compensation would happen anyway? If yes, it cannot be counted as compensation. Examples of measures which are reasonably likely to happen anyway, and so could not be compensation, would be:

(a) if a specific measure was already identified with funding in place to deliver it in a defined timescale; or

(b) if a specific measure was already required under a legal obligation, for example as compensation under a condition in a consent already granted and either implemented of reasonably likely to be implemented.

10.15 A high-level strategy would not normally in itself be sufficient to preclude a compensation measure on the basis of additionality, although specific measures under such a strategy with funding secured for delivery within a defined timescale could not normally count as compensation.

10.16 This should not necessarily exclude or restrict the possibility of an industry-wide compensation solution. Such a solution could be implemented on an incremental basis, as a project requiring compensatory measures is consented. Alternatively, the solution could deliver compensation in advance which could result in no further compensatory measures being necessary when a project comes forward under the derogation tests (the analogous concept of habitat banking is given support in some circumstances in EC guidance[lv]) - any such 'pre-emptive' compensation solution would need careful consideration on how it is structured to ensure the compensation did not simply fall to be treated as part of the existing baseline.

Does compensation need to be delivered in Scotland?

10.17 No. The focus is on the location of the impact of the compensation measure, not the location of the compensation measure itself. That said, as noted above, it would normally be expected that compensation measures located closer to the impacted SPA would be preferable to those located further away (and a good reason would be needed to prefer compensation located further away).

10.18 We also note:

(a) compensation is to ensure the overall coherence of the "UK site network" is protected, which means the European sites currently in the UK (as the network develops in the future), not just Scotland;

(b) measures implemented abroad can positively impact the conservation objectives of the UK site network so could also be compensation (limiting the Danish sand eel fishery being a good example); and

(c) in principle, there is no reason why compensation for a project in England and Wales (or elsewhere) could not be located in Scotland or vice versa, if the land rights and other

necessary consents were secured. Compensation would normally be expected to be secured by a suspensive condition, so in the case of a Scottish project Marine Scotland would have the normal range of enforcement actions if a condition (in relation to compensation located in another jurisdiction) was not complied with.

How must compensation be secured?

10.19 The law is not prescriptive on how compensatory measures should be secured (noting the Compensation Duty is ultimately on the Scottish Ministers). Appropriate methods may be a consent condition or a separate legal agreement. We consider that suspensive conditions would be appropriate, leaving detail of how compensatory measures will be delivered to be approved post-consent. For example, the compensation measures under the Development Consent Order for Hornsea Three require a kittiwake implementation and monitoring plan to be approved by the Secretary of State[lvi], this must be based on a submitted strategy for kittiwake compensation but will provide details of matters such as location of compensation, design detail and monitoring.

10.20 One question relates to availability of land rights to secure off-site compensation. We are not aware of any requirement that land rights for compensatory measures must be secured before consent is granted (although there are requirements in relation to terrestrial planning conditions that land must be within the control of the applicant). If off-site compensatory measures are proposed, we consider it appropriate that the Scottish Ministers are satisfied there is at least a reasonable prospect of the developer securing the necessary land (the ultimate backstop of course is that if the land can't be secured then condition could not satisfied, so it will also be in a developer's interest to have confidence in land availability). Similar considerations may apply where further consents and licences would be required for compensatory measures, and a similar approach appropriate – the Scottish Ministers should be satisfied there is no impediment to necessary consents being granted. The availability of compulsory acquisition powers could become relevant in some situations (a discussion of CPO or other consents required from compulsory measures is beyond the scope of this note).

Adaptive Management Conditions

10.21 Conditions providing for adaptive management are sometimes proposed as a solution to uncertainty in the effectiveness of mitigation or compensation. In principle these are acceptable. However, for reasons set out in paragraph 10.23 below we caution care if considering attaching adaptive management conditions to compensation requirements (either secured by condition or some other means).

10.22 If the parameters of adaptation or additional mitigation which may be required are clearly prescribed at the outset then these would normally be legally acceptable. For example, a condition which contains a maximum amount of compensation which may be required, with the actual requirements to be determined following ongoing implementation monitoring.

10.23 However, if the parameters of adaptation or additional mitigation are not clearly prescribed (at least in broad terms), then there are a number of risks. An example might be a condition which prescribed an outcome only (e.g. placing a limit on the number of collisions which can occur). There is a long history of case law limiting the scope of planning conditions which could be relevant by analogy and create a legal risk to the validity of the condition, including in relation to reasonableness, undercutting the permission granted, certainty, precision and enforceability. Such an approach risks inconsistency with the purpose of environmental legislation: a detailed assessment upfront should then lead to certainty that consent has been

granted. Finally, there are the practical considerations of ensuring a route to market – potential funders will be naturally very concerned if there is a risk of future mitigation of unknown scale and expense (which could involve removing elements of the project, which can be the worst case scenario in some adaptive management scenarios).

10.24 It is also relevant in assessing the need for adaptive management to consider the level of certainty that is required of compensatory measures, which we consider is high but not absolute. See paragraph 10.12(e) above.

When must compensation be in place?

10.25 It would be expected that necessary compensation is implemented before the damage is sustained. This is the natural meaning of the duty to ensure that overall coherence is "protected". In the case of offshore wind in Scotland, this may not present significant practical difficulties, given that collision risk will not occur until structures are in the water. Ultimately, there will be discretion for the Scottish Minsters to consider when compensation must be secured in light of the objective of ensuring the overall coherence of the UK site network is protected – the function of the impacted feature will be an important consideration and it would be expected that timing will be more critical where a feature which plays an important wider strategic role in the coherence of the UK site network (e.g. an important staging post for migration).

10.26 If timing does present practical challenges, it may be appropriate to secure more compensation than would otherwise be appropriate to mitigate for any interim impacts (again the techniques of environmental net-gain may be instructive). This could be appropriately viewed as ensuring the overall coherence is protected taking a long-term view (as is generally appropriate in environmental protection matters), and there is some support in EU Guidance.[lvii]

11. EXAMPLE OF HOW THE COMPENSATION DUTY APPLIES TO A SCOTTISH OFFSHORE WIND FARM

11.1 For an offshore wind farm in Scotland the habitat of an SPA is not usually directly impacted, assuming (as is normally the case) that the offshore wind farm itself is not located in an SPA. However, collisions and displacement outside the SPA boundary could adversely affect Conservation Objectives related to maintaining the population of the qualifying species in the long term as a viable component of the site. If the Appropriate Assessment concludes Conservation Objectives are adversely affected, and the No Alternative Solutions and IROPI tests are passed, then the Compensation Duty is engaged.

11.2 If a population of a species at an SPA is impacted because of an <u>additional</u> pressure on that population outside the site caused by an offshore wind farm, appropriate compensation could be to:

(a) <u>reduce the pressure on the population</u> in another way (e.g. reduce competition for food such as sandeels through fisheries management or improved protection from predators) – clearly the better the understanding of existing population pressures and feasible levers to reduce this pressure the greater the likely available range of compensation measures; or

(b) <u>increase the population</u> (e.g. improving or creating habitat outside the SPA). There should be a reasonable degree of confidence that the population increases will – to use a non-scientific term - 'backfill' the impact caused through recruitment into the affected SPA population (or potentially another SPA). We understand from MacArthur Green that

the meta-population of seabirds gives confidence that compensatory measures to increase the population of a species outside an SPA can be shown to have a functional link with the impacted SPA.

11.3 This would be consistent with the approach to the Compensation Duty described in Paragraph 10.7 above: such compensatory measures would ensure that following implementation of the project and these measures, there would remain a UK site network which viewed as whole offers an equivalently coherent suite of sites aimed at achieving conservation / FCS of Annex 1 and migratory species within their area of distribution. This would remain the case in circumstances where the most appropriate compensation in light of the overall coherence of the UK site network was broader than the impacted SPA and included or focussed on other SPAs hosting the qualifying feature.

11.4 It would not usually be necessary or appropriate to designate created or improved habitat as additional SPA habitat if the SPA habitat itself is not affected (which is likely to be the case for impacts on breeding colonies arising outside the SPA boundary).

11.5 In our opinion, the range of measures identified by MacArthur Green in their work[lviii] also commissioned by SOWEC are in principle acceptable compensatory measures. We agree that some of the compensation measures would appear to be more appropriately developed and delivered at a strategic level, rather than on an ad-hoc basis by individual developers.

11.6 Note that the considerations and conclusions of this section 11 may differ if the adverse impact was directly to habitat within a European site.

PART D: RECOMMENDATIONS

12. RECOMMENDATIONS

12.1 **CMS Recommendation One:** it would be helpful for the Scottish Ministers (or NatureScot) to designate policy or adopt guidance on HRA derogations. This could either be generic, or specific to offshore wind and should:

(a) identify likely objectives (or guidance on how to frame objectives) that would apply to HRA derogation cases for ScotWind projects. See paragraph 7.1 for an example. This would need to be caveated with an explanation that objectives may evolve with time. The benefits in this approach include:

(i) firstly, it would assist developers ensure they are engaging with the potential for a derogation case at an early stage of individual projects (when there is still the most scope to make changes), for example, in undertaking their optioneering process and design of the Rochdale Envelope and through early consideration of the derogation tests and potential compensation options.

(ii) secondly, it will help flush out potential challenges at the front end of the process and, should mitigate the risk of legal challenge to individual projects.

(b) identify the form of alternative solutions (or guidance on how to identify alternative solutions) that should be considered in an HRA derogation case for an offshore wind project. See paragraph 7.2 for an example.

12.2 **CMS Recommendation Two:** the Scottish Ministers should consider strategic compensatory measures (for example fisheries management). Ideally this would be in the form of modular measures which could be scaled up on a per-project basis as required, however, we also consider pre-emptive measures could be appropriate (so long as 'additional', i.e. not reasonably likely to have happened anyway). It will also be important to include legal analysis

as part of any strategic compensation plan or framework to ensure that such measures can appropriately satisfy the Compensation Duty for future individual projects (and ensure they do not form part of the baseline with additional compensation measures still required).

Endnotes

[i] an area classified before exit day pursuant to Article 4(1) or (2) of the old or new Wild Birds Directive, or classified after exit day under the retained transposing regulations

[ii] The Conservation (Natural Habitats, &c.) Regulations 1994 are the regulations which primarily implemented the Habitats Directive and Wild Birds Directive in Scotland (the "1994 Regulations") and which apply to applications for marine licence applications up to 12nm. The Conservation of Habitats and Species Regulations 2017 (the "2017 Regulations") apply to decisions for consent under section 36 of the Electricity Act 1989 (because energy is a reserved matter) up to 12nm. The Conservation of Offshore Marine Habitats and Species Regulations 2017 (the "Offshore 2017 Regulations") apply to applications beyond 12nm. This note will primarily quote sections of the 1994 Regulations, but identify where the 2017 Regulations or Offshore 2017 Regulations are materially different.

[iii] The requirement in the Habitats Regulations to demonstrate that there are no alternative solutions stems from Article 6(4) of the of the Council Directive 92/43/EEC of 21 May 1992 (the Habitats Directive). Article 6(4) provides: "if, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected"

[iv] The assessment provisions are contained in Regulation 48 of the 1994 Regulations, Regulation 63 of the 2017 Regulations (see also Regulation 89 applying the assessment provisions to consents under section 36 of the Electricity Act 1989), and Regulation 28 of the Offshore 2017 Regulations

[v] The principal derogation provisions are contained in Regulation 49 of the 1994 Regulations, Regulation 64 of the 2017 Regulations and Regulation 29 of the Offshore 2017 Regulations.

[vi] Regulation 49(1) of the 1994 Regulations provides that: "If they are satisfied that, there being no alternative solutions, the plan or project must be carried out for imperative reasons of overriding public interest (which, subject to paragraph (2), may be of a social or economic nature), the competent authority may agree [, subject to paragraph (1A),] to the plan or project notwithstanding a negative assessment of the implications for the site"; Regulation 64(1) of the 2017 Regulations provides that: "If the competent authority is satisfied that, there being no alternative solutions, the plan or project must be carried out for imperative reasons of overriding public interest (which, subject to paragraph (2), may be of a social or economic nature), it may agree to the plan or project notwithstanding a negative assessment of the implications for the European site or the European offshore marine site (as the case may be)"; and Regulation 29(1) of the Offshore Regulations provides that: "If it is satisfied that, there being no alternative solutions, the plan or project referred to in regulation 28(1) must be carried out for imperative reasons of overriding public interest (which, subject to paragraph (2), may be of a social or economic nature), the competent authority may agree to the plan or project notwithstanding a negative assessment of the implications for the site".

[vii] There are further restrictions on what may constitute imperative reasons of overriding public interest where the site concerned hosts a priority natural habitat type of a priority species, but these are defined by reference to the Habitats Directive and apply to Special Areas of Conservation.

[viii] The Scottish Ministers are the appropriate authority with the duty to secure necessary compensation under the 1994 Regulations, the 2017 Regulations and the Offshore 2017 Regulations.

[ix] Note that the 2017 Regulations and Offshore 2017 Regulations both refer to "the national site network" rather than the "UK site network" but the definition is the same: "means the network of sites in the United Kingdom's territory consisting of such sites as— (a) immediately before exit day formed part of Natura 2000; or (b) at any time on or after exit day are European sites, European marine sites and European offshore marine sites for the purposes of any of the retained transposing regulations;"

[x] Regulation 53 of the 1994 Regulations. Equivalent (although not identical) provisions are contained in the Regulation 68 of the 2017 Regulations and Regulation 36 of the Offshore 2017 Regulations.

[xi] Such projects would normally require consent under section 36 of the Electricity Act 1989 together with licence(s) under the Marine (Scotland) Act 2010 and/or the Marine and Coastal Access Act 2009.

[xii] Inshore and offshore

[xiii] https://www.gov.scot/binaries/content/documents/govscot/publications/strategy-plan/2020/10/sectoral-marine-plan-appropriate-assessment2/documents/appropriate-assessment-sectoral-marine-plan-offshore-wind-energy-2020/appropriate-assessment-sectoral-marine-plan-offshore-wind-energy-2020/govscot%3Adocument/appropriate-assessment-sectoral-marine-plan-offshore-wind-energy-2020.pdf

[xiv] Regulations 64 and 68 of the 2017 Regulations.

[xv] Page 41, DECC Document Template - Standard Numbering (planninginspectorate.gov.uk)

[xvi] Page 40, DECC Document Template - Standard Numbering (planninginspectorate.gov.uk)

[xvii] SOWEC are our client for the purposes of this note.

[xviii] 3.2 It is important to note that the assessment of alternatives under the Habitats Regulations requires a more detailed assessment of alternatives than the assessment of alternatives required pursuant to Environmental Impact Assessment (EIA) law, which developers, and the Scottish Ministers, will be more familiar with. Article 6(4) of the Habitats Directive requires that there are no alternative solutions which have less of an adverse effect on the site in question than a project, whereas the consideration of alternatives under EIA law is limited to the alternatives studied by a developer. This is confirmed at paragraph 72 of the Opinion of Advocate General Kokott delivered on 27 October 2005 in Case C-209/04

[xix] In this case, the Portuguese Government had considered some, but not all, of the alternative solutions to a motorway project. The ECJ declared that the failure to consider all alternative solutions meant that Portugal had failed to discharge its duties under Article 6(4) of the Habitats Directive.

[xx] Reference is made to HRA derogation in:

- Planning Circular 6/2013: development planning dated December 2013, but only to refer to the fact that the Scottish Ministers do not consider that such circumstances would arise to consider a derogation case; and
- Scottish National Heritage: Habitats Regulations Appraisal of Plans: Guidance for Plan-Making Bodies in Scotland (Version 3.0 January 2015), which relates to development plan making and which states (in respect of HRA derogation cases) that: "It is expected that this would occur only in the most exceptional of circumstances". There is no basis for a derogation case only in exceptional circumstances.

[xxi] For example, in commission opinion (C(2011) 9090) dated 6 December 2011, the European Commission accepted Germany's position that three alternatives did not meet the objectives and could be discounted from the assessment of alternative solutions.

[xxii] Page 233 of The Sixth Carbon Budge: The UK's path to Net Zero dated December 2020

[xxiii] See also for more detail Section 10 of the 2012 DEFRA guidance which states that: "*alternative solutions are limited to those which would deliver the same overall objective as the original proposal. For example, in considering alternative solutions to an offshore wind renewable energy development the competent authority need only consider alternative offshore wind renewable energy developments. Alternative forms of energy generation are not alternative solutions to this project as they are beyond the scope of its objective*"

[xxiv] Section 6.59 of the Secretary of State's decision letter dated 31 December 2020

[xxv] In Case C-239/04, the ECJ stated that: "The absence of alternatives cannot be ascertained when only a few alternatives have been examined, but only after all the alternatives have been ruled out".

[xxvi] as is made clear in MN 2000

[xxvii] This point was made clear in the Attorney General's opinion C-209/04 (Lauteracher Ried) (AG Opinion C-209/04), where the Attorney General noted that the examination of alternatives does not require that "every theoretically imaginable alternative " to be considered. However, the Attorney General did note that those alternatives which are not, beyond reasonable doubt, out of the question should be assessed.

[xxviii] Paragraph 84 of the Humber Sea Terminal Ltd v Secretary of State for Transport and another [2005] EWHC 1289 (Admin)

[xxix] Commission Opinion dated 30 January 2019 (ref: C(2018) 466 final),

[xxx] Paragraph 44 of Case C-239/04
[xxxi] Commission Opinion C(2018) 466 final dated 30 January 2018
[xxxii] Paragraph 77 of Case C-399/14
[xxxiii] See "Alternatives Must be Reasonable" heading - Habitats regulations assessments: protecting a European site - GOV.UK (www.gov.uk)
[xxxiv] This is not to say new transmission infrastructure cannot be constructed, but making the most of the existing grid and recognising the cost / impact of upgrades is in our view an appropriate element of the objectives.
[xxxv] We note in Hornsea Three, the Secretary of State's objectives were linked to UK targets but his consideration was limited to Round 3, the Extension Round and Round 4 but not ScotWind – it is unclear what just justification there was for this approach, but in our view the alternatives assessed must include all those which could achieve the objectives identified.
[xxxvi] See 11.3.6 - DECC Document Template - Standard Numbering (planninginspectorate.gov.uk)
[xxxvii] Page 107 DECC Document Template - Standard Numbering (planninginspectorate.gov.uk)
[xxxviii] See 7.9.10 - EN010007-003948-Recommendation Report - English.pdf (planninginspectorate.gov.uk)
[xxxix] The Scottish Ministers are the appropriate authority with the duty to secure necessary compensation under the 1994 Regulations, the 2017 Regulations and the Offshore 2017 Regulations.
[xl] Note that the 2017 Regulations and Offshore 2017 Regulations both refer to "the national site network" rather than the "UK site network" but the definition is the same: "*means the network of sites in the United Kingdom's territory consisting of such sites as— (a) immediately before exit day formed part of Natura 2000; or (b) at any time on or after exit day are European sites, European marine sites and European offshore marine sites for the purposes of any of the retained transposing regulations*;"
[xli] Regulation 53 of the 1994 Regulations. Equivalent (although not identical) provisions are contained in the Regulation 68 of the 2017 Regulations and Regulation 36 of the Offshore 2017 Regulations.
[xlii] Scottish Government guidance on EU Exit: The Habitats Regulations in Scotland, December 2020 explains that the objectives in relation to the UK site network are to: (i) maintain or restore certain habitats and species listed in the Habitats Directive to favourable conservation status (FCS); and (ii) contribute to ensuring the survival and reproduction of certain species of wild bird in their area of distribution and to maintaining their populations at levels which correspond to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements. It is (ii) which is relevant to birds and SPAs. https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2020/12/eu-exit-habitats-regulations-scotland-2/documents/eu-exit-habitats-regulations-scotland/eu-exit-habitats-regulations-scotland/govscot%3Adocument/eu-exit-habitats-regulations-scotland.pdf
[xliii] Regulation 9A of the 1994 Regulations, noting the duty on the Scottish Ministers is to classify such sites insofar as they consist of sites in Scotland. The duty under this regulation includes sites in the Scottish inshore region. The duty to classify site in the Scottish offshore region is contained in Regulation 13 of the Offshore 2017 Regulations.
[xliv] See e.g. Regulations 9A(5) and 9D of the 1994 Regulations and Articles 4(1) and Art 4(2) of the Birds Directive.
[xlv] Favourable Conservation Status: UK Statutory Nature Conservation Bodies Common Statement (jncc.gov.uk)
[xlvi] *Ibid.*
[xlvii] This is consistent with the way the Conservation Objectives of some Special Areas of Conservation are framed – that the site contributes to achieving FCS.
[xlviii] This is not to undermine the importance of individual sites, noting that the SNCB's statement recognises that the contribution of individual sites to the overall FCS will differ and may change over time
[xlix]Regulation 9D(1) of the 1994 Regulations

[l] The same is true for lots of compensation regimes where the purpose is to be of equivalent value to the loss of something unique and not directly replaceable (albeit it is appreciated that concepts of environmental net gain differ from monetary compensation in a compulsory purchase or personal injury context).
[li] for example in the compulsory purchase regime an order is confirmed if the confirming authority is satisfied there is a compelling case in the public intertest, and the question of compensation is settled later through agreement or referral to the Lands Tribunal for Scotland
[lii] the Habitats Regulations anticipate that a decision has been taken to agree to the plan or project at the point the compensation duty is engaged and do not anticipate, or provide any mechanism, to change the decision to agree to the project based on compensation available (particularly relevant as it can be the case that the decision maker on the IROPI and No Satisfactory Alternatives test is different from the authority with the duty to secure compensation). It is noted that recent DEFRA guidance refers to Compensation as a third "test", although the guidance is a summary and when the substance is read it's clear that DEFRA also consider it a duty rather than a pass/fail test: "you need to make sure that compensatory measures will be taken." - Habitats regulations assessments: protecting a European site - GOV.UK (www.gov.uk)
[liv] See e.g. 1.4.2 of the Article 6(4) Guidance
[lv] See 14.3 of the Article 6(4) Guidance:
"The option of habitat banking as compensatory measures under Article 6(4) is of very limited value due to the tight criteria mentioned in relation to the need for compensation to ensure the protection of the coherence of the network (Section 1.4.2).
Nevertheless, there could be a potential use of the concept of habitat banking in a constraint regime linked to Article 6(1). For instance, where a development is foreseen it might be appropriate to consider and implement within the management plan designed for the site or integrated into other development plans, the necessary compensatory measures that would be required in the context of such development and consequently before any decision is made by the competent authorities."
[lvi] Prior to commencement of development the timetable for preparation of the plan must be approved, and the plan itself must subsequently be approved .No operation of any turbine forming part of the authorised development may be commenced until four full breeding seasons following the implementation of the measures set out in the plan have elapsed.
[lvii] Paragraph 1.5.6 of the Article 6(4) Guidance
[lviii] Report to Crown Estate Scotland and SOWEC: HRA Derogation Scope B - Review of seabird strategic compensation options