Consultation on policies to inform updated guidance for Marine Protected Area (MPA) assessments.

25th March 2024

This consultation response has been drafted on behalf of nature coalition Wildlife and Countryside Link to inform Defra's guidance for marine protected area assessments.

Section One: Protecting the coherence of the network.

9. (a) To what extent do you agree that the guidance on protecting the coherence of the MPA network, and the checklist provides clarity to stakeholders?

Disagree.

(b) Please provide further evidence or comments to support your answer.

We do not consider it accurate to suggest that 'when considering compensatory measures, the MPA network (as it exists at the time of the assessment) is assumed to be coherent'. This is because the status of the UK MPA network is largely unknown, particularly in relation to achieving individual conservation objectives and/or favourable conditions of protected features.

Moreover, the network has significant gaps regarding the protection of mobile species which must be considered in tandem with conservation objectives in order for the MPA network to be truly coherent. An SPA Sufficiency Review is required to address these gaps in species conservation and protection efforts.

As a result, when considering appropriate compensation measures to ensure the 'coherence of the network,' the Department for Environment, Food and Rural Affairs is working from a degraded baseline. It is also important to better understand the Department's expectations for how this baseline is being calculated and therefore the compensatory measures which are being designed to support an ecologically coherent network.

We support the application of a mandatory methodology for baseline assessments to ensure that applicants are designing compensatory measures from a robust and equitable starting point. We would also like to see further clarification of the Government's vision for what a coherent network should look like for species and habitats. In lieu of the publication of the Marine Strategy Part 3, this guidance should point stakeholders towards a future vision of the sea to which their compensatory measures can contribute.

10. Is there anything the definition for protecting the coherence of the MPA network and checklist misses, or should not include?

As part of the checklist to help evaluate the suitability and contribution of compensatory measures for MPAs to the overall coherence of the MPA network, we support the inclusion of the following:

- A written definition of 'coherence of the network' with guiding principles outlining the Government's vision for what a coherent network should look like for species and habitats e.g., all GES indicators positively inclining, halting species decline etc.
- A mandatory methodology for baseline assessments.
- All plans for adaptive management must be made publicly available and must ensure network coherence is achieved.

Section Two: Marine Conservation Zones, including HPMAs.

11. (a) To what extent do you agree that the information above provides clarity to stakeholders about the use of compensatory measures in MCZs?

Disagree.

(b) Please provide evidence or comments to support your answer.

We welcome DEFRA's explicit reference to HPMAs having the 'highest level of protection in English waters' and that it is the Government's 'policy that there should be no extractive, destructive or depositional activities in HPMAs (including offshore wind).' However, we do not support enabling non-like-for-like for MCZ assessments supporting benthic features and/or habitats because many of these sites are irreplaceable and cannot be compensated for. This will mean a loss in benthic features across the MPA network and MPA targets outlined in the Environment Act will not be met. Similarly, the guidance states that plan level MCZ assessments are not required. However, in order to meet the requirements of the 'general duty' for environmental regard as outlined in in section 125 of MCAA, only a plan level assessment of the site would satisfy this requirement. Therefore, it does not seem appropriate for plan level assessment not to be a requirement of an MCZ.

12. Is there anything in relation to MCZs or section 126 of the MCAA that the guidance misses or should not include?

Wildlife and Countryside Link responded to the Department for Environment, Food and Rural Affairs consultation on draft guidance for public authorities on exercising duties in relation to Highly Protected Marine Areas. Some of those concerns remain outstanding and we would like to see further clarification on them in this guidance document.

- We are concerned that by outlining acceptable MEEB for HPMAs, applicants will assume that the Government could consent to projects within their bounds. This does not fit with the purpose of an HPMA.
- We would like to see the Defra SoS (or the appropriate Minister of State) given a role in agreeing any compensation within HPMAs. We understand it is highly unlikely that applications for development within HPMAs would be submitted but are concerned that selecting an equivalent site for designation should not be left to applicants, examiners and or the DESNZ SoS given the ecological integrity alternative sites must have. By ensuring that compensation measures within an HPMA are always agreed by the Defra SoS (or the appropriate Minister of State), integrity of equivalent site designation will be maintained.

Section Three: Compensation Hierarchy.

Wildlife and Countryside Link support the responses of the Wildlife Trusts and the RSPB.

13. (a)To what extent do you agree that our proposed compensatory hierarchy provides clarity on compensatory measure options to stakeholders?

(b) Please provide further evidence or comments to support your answer.

14. (a) To what extent do you agree that the proposed hierarchy will assist in identifying suitable compensation measures, and if not, why not?

(b) Please provide further evidence or comments to support your answer.

15. Is there anything in relation to compensatory measures that the hierarchy misses or should not include?

Section Four: Additionality.

16. (a) To what extent do you agree our guidance on additionality provides clarity to stakeholders?

Disagree.

(b) Please provide further evidence or comments to support your answer.

Within the definition of 'normal,' we would like the Department for the Environment, Food and Rural Affairs to provide clarification on what is meant by 'a measure … which can reasonably be expected to be taken in the absence of a plan or project…,' as a reasonable expectation is subjective. Is the Department for the Environment, Food and Rural Affairs referring to measures which the Government has publicly committed to delivering across our oceans e.g., fisheries management measures across all MPAs by 2024 or 'minimise and where possible eliminate bycatch' as outlined in the Fisheries Act 2024. Or is the Department referring only to those measures which it has a legal obligation to undertake e.g., ensuring 70% of protected features are in a favourable condition by 2024 as defined in the Environment Act 2021? A reasonable assumption would be for the Government to achieve the targets it has publicly committed to and/or fulfil its legal obligations, however, the Government is currently not on track to deliver these commitments. Therefore, further guidance on what constitutes as reasonable is required.

Similarly, we have the same concern regarding the terminology 'normal steps to avoid deterioration or disturbance' which presents the same issues as above. What does the Department for the Environment, Food and Rural Affairs constitute as a 'normal step,' is this carrying out measures which the Government has publicly committed to delivering or only to those which it has a legal obligation to undertake? A reasonable assumption would be that carrying out publicly committed to and legally required measures constitutes as 'normal' Government steps, however, the Government is currently not on track to deliver these. Therefore, further guidance on what constitutes a 'normal step' undertaken by the Government is required.

Without clarity on the above, it is difficult for the draft guidance to effectively define what an additional management measure is. The guidance suggests that measures which would be considered additional would include those which:

- increase the scale, magnitude, or scope of normal measures.

- speed up delivery beyond what would be normally delivered in the absence of the plan or project coming forwards and where the current implementation timescales risk meaningful ecological deterioration in the interim.

However, these suggest that it is acceptable for the Government to allow sites to deteriorate because compensatory measures from damage not caused by the polluter in question would theoretically mitigate Government inaction. Under the polluter pays principle, this is not acceptable. Defra's definition of 'speed up delivery beyond what would be normally delivered' relies heavily on their understanding of what is 'normally delivered.'

At present, normal delivery of measures is not currently on track to deliver Defra's statutory obligations for nature recovery and so further clarification is required. Speeding up of 'normal delivery' to Defra could only achieve what other group stakeholders would describe as business as usual.

Moreover, further clarification is needed around what is meant by 'where current implementation timescales risk meaningful ecological deterioration in the interim.' Is the guidance suggesting that compensatory measures which speed up the delivery of Government measures which should be 'normally delivered' contributes towards additionality? If so, is the Department therefore suggesting it would be appropriate for applicants to be expected to include measures to deliver publicly committed to and/or legally binding policies which the Government is in fact obligated to deliver?

We do not consider it appropriate for applicants to be expected to deliver Government policies, in lieu of the Government failing to deliver them. Additionality should only encompass positive impacts above and beyond policies which the Government has publicly committed to and/or has a legally binding duty to complete.

17. Is there anything the definition of additionality misses, or should not include?

Please refer to the above response.

Section Five: Baselines.

18. (a) Should we provide additional guidance on baselines and how to establish them?

Yes.

(b) Please provide further evidence or comments to support your answer. If answered yes, what should be included in future guidance on baselines?

Any future guidance on collecting baseline data should be agreed in conjunction with the SNCBs. All applicants must be required to follow the same methodology for collecting baseline data to ensure equity across applications. We recommend placing Natural England's Best Practice Guidance Phases 1 - 3 on a statutory footing (through the Offshore Wind Environmental Standards workstream). These documents provide advice for baseline characterisation surveys of ecological receptors, pre-application engagement, data and evidence expectations at the application stage and post-consent monitoring plans.

If Defra standardised the approach to undertaking baseline data collection, it would considerably strengthen environmental protections and shorten consenting times. Moreover, if all applicants are required to design compensatory measures from an equal starting position, it will reduce the risk of some providing greater compensatory measures than required.

Section Six: Timings of Compensation delivery.

19. (a) To what extent do you agree that the guidance on timing of compensation delivery provides sufficient clarity?

Neither agree nor disagree.

(b) Please provide further evidence or comments to support your answer.

We do not consider it appropriate for the Government to be offering applicants the ability to implement compensation after damage has occurred to a site. This directly contradicts current legal requirements under the Habitats Regulations Assessment and will lead to unmanaged, under researched, irreversible ecological damage.

As part of the site scoping conducted by The Crown Estate, plan level environmental assessments are undertaken prior to site allocation. Therefore, organisations submitting applications for offshore wind projects will already have a general understanding of potential avoidance, reduction, mitigation and compensation requirements for their project. This means that prior to beginning their own pre-application processes an applicant will be aware of potential compensatory requirements.

Using the Government's own estimates, the average applicant spends around 4 years in pre-application, 1 year in examination and decisions and 2 further years in post-consent (including CfD). This means prior to construction of their project applicants have around 7 years to ensure compensation requirements are in place and effective before damage to the site occurs and their legal requirements are discharged. Given this extensive lead in time, we fail to see a suitable reason for applicants to require a 'time lag' between a negative effect arising and a compensatory measure becoming ecologically effective.

Furthermore, we suggest Defra sets out what it means by a 'fully functional' package of compensatory measures, as it is unclear when functionality kicks in. 'Functionality' or ecological effectiveness will be different depending on the effect an applicant is compensating for. For example, the Hornsea 3 project suggested an estimate of 15-20 years before they begin off-setting their accumulated impact on the seabird colony in question. Whereas for the same project, its compensation requirement to collect marine litter was exhausted before the compensation was completed due to a lack of marine litter in the area.

We suggest the Department for the Environment, Food and Rural Affairs works with its statutory nature conservation bodies and the Planning Inspectorate to ensure that compensation is secured prior to a project submitting its application. This will give applicants legal certainty around the compensatory measures they are required to deliver. With approximately, three years between receiving a DCO and construction, this provides enough time for an applicant to ensure compensation measures are in place and ecologically effective before damage to a site occurs.

In order for a package of compensatory measures to be secured prior to a project submitting its application with a reasonable guarantee of success, we recommend that the guidance emphasises the responsibility on the applicant to address these matters seriously from the outset of the pre-application process (possibly from the pre Agreement for Lease stage as they do with survey work), rather than deferring consideration and discussion until late in the pre-application process.

To reach the agreement we describe will require a well-developed and evidenced package of measures well in advance of the application. This requires time and investment and early acceptance of the potential for adverse effects on relevant MPA features. It is also essential that the Department for the Environment, Food and Rural Affairs properly utilises the new cost-recovery powers obtained through the Levelling Up and Regeneration Act to better resource statutory nature conservation bodies. Without timely expert advice the Department for the Environment, Food and Rural Affairs will continue to have to deliver underdeveloped policy options which add additional complexity to both applicants and statutory consultees such as the introduction of a 'time lag' function.

Moreover, if the Department for the Environment, Food and Rural Affairs continues to explore facilitating a time lag between a negative effect arising and compensatory measures becoming fully functional, we would like further clarification regarding who, when and how it is decided as appropriate. The draft guidance suggests 'any decision as to whether a project may commence before compensatory measures are fully functional should also be informed by the ecological assessment of the site' but offers little detail of what this ecological assessment would entail. Is it the Department for the Environment, Food and Rural Affairs intention that statutory consultees will undertake an assessment of an applicant's 'Compensation Plan prior to examination to decide whether a 'time lag' should be considered appropriate? If this is the case, then statutory consultees and the examination authority will have to make case specific judgements on whether a time lag is justified. This directly contradicts the Department for the Environment, Food and Rural Affairs' ambition to speed up consenting and reduce certainty for applicants in the planning system.

20. Is there anything the guidance misses, or should not include?

In addition to the above, we would like the Department for the Environment, Food and Rural Affairs to provide further clarification of what 'every effort should be made' means for an applicant, statutory consultee, examination authorities and decision makers. Is it the Department for the Environment, Food and Rural Affairs intention that the examining authority will undertake an assessment of an applicant's Compensation Plan to inform a decision on whether sufficient effort has been exerted to provide compensation options prior to damage to a site occurring? If so, then further information and/or guidance of what this assessment will entail is urgently required. Similarly, the Department for the Environment, Food and Rural Affairs should provide further clarification of what they consider 'measures should be implemented "in time"' to mean. The phrase "in time" appears in quotation marks in the draft guidance which suggests it needs further defining which perhaps suggests further clarification is needed within the Department, as well as for applicants, statutory consultee, examination authorities and decision makers.

Section Seven: Plan level compensation at project level.

21. (a) To what extent do you agree that the guidance on plan level compensation at project level provides clarity?

Neither agree nor disagree.

(b) Please provide further evidence or comments to support your answer.

We support the streamlining of environmental assessments where legal obligations have been fulfilled to accelerate renewables deployment. Where plan-level assessments have identified avoidance, reduction, mitigation and/or compensation measures, we agree that these should be used to form part of an applicant's plan and/or project level Report to Inform Appropriate Assessment and/or any subsequent 'Compensation Plan'.

Where project-level environmental assessments must be undertaken, we support incorporating plan level compensation where ecologically appropriate, e.g., where plan-level compensation will deliver better outcomes for nature than project-level compensation, having undertaken both plan and project level assessments. However, under MCAA section 125, we strongly support the need to undertake plan level MCZ assessments as part of an applicants 'general duty.' We do not think it is appropriate for avoidance, reduction, mitigation and/or compensation measures to only be considered at project level as they do not take impacts on the whole ecosystem into account.

22. Is there anything the guidance misses, or should not include?

We would like to see further clarification on the below issues.

- What specifically does the 'development of a compensation plan' mean to the Government above and beyond current legal requirements?
- Would the completion of the 'compensation plan' require further consultation with statutory consultees above and beyond current expected requirements?
- Interaction between the development of proposed compensation plans and the Planning Inspectorate enhanced pre-application offer.
- Interaction between the development of proposed compensation plans and the quality criteria to gain acceptance onto the fast-track scheme.
- Interaction between the development of proposed compensation plans and the implementation of the CNP presumption.

Section Eight: Adaptive Management.

23. (a) To what extent do you agree that the guidance on adaptive management provides clarity to stakeholders?

Neither agree nor disagree.

(b) Please provide further evidence or comments to support your answer.

We support the requirement for adaptive management options being proposed at the outset of a project to ensure appropriate action can be taken if proposed compensatory (and mitigation) measures are unsuccessful. However, we would like to see further information regarding the assessment of the efficacy of compensatory measures.

While it is the responsibility of the person delivering the project to monitor and demonstrate the effective and sustainable delivery of compensation, it is the responsibility of the Government to ensure applicants are discharging their legal obligations and ensuring ecological effectiveness of measures. Therefore, we suggest the Government establishes a Compensation Delivery Oversight Group with representatives from DESNZ, DLUHC, Defra, PINs, SNCBs, the MMO and any other parties with relevant expertise to oversee the effective implementation and adaptive management of strategic and project-level compensation. We do not consider it appropriate for decisions regarding adaptive management to be taken in isolation by the project proposer without consultation post-

consent with the Compensation Delivery Oversight Group. This will ensure any adaptive management decisions are made using reliable monitoring data and are ecologically robust.

In addition we remain concerned with the proposed use of adaptive management due to unforeseeable additional harm due to insufficient details of the development being provided at the start of an application process. Therefore we would welcome a further discussion on how further safeguards could be put in place to reduce the chances of irreversible harm.

24. If monitoring shows that impact is less than expected, should adaptive management be used to reduce project-specific compensatory efforts?

No.

25. Please provide further evidence or comments to support your answer.

We do not consider using adaptive management to reduce project-specific compensatory efforts to be a priority for the Government. Due to issues with transparency, the Department for the Environment, Food and Rural Affairs and the eNGO sector currently have limited understanding of the efficacy of compensatory measures already underway e.g., the Hornsea 4 bycatch mitigation trials. We encourage resources to be expended on resolving issues with transparency of current projects delivering their legal compensation requirements, rather than on projects which have not entered the pipeline and are not yet producing additional positive impacts.

Rather the Department for the Environment, Food and Rural Affairs should focus their efforts on how any additional positive impact of compensatory efforts can be attributed to an applicant's Marine Net Gain obligations. In lieu of the implementation of Marine Net Gain, the Department for the Environment, Food and Rural Affairs should be exploring how applicants can record additional positive impacts so they can be attributed to Marine Net Gain requirements in the future. Assuming Marine Net Gain will not be required by applicants retrospectively, consideration of how additional positive impacts of compensation between projects undertaken by the same applicant should be undertaken.

26. Is there anything the guidance on adaptive management misses, or should not include?

We would like to see further clarification regarding the transparency of the efficacy of compensatory measures. Currently, it is unclear at what stage in the delivery, implementation and/or operation of compensatory measures an applicant is required to begin proceedings to adapt them. It is also unclear whether an applicant decides whether their compensatory measures require adapting in isolation to any Government bodies or whether this is a decision they make independently.

Moreover, more information is required regarding which Government bodies if any are required to contribute to altering or introducing new management measures and at what stage in the adaptive management process this would be.

Section Nine: Energy Policy Statement.

27. (a) Do you agree that the guidance on the application of the National Policy Statement EN-1 provides clarity to stakeholders?

Neither agree nor disagree.

(b) Please provide further evidence or comments to support your answer.

We do not feel that the guidance on the application of the NPS EN-1 provides enough clarity to stakeholders. While the Department for Energy Security and Net Zero has suggested the Critical National Priority approach will not be fully implemented for a further 12 months, the Government cannot expect applicants, developers, statutory consultees, consultants and/or other interested parties to effectively consider the measure with just over a page of official explanation on the subject. We urge the publication of further guidance on the application of the CNP specific to each stakeholder group to ensure it is used fairly and legally.

Although the CNP presumption is only going to be applied by the Planning Inspectorate and the DESNZ SoS during the examination and decision stages of an application, it is not clear how the Government is going to prevent applicants completing vital environmental assessments without taking it into consideration. If environmental assessments are undertaken with presumption that derogations will almost certainly be made by the DESNZ SoS, any avoidance, reduction, mitigation and compensation measures cannot be identified 'without prejudice'. Further clarification on how the Planning Inspectorate and the DESNZ SoS expects applicants and other interested parties to interpret the approach during this phase is necessary, particularly from a legal standpoint.

Considerably more detail is also needed on how the CNP approach will interact with the Department for Leveling Up, Housing and Communities NSIP enhanced pre-application service and fast track scheme. The Government response to DLUHCs consultation on operational reforms for NSIP consenting processes offers no further information on either policy. It is unclear what information an applicant will have to provide in order to be accepted onto the fast track other than a requirement to use the enhanced pre-application service.

We understand that one potential criteria for being accepted onto the fast track is resolution between applicants and statutory consultees of all outstanding issues relating to avoidance, reduction,

mitigation and compensation measures. This means that the CNP presumption will have to be considered and applied, not just by the Planning Inspectorate and the DESNZ SoS but by all other statutory consultees who are required to input into resolving compensation issues. This directly contradicts the application of the CNP as outlined in the NPS EN-1. We outlined these concerns in our response to the survey on available guidance for HRAs.

For questions or further information please contact:
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The following organisations support this consultation response.

The Wildlife Trusts

Cornwall SEAL Group Research Trust

ORCA Looking out for Whales and Dolphins

WDC WHALE AND DOLPHIN CONSERVATION

RSPB

ZSL