



## **Berwick Bank Wind Farm**

### **Additional Environmental Information (AEI) Submission**

#### **AEI03: Supplementary Information Section 4 Alternatives and Additionality**

### Revision Information

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## Acronyms

Acronym	Description
AEI	Additional Environmental Information
CION	Connection and Infrastructure Options Note
FCS	Favourable Conservation Status
GES	Good Environmental Status
HRA	Habitat Regulations Appraisal
SPA	Special Protection Area

# 1. Alternative Solutions

The Applicant has responded to RSPB's comments on alternative solutions in the gap analysis. As stated there, the Applicant's position is unchanged and it continues to advocate for its established objectives and robust consideration of alternatives, including ScotWind, as presented in its Derogation Case. The assessment of alternatives presented in the Derogation Case includes a detailed analysis of relevant law and policy and establishes appropriate and compliant project objectives for Berwick Bank, against which to consider whether there are alternative solutions. Following a detailed analysis against those objectives, the firm conclusion is that there are no feasible alternative solutions to Berwick Bank.

## 1.1. Identification of Berwick Bank

The location of Berwick Bank was identified via a site selection process carried out over a decade, based on detailed analysis of environmental constraints and technical feasibility. The identification of Berwick Bank commenced prior to 2010, with the Crown Estate's Offshore Energy Strategic Environment Assessment which involved a three-stage process of delineation of the Round 3 Zones based on suitability for offshore wind development. Areas of seabed considered unsuitable for offshore wind were removed, with the remaining areas evaluated against mapping and modelling. This process ultimately resulted in the award of seabed leasing rights to SSE Renewables in 2010 for the Firth of Forth Zone, which was thus considered suitable for offshore wind development. Subsequently, between 2010 and 2012 a detailed mapping and analysis of environmental and technical constraints of the Firth of Forth Zone was conducted by SSE Renewables, including analysis of water depth, wind speed, nature conservation designations, ornithological data, fisheries activity and shipping and navigation (amongst a host of other factors). Following that zone appraisal process, a further project identification process was carried out, again involving a detailed analysis of environmental and technical constraints and ornithology survey data, ultimately resulting in the identification of Berwick Bank array area that is the subject of this application. A detailed timeline of the site selection process is presented in Section 7.4 of the Derogation Case. There has therefore been a thorough analysis of alternative locations for offshore wind development within the constraints of available seabed which resulted in the identification of Berwick Bank.

## 1.2. ScotWind is not an Alternative Solution

RSPB continues to raise the question of whether one or more unidentified ScotWind sites could meet the objectives of Berwick Bank with less impact on relevant protected sites. Table 12 of the Derogation Case assesses other leasing rounds, including ScotWind, against the project objectives, and concludes they are not alternative solutions. ScotWind is not an alternative solution as it will not provide a large-scale contribution to decarbonisation within the timescales for Berwick Bank and will not deliver low carbon electricity at the lowest possible cost to the UK consumer, as many ScotWind projects will deploy more costly floating technology.

Since submission of the Derogation Case, the alternatives case in support of Berwick Bank has been further strengthened, as the Applicant has now secured an earlier connection date for its grid connection at Cambois of 2029, meaning the full 4.1GW of project capacity can be delivered to the national grid within the 2020s. This fundamentally sets Berwick Bank apart from other projects, which will not deliver a significant volume of new low carbon electricity before 2030, and will not therefore contribute to legally binding carbon reduction targets for Scotland in this decade, and will not make the same sizeable and early contribution to the urgent need for climate change mitigation and security of energy supply.

RSPB's suggestion that grid capacity could "theoretically" be reallocated from Berwick Bank to other ScotWind projects is speculative and unsubstantiated. It is also not grounded in the reality of the regulatory and grid framework in Great Britain which is subject to a detailed options design and appraisal process

(e.g. Connection and Infrastructure Options Note (CION) and recently the Offshore Transmission Network Review and Holistic Network Design).

In addition, RSPB's line of reasoning is fundamentally flawed because, as conceded by RSPB, there is no upper limit on the capacity of offshore wind which policy establishes should be delivered. The climate emergency and security of supply imperatives are such that there is no room for delay and no scope for "trading off" of one deliverable site against another.

In this regard, the Applicant wholly supports the emerging policy position of the UK Government for offshore wind projects. In draft National Policy Statement for Energy-3<sup>1</sup>, the Secretary of State establishes offshore wind and its transmission infrastructure as "Critical National Priority Infrastructure" receiving the highest form of policy support and established need.

Specifically with regards to alternative solutions in the context of HRA, the Secretary of State establishes (paragraph 3.8.19):

*"the Secretary of State ... will start from the position that energy security and decarbonising the power sector to combat climate change... requires a significant number of deliverable locations for CNP Infrastructure and for each location to maximise its capacity. There are no limits to how many such locations may be required. Therefore, the existence of another deliverable location to meet the need for CNP Infrastructure should not be treated as an alternative solution. Further, the existence of another way of developing the proposed site which results in a significantly lower generation capacity should not be treated as an alternative solution"*

The principles established in this draft policy are capable of being material considerations in the Scottish Ministers' decision making. In any event, it would be wholly reasonable for Scottish Ministers to independently reach the same conclusion. It is worth re-emphasising that the approach taken by the Applicant in its Derogation Case is wholly consistent with the six offshore wind farms subject to derogation already consented by the UK Government, and the multiple others in the consenting phase. As recently as July 2023 (in granting the Hornsea Four Offshore Wind Farm Order 2023), the Secretary of State concluded that other offshore wind leasing rounds are not alternative solutions.

Furthermore, the precise array and turbine locations,<sup>2</sup> numbers and design of, and consequently the impacts associated with, one or more ScotWind projects are not sufficiently defined and cannot be quantified in order to make any meaningful comparison with Berwick Bank.

The environmental effects associated with ScotWind remain unquantified and will not be known for some time, although given a number of areas have been identified in the Sectoral Marine Plan as areas of high ornithological constraint it is reasonable to assume that there will be significant ornithological impacts.

The argument that ScotWind project(s) are an alternative solution to Berwick Bank therefore fails on two fronts. First, ScotWind does not meet the legitimate project objectives established in the Derogation Case. Second, even if those project objectives were met (which the Applicant strongly rejects), ScotWind projects will also have ornithological impacts on European sites, which are as yet unquantified and the information does not exist to meaningfully comparatively assess them, and so there is no rational basis on which to conclude that any ScotWind project(s) are alternative solutions.

RSPB has therefore not identified any feasible alternative solution to Berwick Bank. RSPB has advanced a series of speculative assertions and hypothetical scenarios, in an effort to create doubt. This can be contrasted with the detailed and robust case put forward by the Applicant. It would be unreasonable and

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<sup>1</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1147382/NPS\\_EN-3.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1147382/NPS_EN-3.pdf)

<sup>2</sup> In practice a developer often applies for consent for a red line boundary that is refined from the full Option for Lease area.

irrational to conclude that one or more inchoate potential future projects (which may not come forward), with uncertain timelines, unspecified turbine numbers and locations, and unquantified and unknown impacts, constitute an alternative solution.

## 2. Suitability of Sandeel Closures – Addressing additionality concerns

The Applicant has identified its suite of compensatory measures following a rigorous appraisal of feasibility and sufficiency of compensation options, and in consultation with stakeholders, as set out in Part D of the Derogation Case. For the reasons set out in Part D, appropriate management of sandeel fisheries in the North Sea is the most suitable and sufficient compensation measure for the predicted impact of the Proposed Development on kittiwake, guillemot, razorbill and puffin.

The Applicant continues to advocate for sandeel fisheries management as a compensatory measure for Berwick Bank.

### 2.1. Additionality

RSPB has raised a concern around a perceived lack of additionality. This is misguided. The concept of additionality does have to be considered, although the scope and importance of the principle should not be overstated. The principle is described in EU Guidance<sup>3</sup> as:

*“Compensatory measures should be additional to the actions that are **normal practice** under the Habitats and Birds Directives or obligations laid down in EU law. For example, the implementation of conservation measures under Article 6(1), or the proposal/designation of a new area already inventoried as being of Community importance, **constitute ‘normal’ measures** for a Member State. Thus, compensatory measures should go beyond the normal/standard measures required for the designation, protection and management of Natura 2000 sites”. (emphasis added).*

In the draft Scottish Guidance “Framework to Evaluate Ornithological Compensatory Measures for Offshore Wind” (DTA Ecology), developers are referred to this EU Guidance and the guidance also confirms that the:

*“reference to ‘normal/standard measures’ emphasises that the measures which the Commission intends to exclude are those which are reasonably accepted as ‘normal practice’ (i.e. within the bounds of everyday financial and political realities).”*

and

*“Potential compensatory measures need to be considered with an open mind, in light of the specific pressures and threats facing the qualifying features which are negatively affected, on the basis of a credible assessment of what might otherwise be delivered on the site as ‘normal practice.’”*

Defra guidance<sup>4</sup> (which also remains in draft) refers to “additionality” in this context as:

*“...compensation must be additional to **the normal practices** required for the protection and management of the MP[A] so that measures should provide additional benefit. Therefore, any measure that is being or will be undertaken by government bodies to ensure that the site is in favourable conservation status or that protected features are in favourable condition, should not be considered as compensation. SNCBs will provide information on planned future management activity to enable developers to avoid additionality conflicts.” (emphasis added)*

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<sup>3</sup> “Managing Natura 2000 sites, The provisions of Article 6 of the Habitats Directive 92/43/EEC”, EC 2018

<sup>4</sup> “Best practice guidance for developing compensatory measures in relation to Marine Protected Areas”, Version for Consultation, Defra 2021



Therefore, if sandeel fisheries management is not pursuant to the normal management of national site network management (noting this is a different and more specific concept than general environmental benefit), and there is no requirement for the sandeel fisheries management under any relevant site management plan, the guidance supports the sandeel fisheries management as additional.

Regulators have management objectives relating to favourable conservation status (FCS) of special areas of conservation, and have other management objectives for special protection areas to ensure survival and reproduction of protected species<sup>5</sup>, however sandeel fisheries management does not occur in the normal course of management of the national site network, or for the management of any individual SPA, and sandeel fisheries management does not feature as a management measure of relevant SPA management plans which the relevant management body is required to carry out (to the extent any such plans exist). It is not normal practice within financial and political realities to manage/close fisheries to benefit European sites and there is no statutory, administrative or contractual duty for the Scottish Ministers to do so.

In addition to the general management objectives under the Habitats Regulations, regulators are also under a duty to achieve Good Environmental Status (GES) pursuant to the Marine Strategy Regulations 2010. It is not however possible to reasonably “read in” an obligation to manage sandeel fisheries in the North Sea as something which must follow from either of these broad obligations. If it were possible to “read in” obligations in this manner, then it could be argued that any action by the competent authority which could have ecological benefits for the relevant seabird species must run from the general management obligations under the Habitats Regulations or GES. In other words, all and any actions which would produce ecological benefit for the national site network or marine waters would be “used up” and it would be impossible to demonstrate any additionality as it could always be argued that all and any actions are pursuant to Habitats Regulations or GES duties. That plainly cannot be the case, and it cannot be reconciled with the ability to provide compensatory measures for adverse effects on integrity (as any action which could have ecological benefit, on RSPB’s argument, should be attributed to Habitats Regulations or GES duties). Ultimately, it is no more legitimate to say that the obligation to achieve GES or management objectives under the Habitats Regulations requires the Scottish Ministers to manage sandeel fisheries than it is to say the obligation to achieve GES or management objectives under the Habitats Regulations requires the Scottish Ministers to consent offshore wind farms, given both fisheries and climate change are well recognised pressures on seabirds and the marine environment.

Ultimately it would be entirely reasonable for a public authority to conclude that the general obligations under the Habitats Regulations and to achieve GES do not require such unprecedented steps as sandeel fisheries management.

This is supported by the precise wording of the Habitat Regulations Appraisal (HRA) Regulations<sup>6</sup>, which place a legal obligation on the relevant regulator to ensure that any necessary compensatory measures are secured:

*“The appropriate authority must secure that any necessary compensatory measures are taken to ensure that the overall coherence of [the national site network] is protected.”*

There is nothing in this or surrounding wording in the HRA Regulations which prevents measures being relied upon as compensation whilst also serving another purpose, e.g. wider ecological benefits. The current legislative framework therefore enables the Scottish Ministers to consent Berwick Bank and to rely on sandeel fisheries management as compensation, whilst also acknowledging the wider environmental benefits including increased resilience in the seabird populations in response to avian flu. This can be done

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<sup>5</sup> E.g. there is a general duty on competent authorities to manage the national site network to achieve favourable conservation status of protected species in Regulation 9D of the Conservation (Natural Habitats, &C.) Regulations 1994

<sup>6</sup> E.g. Regulation 36(2) of the Conservation of Offshore Habitats and Species Regulations 2017.

now, utilising the robustly evidenced Implementation and Monitoring Plan provided as part of the Berwick Bank Derogation Case. The sufficiency of the quantum of ecological benefit is established in the Fisheries Compensatory Measures Evidence Report and the additional information on timing of benefits of fisheries management submitted alongside this document.

RSPB states “Furthermore, Scottish Government has already committed to the closure of the industrial sandeel fishery in Scottish waters to help meet the obligations of Good Environmental Status for our seas under the Marine Strategy Regulations 2020<sup>3</sup> [sic] and to accord with the Scotland’s Fisheries Management Strategy” and therefore the sandeel closure proposed by the Applicant cannot be regarded as additional compensation. This is incorrect. There is nothing in the general duties set out in the Marine Strategy Regulations 2010 which expressly requires the Scottish Government to implement a sandeel fisheries closures to fulfil those duties. A specific obligation to close sandeel fisheries cannot be read into these general provisions for the reasons described above.

In addition, the Scottish Government’s Fisheries Management Strategy does not commit to the closure of the industrial sandeel fishery in Scottish waters. Instead, the Strategy commits to work with stakeholders to deliver an ecosystem-based approach to management, including *considering* (emphasis added) additional protections or prohibiting fishing for species which are integral components of the marine food web, such as sandeels. Likewise, the Scottish Government has published a consultation seeking views on proposals to close fishing for sandeel in all Scottish waters. By their very nature, the proposals in any consultation must be open to rejection or amendment based on the feedback received, otherwise the consultation process would be rendered futile. Neither of these documents can be read as containing a commitment to close sandeel fisheries which is clear, unambiguous and devoid of relevant qualification and therefore capable of being legally binding. Even if there were such a commitment, there is nothing prohibiting such a closure also being relied upon as compensation for offshore wind as it is not something which the Scottish Ministers are obliged to do for the purposes of protecting the national site network, or pursuant conservation or GES obligations.

None of the consultation, the Strategy, the management obligations pursuant to the Habitats Regulations or the duties relating to conservation or GES contains promises, representations or assurances that are clear, unambiguous and devoid of relevant qualification that specifically require the Scottish Ministers to close fishing grounds for sandeel. Instead, the statements relate simply to collaborating on and considering broad options in relation to delivering an ecosystem-based approach to management, additional protections and marine biodiversity. RSPB’s comments in this respect misunderstand the nature and legal effect of the public statements made by the Scottish Government and the obligations based upon them by the relevant legislation.

RSPB has also noted the Scottish Government’s current position not to support sandeel fishing in Scottish waters. Whilst this is a correct statement of the Scottish Government’s general stated position, it is not the same as saying that the Scottish Government have committed to the full closure of sandeel fishing in Scottish waters in the clear and unambiguous terms required to give rise to a legally binding commitment (as described above). Moreover, even if it was, the commitment would not be pursuant to a defined legal obligation pursuant to habitats law, and so would not offend the principle of additionality. Lastly in practical terms, if there were such a commitment, RSPB would have no need to lend their strong support for a sandeel fishing ban in UK EEZ waters.

It is also worth noting that this legal position – whereby a measure taken for ecological reasons or obligations outside of the obligations under the Habitats Regulations regime can still be legitimately treated as compensation in a habitats derogations case - is expected to be further strengthened by proposals in

the draft Energy Bill<sup>7</sup> which has passed through the House of Lords and is currently at Report Stage in the House of Commons (after its first and second readings and committee stage).

The relevant proposed provisions will apply in Scottish and English waters and so are relevant to Berwick Bank. They are focused on enabling strategic compensation, including via the establishment of a Marine Recovery Fund, whilst also specifically making provision for a regulator to designate actions it takes in the discharge of any of its functions as discharging its obligation to secure compensation for an offshore wind project.

S246 (Strategic compensation for adverse environmental effects) of the Energy Bill provides:

*“(1) This section applies where a public authority is subject to one or more environmental compensation obligations in relation to one or more relevant offshore wind projects.*

*(2) “Environmental compensation obligation” means—*

*(a) a statutory duty (however expressed) to secure that measures are taken to compensate for adverse environmental effects of a project, or*

*(b) a statutory condition (however expressed) requiring a public authority, before granting consent for the doing of an act by a person (“P”) in connection with a project, to be satisfied that P will take or secure the taking of measures to compensate for adverse environmental effects of the act.*

*(3) The public authority may determine that—*

*(a) measures taken or secured by the authority in the exercise of any of its functions, or*

*(b) measures to be taken or secured by the authority in the exercise of any of its functions,*

*are to count towards discharging the environmental compensation obligation or obligations to which the authority is subject.*

...

*(5) The measures referred to in subsection (3) may be measures taken at the site or sites of the project or projects to which the measures relate or elsewhere.*

...

*(7) For the purposes of subsection (3), a public authority (“authority A”) may, with the consent of another public authority (“authority B”), treat measures taken or secured (or to be taken or secured) by authority B as taken or secured (or to be taken or secured) by authority A in the exercise of any of its functions.*

Whilst these provisions remain to be enacted, there is a clear direction of travel towards facilitating strategic compensation in Scottish waters. This provision will enable:

- Measures taken/secured or to be taken/secured by the Scottish Ministers as regulator in the exercise of **any of its functions** to be applied as a compensatory measure, and this includes measures taken “off-site” from the relevant project; and
- Measures taken or to be taken by any other public authority to be applied as a compensatory measure by the Scottish Ministers, with that authority’s consent.

Therefore, once the Bill is enacted (noting no secondary legislation is required under this provision), this provision will further consolidate the current legislative position enabling the Scottish Ministers to rely upon sandeel fisheries management as compensation for Berwick Bank.

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<sup>7</sup> <https://bills.parliament.uk/bills/3311>

Overall it is clear therefore that there is no legal reason why sandeel fisheries management could not be applied as compensation for Berwick Bank as well as for environmental purposes (including in response to avian flu) and, in due course, to compensate for impacts from ScotWind projects.

## 2.2. Timing

An important point to consider in the wider discussion on additionality, is timing of benefit of the compensatory measures.

The EU Guidance recommends that, whilst timing of compensation measures requires a case-by-case approach, the general presumption is that:

*“The result of compensation should be operational at the time the damage occurs on the site concerned. Under certain circumstances where this cannot be fully achieved, overcompensation would be required for the interim losses.”*

As a result of implementing the sandeel fisheries closure for Berwick Bank and environmental purposes now, there will be immediate environmental benefits, as set out in the supporting evidence to the Derogation Case and further expanded below. These benefits will increase over time, meaning that the compensation will be established and functioning at the point ScotWind projects are being consented, well before any impacts occur and thus the timing is in line with timing hierarchy in EU Guidance.

This would also not offend the principle of additionality as guidance clearly supports the provision of time for the compensation measure to function. The provision of time between implementation of the measure and the relevant project cannot lead to the measure automatically being wrapped up in a general management obligation and no longer able to serve as compensation, as RSPB appear to suggest. On the contrary, the concept of putting compensation measures in place prior to operation of the relevant project is a central part of the approach recommended by the Guidance.

Ultimately therefore, it is entirely reasonable for the Scottish Ministers to conclude that the compensation ratios proposed are greater than actually required to sufficiently compensate for predicted impacts of Berwick Bank, therefore leaving further headroom benefit for future Scotwind projects, which could be allocated as compensation.

In conclusion, the sandeel fisheries management measure proposed in the Derogation Case is feasible and does not suffer from a lack of additionality. It is reasonable for the Scottish Ministers to rely upon it to consent Berwick Bank, and there is no legal impediment to the measure also being available for wider environmental benefits for seabirds and future ScotWind projects.