



Francis Taylor Building

Webinar: Wind Energy

10 June 2021



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Offshore Wind and Cumulative Impacts

Mark Westmoreland Smith

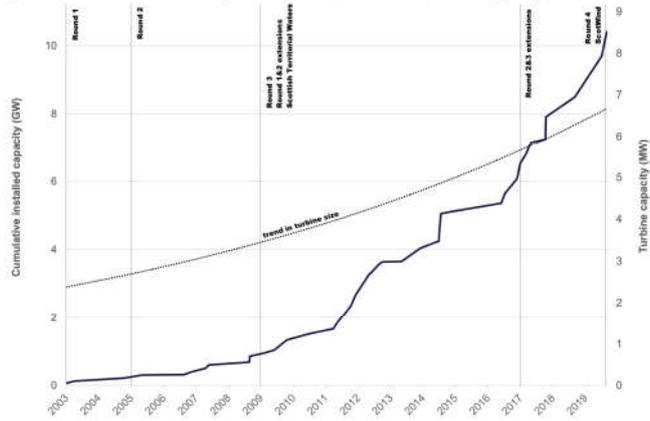


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Figure 3.5: Trend in cumulative operational UK offshore wind installed capacity, 2003-2020



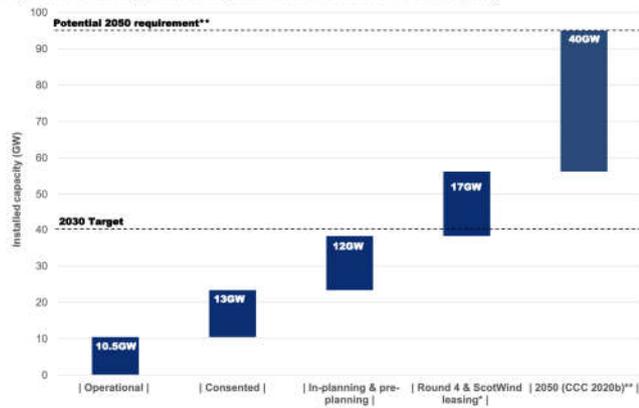
Source: BEIS renewable energy planning database. Note: data correct at September 2020. Excludes Blyth which was decommissioned in 2019.

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Figure 3.6: Current, planned and potential offshore wind installed capacity



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EIA

- Article 5 of the 2011 EIA Directive (as amended by the 2014 Directive) states:
 - *“Where an environmental impact assessment is required, the developer shall prepare and submit an environmental impact assessment report. The information to be provided by the developer shall include at least: ...(f) any additional information specified in annex iv relevant to the specific characteristics of a particular project or type of project and to the environmental features likely to be affected.”*
- Annex IV, paragraph 5 requires:
 - *“a description of the likely significant effects of the project on the environment resulting from, inter alia: ...(e) the cumulation of effects with other existing and/or approved projects, taking into account any existing environmental problems relating to areas of particular environmental importance likely to be affected or the use of natural resources...”*

Cumulative impacts – some difficulties

- (1) The race to the water
- (2) Rochdale Envelope
- (3) Data sharing



Norfolk Vanguard

- *R (Peacre) v Secretary of State for BEIS* [2021] EWHC 326 (Admin)



Norfolk Vanguard

- Paragraph 4.5.102 of the ExAR said: *“Finally, whilst the Norfolk Boreas Offshore wind farm has been included in the Applicant’s LVIA cumulative impact assessment, the ExA [(Examining Authority of inspectors)] have not considered it in this part of the assessment due to the limited amount of details available. The ExA considers it would most appropriate for Norfolk Vanguard Offshore Wind Farm cumulative impacts to be considered in any future examination into Norfolk Boreas”*
- The Secretary of State adopted that conclusion
- The Judge dealt with the essential principle at [120]: *“120. The effect of Directive 2011/92/EU, the 2009 Regulations and the case law is that, as a matter of general principle, a decision-maker may not grant a development consent without, firstly, being satisfied that he has sufficient information to enable him to evaluate and weigh the likely significant environmental effects of the proposal (having regard to any constraints on what an applicant could reasonably be required to provide) and secondly, making that evaluation”*



Norfolk Vanguard

129. NVL included in the ES an assessment of cumulative landscape and visual impacts at Necton. They considered the information available on the two projects to be adequate for this purpose and they concluded that there were likely to be significant environmental impacts. No complaint has been made about the adequacy of the ES or of the environmental information subsequently gathered. The legal challenge in this case has simply arisen because, first the Examining Authority, and then the Defendant, decided to defer *any* evaluation of those cumulative impacts to the decision on the Boreas project. They did so without the point being discussed publicly during the examination process. They did so on the basis of reasoning which, even on a generous view, could only be described as cursory, despite the importance of the decision being taken and the substantial concerns which had been raised about the selection of Necton for co-located grid connections. A departure from the general principle set out in [120] required proper justification by the Defendant directed to the environmental information and the issues before him, *a fortiori* given the somewhat unusual circumstances of this case as described above.



Conclusions

- Cumulative impacts are a real issue in relation to offshore wind farm simply as a result of the number of projects and the government's ambitions in this area
- Cumulative impacts have recently and directly resulted in the delay of both Norfolk Vanguard and Norfolk Boreas
- Although to a certain extent the increasing cumulative effects are inevitable given the proposed increases in offshore wind energy, consideration needs to be given to a strategic approach to the issue
- Just as national policy statements set out need so that the issue does not need to be returned on each application and overall solution/ approach could be set out in overarching policy
- What is clear is that without a strategic approach there will continue to be a danger of delays and potentially the frustration of the delivery of the carbon neutral power generation required to meet net zero



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OFFSHORE TRANSMISSION NETWORK REVIEW

Isabella Tafur



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The problem

- To date, offshore windfarms in GB have been connected to the shore via standalone transmission links.
- The current approach was developed when the offshore wind target was 10GW by 2030. A much more ambitious target is now in place.
- The system of point-to-point connections is no longer likely to be appropriate. It results in costs, environmental impacts and disruption to coastal communities which could be reduced through a more coordinated approach

An illustration of the problem





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An example of the problem: Suffolk

- EA1N, EA2, Five Wings Estuary, North Falls, Nautilus and Eurolink
- *“It appears to the Local Authorities that the way that the energy market is currently constructed (by Government policy) does not allow anything but incremental change that precludes looking at, for instance, an offshore grid to connect together windfarms and capable of being brought ashore closer to key markets. We see many parties having some influence in this field (BEIS, Crown Estates, Ofgem, National Grid Strategy, National Grid Transmission, windfarm operating companies interconnector companies and OFTOs), but we do not see any formal co-ordination”*

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The response

- 2019: Net Zero 2050 enshrined in law
- February 2020: Ofgem published its Decarbonisation Action Plan
- June 2020: Committee on Climate Change recommendation to Parliament
- July 2020: BEIS launched Offshore Transmission Network Review
- August 2020: Joint open letter from BEIS and Ofgem
- November 2020: Ten Point Plan for a Green Revolution
- December 2020: Energy White Paper
- December 2020: BEIS and Ofgem response to open letter
- December 2020: NGENSO published Phase 1 Report
- April 2021: Crown Estate published East Coast Grid Spatial Strategy

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OTNR: Key Points

- Recognition of the problem
- Forum for coordination between key stakeholders
- Main workstreams:
 - i) Early opportunities
 - ii) Pathway to 2030
 - iii) Enduring regime
 - iv) Multi-purpose interconnectors
- Tension between early coordination and 2030 targets

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Impact on NSIPs

- Hornsea Three (December 2020)
- Norfolk Vanguard
 - ExA report and decision (September 2019/July 2020)
 - pre-action correspondence (July 2020)
 - Judgment (February 2021)
 - re-consultation (April 2021)
- East Anglia One North and East Anglia Two (ongoing)

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Summary

- Change to the offshore connection regime appears inevitable
- Unlikely to affect the examination of existing DCOs or those currently on the horizon
- Opportunities to influence the new regime

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WIND FARM NOISE

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OVERVIEW

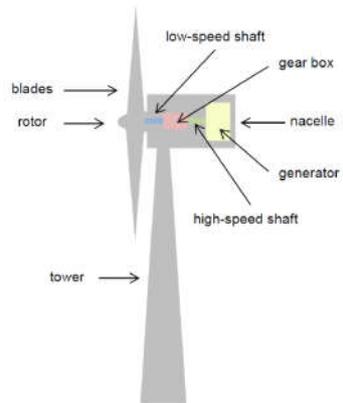
Describing Windfarm Noise

Applicable Guidance

Planning for Windfarm Noise

Windfarms and Nuisance

TURBINE ANATOMY



DESCRIBING
WINDFARM
NOISE:
PRESSURE

- Noise is pressure, measured in decibels (dB) weighted to account for the response of the human ear (dBA)
- Statistical averaging used to quantify noise over a given time period (dB L_{AeqT}). L_{den} = Eq across Day-Evening-Night
- Maximum A weighted sound pressure recorded over a given period (dB L_{Amax})
- A weighted sound pressure exceeded for a particular percentage of time is expressed as (dB L_{An%}). dB L_{A90} = level exceeded 90% of the time; dB L_{A10} = level exceeded 10% of the time.

DESCRIBING
WINDFARM
NOISE:
ACOUSTIC
FEATURES

Acoustic features can make noise more annoying. This is normally accommodated for by adding a penalty to noise levels where such features are present:

- **Tonal Components:** described in terms of frequency (akin to pitch and measured in Hertz) and the extent to which they protrude above other noise (in dB). Conducted by dividing the noise into frequency bands
- **Impulsive Components:** Bangs, clicks, clatters or thumps.
- **Amplitude Modulation:** Noise with a varying noise level. For wind farms it refers to noise varying in line with the rotational speed of the blades.
- **Low Frequency Noise:** Tonal components below 200Hz more dominant than those above 200Hz

GUIDANCE

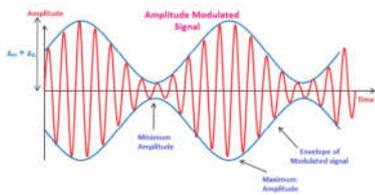
ETSU-R-97 "The Assessment and Rating of Noise from Windfarms"

- Based on BS4142
- Compares turbine noise with a level 5db above background noise, with a lower limit when background noise levels are low
- Day time limit anywhere between 35-30dB_{A90}
- Night time lower limit 43dB_{A90}
- Sliding scale of penalty for tonal noise.
- AM not fully covered

WHO Environmental Noise Guidelines for the European Region 2018

Section on wind turbine noise states that 'for average noise exposure, the GDG (Guideline Development Group) conditionally recommends reducing noise levels produced by wind turbines below 45 dB Lden, as wind turbine noise above this level is associated with adverse health effects'. This is a yearly value taking into account periods of shut-down, low wind speeds, and upwind propagation.

AMPLITUDE MODULATION: GUIDANCE



IoA "Method for Rating Amplitude Modulation in Wind Turbine Noise"

- The onset of perception for AM is around 2 dB 'peak-to-trough value';
- Normal AM' is considered to be in the range 2 to 6 dB 'peak-to-trough value';
- 'Excessive AM' may be above 6 dB 'peak-to-trough value'
- AM above 3 dB should be reduced in depth and/or occurrence and that any penalty scheme for AM should commence at a 3 dB peak-to-trough value

Wind Turbine AM Review, WSP Parsons Brinkerhoff for DECC

- Approves IoA Method
- 'Independent Noise Working Group' Amplitude Modulation and Planning Control Study
- Sponsored by Chris Heaton Harris MP and National Alliance of Wind Farm Action Groups.
- Express objective "to protect communities and wind turbine neighbours from amplitude modulation"

PLANNING FOR WINDFARM NOISE

NPPF 170

Planning policies should contribute to and enhance the natural and local environment by preventing new development contributing to unacceptable levels of noise pollution.

SOAEL - Level of noise exposure above which significant adverse effects on health and quality of life occur)

LOAEL – Level above which adverse effects on health and quality of life can be detected

NOAEL – No effect at all on health or quality of life

PPG

Plan-making and decision making need to take account of the acoustic environment and in doing so consider:

- whether or not a significant adverse effect is occurring or likely to occur;
- whether or not an adverse effect is occurring or likely to occur; and
- whether or not a good standard of amenity can be achieved.
- In line with the Explanatory note of the noise policy statement for England, this would include identifying whether the overall effect of the noise exposure (including the impact during the construction phase wherever applicable) is, or would be, above or below the significant observed adverse effect level and the lowest observed adverse effect level for the given situation.

NUISANCE: CAUSES OF ACTION

Statutory Nuisance under the Environmental Protection Act 1990

- Local authority abatement notice (section 80)
 - Appeal to Magistrates Court (civil standard of proof)
 - Best Practicable Means is a defence
 - Costs do not follow the event
- Private prosecution (section 82)
 - Magistrates' Court
 - Defendant is 'person responsible' or owner/ occupier in default
 - CrimPR Apply, criminal burden and standard of proof
 - Offence may only occur during 6 months prior to laying the information in the Magistrates' Court (s.127 MCA 1980 and *R v Crown Court at Liverpool ex p Cooke* [1997] 1 WLR 700.)
 - Remedy is an abatement order/ compensation under s 35 Powers of Criminal Courts Act 1973
 - Costs under Prosecution of Offences Act 1985

Common law nuisance

- County of High Court
- Civil burden and standard of proof
- Remedy is injunction or damages in lieu
- Costs follow the event

NUISANCE: KEY THEMES

- The broad unifying principle in the law of nuisance is reasonableness (*Williams v Network Rail Infrastructure Ltd* [2019] QB 601).
- What is reasonable is to be judged objectively; it will depend on context including the character of the locality. "what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey" (*Sturges v Bridgman* (1879) 11 Ch D 85).
- There is a need for individuals to be subject to the consequences of activities which contribute to the ordinary life of a modern community, and which need to be accommodated in that context (*Coventry v Lawrence* [2014] AC 822).
- The mere fact that a noise is audible or even irritating does not mean that it is a nuisance. Even noise which causes considerable disturbance judged by ordinary residential standards may not constitute a nuisance (see *Gillingham BC v Medway (Chatham) Dock Co Ltd* per Buckley J. [1993] QB 343).
- The fact that planning permission has been granted for a particular use is relevant to (but not determinative of) the question of whether the noise generated by that use amounts to a nuisance. In particular:
 - a planning permission may change or at least be relevant to the character of the locality
 - a planning permission may provide evidence regarding the relative importance of the permitted activity as part of the pattern of uses in the area;
 - where it includes a detailed and carefully considered framework of conditions governing the acceptable limits of a noise use, a planning permission provides a useful benchmark for the court's consideration of the same issues.
- Ultimately, whether or not a nuisance exists will always involve an element of judgment on a continuum between a mildly irritating activity (which is not a nuisance) to something which is intolerable and positively criminal if it affects a large enough number of people (see *Budd v Colchester BC* [1997] Env LR).



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THE HABITAT REGS: POPULATION VS HABITAT DE MINIMIS

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Two issues

- Dealing with an adverse effect by disturbance – can it be assessed by reference to effects on population, or does it have to be considered as an impact on habitats?
- Is there a concept of “de minimis” when considering issues of habitat loss/damage?

Clearly of great importance for both offshore and onshore wind

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The basics

Conservation of Offshore Marine Habitats and Species
Regs 2017 (SI 2017/1013)

- Reg 28 – the familiar two stage test
“likely to have a significant effect”
If so, appropriate assessment “*in view of that site’s conservation objectives*”

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- Reg 28(5)
 - Permission only if plan or project will not adversely affect the integrity of the European site – unless IROPI (difficult to establish)
 - Unless IROPI
- Based on “best scientific knowledge in the field” (*Holohan v An Bord Pleanala* (ECJ C-461/17))
- Looked at first by ref to domestic law but CJEU decisions still relevant

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The issue

So...

What's the correct approach if a bird species is displaced by disturbance from turbines from a particular part of an SPA?

How is to the issue of impact on integrity to be considered – is it to be regarded as a matter of habitat loss or as a matter based on effect on population

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- A distinction between disturbance and loss of habitat.
- Habitat remains and extent is unaffected
- However may be a dynamic redistribution of birds within the SPA



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Sweetman v An Bord Pleanála (Case C–258/11)

- Lough Corrib SCI , proposed bypass road through it
- SCI have been designated as a site hosting a priority habitat type, limestone pavement – specifically listed for protection in annex 1 of the habitats directive
- 1.5 ha (out of 270 ha) of the limestone pavement would be permanently lost

Held – an adverse impact on integrity
but a direct loss of habitat case



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Grace and Sweetman v An Bord Pleanála (Case C-164/17)

- Slieve Felim to Silvermines Mountains SPA
- conservation objective maintain or restore the favourable conservation condition of the hen harrier.
- development was a wind farm
- a “permanent and direct loss” of part of the foraging habitat, as well as a “temporary loss of part” of another part

Held - an adverse effect on integrity

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Conservation Objectives

- Consider aa “in view of”
- Outer Thames SPA
 - “to ensure that, subject to natural change, the integrity of the site is maintained or restored as appropriate, and that the site contributes to achieving the aims of the Wild Birds Directive, by maintaining or restoring:
 - the extent and distribution of the habitats of the qualifying features;
 - the structure and function of the habitats of the qualifying features;
 - the supporting processes on which the habitats of the qualifying features rely;
 - the populations of each of the qualifying features;
 - the distribution of qualifying features within the site.”

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Definition of integrity

- (see Sweetman (paragraph 39) and Grace (paragraph 35))
- lasting preservation of the constitutive characteristics of the site of the habitat in that area
- the survival of the species in question
- and its reproduction

So, a broad concept



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Reference to the Wild Birds Directive

Article 2 – "take the requisite measures to maintain the population of the species referred to..."

Article 4 – species "shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction"

therefore designation of special protection areas



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Conclusions - disturbance

- Strong argument that focus in disturbance cases on issue of whether or not there is a significant adverse effect on overall population in the SPA
- But:
 - Need to be very clear not an effective loss of habitat (and see Bagmoor Wind v Scottish Ministers [2012] Scot CS CSIH 93
 - Will always depend on scale/evidence



De Minimis

- Not mentioned in legislation
- Tighter approach by UK nature conservation statutory consultees after Sweetman
 - MMO guidance note refs “uncompromising language” of Sweetman – “no scope...to apply any form of de minimis rule” for loss of habitat
 - Therefore, *any* loss of habitat the reason for designation would need IROPI
- MMO online guidance (“regardless how small”)



Sweetman – AG Sharpton Opinion – Para 48

“The requirement that the effect in question be “significant” exists in order to lay down a diminished threshold. Plans or projects that have no appreciable effect on the site thereby excluded. If all plans or projects capable of having any effect whatsoever on the site were to be caught by article 6 (3), activities on or near the site would risk being impossible”

- Although said in context of the screening stage, logic suggests that should also apply at the AA stage - consider effect of *People Over Wind*



But: Sweetman – AG Sharpton Opinion – Para 60

- “Significant” different to “adverse”

“Measures which involve the permanent destruction of a part of the habitat in relation to his existence the site was designated are, in my view, destined by definition to be characterised as adverse. The conservation objectives of the site are, by virtue of that destruction, liable to be fundamentally – and irreversibly – compromised”

- However, CJEU judgment emphasised “favourable conservation status” and priority habitat types



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CJEU position

- Any loss of priority habitat (see Annex I) will be adverse effect
- Non-priority habitat loss – much more open
- AG Sharpton Opinion suggests strict approach – wary of “death by a thousand cuts”
- CJEU perhaps more open to suggestion of de minimis



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Domestic position

- See useful Natural England report NECR205 on small-scale effects
- English Nature Guidance Note (dated, pre-*Sweetman*)
- recognises de minimis
- See eg *Morge (CA)*, *Wealden*, *Smyth* – English cases recognising *de minimis*
- DCO decisions – East Anglia 3, Rampion, Thanet Extension, Norfolk Vanguard



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Conclusion – de minimis

- May exist in EU law
- Seems to be accepted in domestic decision – but as assumption rather than reasoned through
- Brexit – diminishing role for CJEU jurisprudence?



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