



# Strategic Compensation Studies

Strategic Compensatory Delivery Mechanism

Legal Note: Seabird Predation Reduction

## Document Control

| Revision | Author            | Checked        | Approved              | Date        | Description of change/<br>status                    |
|----------|-------------------|----------------|-----------------------|-------------|-----------------------------------------------------|
| 1.0      | Pinsent<br>Masons | Anna<br>Tarbet | K. Route-<br>Stephens | Nov<br>2025 | Final Approval                                      |
| 2.0      | OWIC              | Anna<br>Tarbet | K. Route-<br>Stephens | Dec<br>2025 | Note re date of completion<br>added. Final Approval |

**Reference:** OWIC (2025). Strategic Compensatory Delivery Mechanism Legal Note: Seabird Predation Reduction. OWEC SCS Report No. 06. A report produced by OWIC for the OWEC Strategic Compensation Studies (SCS) project.

**Acknowledgements:** We would like to acknowledge Pinsent Masons LLP for leading on the production of this report

**About the OWEC Programme:** This project forms part of the Offshore Wind Evidence and Change (OWEC) programme, led by The Crown Estate in partnership with the Department for Energy Security and Net Zero and Department for Environment, Food & Rural Affairs. The OWEC programme is an ambitious strategic research and data-led programme. Its aim is to facilitate the sustainable and coordinated expansion of offshore wind to help meet the UK's commitments to low carbon energy transition whilst supporting clean, healthy, productive, and biologically diverse seas.

**About the OWEC SCS Project:** The Strategic Compensation Studies (SCS) is a £3.5 million project running until the end of 2027 which forms part of the OWEC programme. Alongside OWEC funding, the SCS project is supported through financial and in-kind contributions from participating Offshore Wind Industry Council (OWIC) members. Further information can be found via the [Strategic Compensation Studies](#) webpage.

**Purpose of this Report:** This report forms part of the SCS Delivery Mechanism work package and considers whether the delivery of developer-led strategic compensatory measures is both lawful and practicable, and recommend options for the possible approach, structure, functioning and delivery body of the proposed predator-reduction measure.

**This Legal Note was finalised at the end of August 2025, prior to the Marine Recovery Fund Regulations 2025 coming into force and before responses to the Environmental Compensatory Measures Reform and Strategic Compensation Policy for Offshore Wind (Scotland) were published. As such, it represents the position at that date.**

# The Offshore Wind Industry Council

Strategic Compensatory Delivery Mechanism  
Seabird Predation Reduction

Legal Advice Work Packages 1 & 2  
November 2025

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BUSINESS WITH LAW AT THE CORE

## Executive Summary

1. We have been instructed by the Offshore Wind Industry Council (**OWIC**), through their Strategic Compensation Studies (**SCS**) project, to advise on a proposed developer-led ornithological strategic compensation measure (**SCM**, or **DL-SCM**); namely a predator-reduction measure.
2. OWIC have been considering options for DL-SCM in order to help address the challenges that Offshore Wind Farm (**OWF**) developers face in securing compensation for the predicted adverse impacts of their projects on ornithological receptors. We understand that OWIC has been progressing a specific predator-reduction DL-SCM, with a view to specific OWF projects being able to rely on the measure as part of their live consent applications.
3. The OWIC instruction refers to three Phases of workstream. As agreed with OWIC, this Note addresses Phases 1 and 2, namely:
  - a. Phase 1 - Whether a DL-SCM is lawful and practicable; and
  - b. Phase 2 - Considering and recommending options for the possible approach, structure, functioning and delivery body of the predator-reduction DL-SCM.
4. In terms of Phase 1, we conclude that developer-led strategic compensation is in principle a lawful approach to satisfying the legal requirements of the relevant legislation, guidance and policy. The question of legality for compensation is whether it is rational and reasonable for the decision-maker to conclude that the relevant DL-SCM will secure the overall coherence of the affected site. Subject to the relevant ecological and ornithological evidence regarding the strategic compensation measure, there is no in-principle hurdle posed by a developer-led strategic form of compensation that presents a barrier to satisfying that legal test. We also see no barrier posed by the existing policy or guidance.
5. In terms of Phase 2 we have considered and provided advice on the various options that could be pursued to structure the proposed predator-reduction strategic compensation measure, including proposals for the delivery body and/or delivery mechanism. We have closely followed the scope provided by OWIC in addressing Phase 2, and have supported this analysis with structure charts, tables and diagrams to help present the advice with visual tools.
6. Overall, in respect of Phase 2, we envisage that OWIC may wish to consider this Note in light of its interim capacity study and ongoing discussions with developers, following which it may be that some of the options currently set out in Phase 2 can be eliminated. The Phase 2 section will help inform future discussions with developers as well as the establishment of a pilot delivery model, which is the intention of Phase 3 of the OWIC scope.
7. It is anticipated that the law and policy relevant to this Note will be updated in the near future, as Government introduces new legislation and guidance and as the offshore wind market adapts to that evolving landscape. Therefore, this Note captures the position as at the issuing date of this Note.
8. We look forward to continuing our work with OWIC on the development of the predator-reduction DL-SCM.

## Recommendations

Our key recommendations in response to OWIC's queries and on practicalities of the delivery mechanisms under Phase 2 are summarised in the table below. These recommendations seek to draw upon the key practical tips outlined in the Phase 2 section as well as to respond to specific queries raised by OWIC via the OWIC Scope. Please note that terms used in this table are defined in the main body of the Note.

| TOPIC / QUERY                                                                                                                          | SOURCE OF QUERY (IF APPLICABLE) | RECOMMENDATION                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
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| <b>How benefits should be allocated between OWF projects to satisfy consent requirements</b>                                           | Query raised in OWIC Scope      | <p>We note that the UK MRF Consultation proposes to allocate compensation to projects based on the expected adverse impacts of that project (see paragraph 60, UK MRF Consultation). The UK MRF Consultation proposes that each developer seeking to rely on the UK MRF must pay a reservation fee once accepted into the MRF – the reservation fee is non-refundable. The reservation fee is proposed to be proportionate on a sliding scale to the estimated cost of compensation, ranging between £75,000 and £200,000.</p> <p>In Defra's consultation events on the UK MRF Consultation, it was explained that part of the reason for the reservation fee is to deter speculative reservations of capacity. We note however that speculative reservations of capacity may not arise if a developer is required to evidence its predicated ornithological impact figures by producing its RIAA.</p> <p>Subject to discussions with the participating developers, a model that allocates capacity based on the project's predicted impacts (as evidenced in their RIAA) seems a straightforward approach that does not require projects to provide any additional evidence.</p>                                                                                                                                                                                                         |
| <b>How risk should be allocated between multiple parties of the collaborative agreement and party(ies) delivering the compensation</b> | Query raised in OWIC Scope      | <p>We discuss the allocation of risk and responsibility in detail in the Phase 2 section of the Note when considering the different options for managing and delivering the predator-reduction DL-SCM. We consider key aspects of risk to be:</p> <ul style="list-style-type: none"> <li>• <b><i>Risk of the Secretary of State disagreeing that the SCM is appropriate compensation, or that there is sufficient capacity in the SCM for all projects seeking to rely upon the SCM:</i></b> this risk primarily sits with the individual projects, who will likely need to identify alternative or supplementary compensation in order to be granted their respective consents or comply with the requirements of those consents.</li> <li>• <b><i>Risk of a developer withdrawing from the SCM, or if further financial contributions are required to maintain the SCM:</i></b> the risk allocation will likely depend on the option for delivery (i.e. options 1-4 discussed in Phase 2 of this Note). If option 1 (equal developer responsibility) is taken forward, this risk will likely sit with each participating OWF project. In the event of a financial shortfall, each remaining project may need to make greater financial contributions or find an additional OWF project to join the measure to maintain the necessary level of financial support. If option 2</li> </ul> |

| TOPIC / QUERY                                                                                                                                                                                                                                                                                                                                                                          | SOURCE OF QUERY (IF APPLICABLE) | RECOMMENDATION                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
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|                                                                                                                                                                                                                                                                                                                                                                                        |                                 | <p>(lead/subsequent developer) is progressed, the risk of subsequent projects withdrawing will sit with the lead developer; whereas the risk of the lead developer falling away sits with the subsequent projects who may seek step-in rights and powers. The risk in option 3 (third party-led) could lie with the third party-led delivery body (subject to the private agreements they negotiate with developers) and under option 4 the risk would lie with the Government MRF.</p> <ul style="list-style-type: none"> <li>• <b>Risk of adaptive management being required:</b> we consider the risk of sourcing adaptive management (such as scaling-up the SCM) is the same as under the bullet point above.</li> <li>• <b>Risk of the DL-SCM failing and consent conditions being breached:</b> in the event the SCM can no longer progress, or fails to be successful, the key risk for each project is of being in breach of its respective DCO consent. Contractually, the developers may have allocated the costs of such failure to one another or to the third party-led delivery body, depending on whether options 1, 2 or 3 are taken forward. We anticipate each developer will likely seek to retain a substantial degree of control, oversight and approval over the operation and compliance of the predator-reduction DL-SCM, primarily so as to secure compliance with their DCO.</li> </ul> |
| <b>Mechanisms to uncouple the lead-in time for compensation measures from development timescales for individual projects. For example, consent conditions often require compensation to be established at least 2 years prior to construction taking place. If the compensation is delivered independently to the OWF project consents, how would the timescales be accounted for?</b> | Query raised in OWIC Scope      | <p>Paragraph 3.6.4 discusses the approach to date by consented and in-Examination projects of the period compensation must be in place prior to operation commencing. In brief, this period will be tied to factors such as the ecological evidence, the specific purpose of the compensation measure in respect of the AEOL to be compensated and the lifecycle of the species being compensated.</p> <p>The approach undertaken by OWF projects consented to date is for compensation to be in place prior to the AEOL occurring. This approach is supported by the UK Guidance, which states that “<i>Compensatory measures should usually be in place and effective before the negative effect on a site is allowed to occur.</i>” However, it is worth noting that there has been possible discussion at a Government level of using new statutory powers to amend the Habitats Regulations to make it more explicit that compensation need not be in place in advance of AEOL occurring.</p> <p>Subject to any statutory changes, under the present legal regime it is arguable that a project need not delay operation if the compensation has already been established for the relevant period. The relevant period will likely depend on the ecological evidence for each project and impact.</p>                                                                                                         |
| <b>Compliance and enforcement of collaborative (or strategic) predation reduction compensation measures throughout the</b>                                                                                                                                                                                                                                                             | Query raised in OWIC Scope      | <p>We consider there are two aspects to compliance and enforcement:</p> <p>Contractual compliance: this aspect of compliance relates to each party to the DL-SCM complying with their contractual roles and responsibilities as determined in accordance with the agreements to be entered into between the parties. In terms of the predator-reduction DL-SCM the nature of this compliance will be subject</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |

| TOPIC / QUERY                                                                                                                                                                   | SOURCE OF QUERY (IF APPLICABLE) | RECOMMENDATION                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
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| <b>duration of an OWF project consent. Including how compliance and enforcement action should be assessed, such as thresholds and triggers, and who is responsible for this</b> |                                 | <p>to the option taken forward for progressing the DL-SCM (i.e. options 1-4). We anticipate each agreement will set out detailed enforcement provisions and dispute resolution mechanisms to manage compliance, which will be specific to the party/ies undertaking the day-to-day operation of the measure as well as the degree of supervisory control that other parties to the DL- SCM seek to achieve.</p> <p>Consent compliance: this aspect of compliance concerns each OWF developer complying with their project DCO, including any IMP approved under that DCO. Subject to the specific consent and IMP wording, we envisage enforcement will be by the Secretary of State or local planning authority, as advised by Natural England.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| <b>Principles and processes of adaptive management in compensation, including weight of information that needs to be provided at different stages of the consenting process</b> | Query raised in OWIC Scope      | <p>In the UK MRF Consultation, adaptive management is defined as the adjustment or replacement of a SCM if monitoring of a SCM finds it is not functioning as expected.</p> <p>The UK MRF proposes to include an adaptive management charge into the cost paid by each developer to access the MRF. The adaptive management charge is proposed to be 30% of the total estimated cost of the SCM, which is non-refundable. This adaptive management charge is said, in the UK MRF Consultation, to be put towards modifying or adjusting a SCM if the measure is not functioning as intended, agreeing a new measure in certain circumstances, and to protect applicants from further charges.</p> <p>The need to provide for adaptive management in the predator-reduction DL-SCM is likely to depend upon the confidence in the measure. We understand that OWIC has instructed a study to help support the evidence base for the capacity in the predator-reduction DL-SCM, and that the results of the study are due to become available in the autumn.</p> <p>If the evidence strongly supports the position that the predator-reduction DL-SCM is feasible and that there is sufficient capacity in the measure, there will be more confidence in the DL-SCM and so there can be less emphasis on adaptive management. However ultimately this position is subject to the view of the Secretary of State.</p> <p>We note that in the OWF consented to date it has been common for OWF developers to propose adaptive management measures. Where there is a substantial evidence base in support of the primary measure, the case for the adaptive management compensation is typically at a higher level. More recently, OWF applications have relied upon the UK MRF as the proposed adaptive management measure.</p> |
| <b>Mechanism for “banking” benefits from collaborative (or strategic) predation reduction compensation</b>                                                                      | Query raised in OWIC Scope      | Our anticipation is that part of the development of the predator-reduction DL-SCM will involve producing a methodology that calculates the predicted benefit of the compensation. Once implemented, ongoing                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |

| TOPIC / QUERY                                                                                                                                                                                                                                                                                                                                       | SOURCE OF QUERY (IF APPLICABLE)   | RECOMMENDATION                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
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| <p>measures in advance of need. For example, if scheme is expected to deliver excess compensation / ecosystem benefits that could be used by subsequent OWF projects or plans that require a derogation</p>                                                                                                                                         |                                   | <p>monitoring will likely be required to track the progress of the measure and whether it is delivering the anticipated level of compensation.</p> <p>If the ongoing monitoring identifies more compensation than expected is being delivered, as a result of the DL-SCM, this could be relied upon by other OWF projects subject to a future ecological evidence case.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| <p><b>Mechanism for the long-term protection of the collaborative (or strategic) predation reduction compensation measures once delivered. For example, if this should be formal legal protected status as part of the UK National Sites Network or safeguarding mechanisms to ensure the coherence of the network between relevant parties</b></p> | <p>Query raised in OWIC Scope</p> | <p>In the Note, one of the options for structuring the predator-reduction DL-SCM is seeking to incorporate the SCM into the UK's LoSCM (i.e., option 4). If option 4 is progressed, the long-term management of the SCM would sit with the UK MRF's operator.</p> <p>If the predator-reduction DL-SCM remains as a developer or third party-led measure (i.e. options 1-3 under this Note) the long-term protection of the measure should be considered together with: the relevant compensation requirements of each DCO; the party responsible for delivering the measure, the appetite of developers, the contractual agreements in place and the risk or liability profile associated with the parties remaining involved in the operation of the measure. The aspects relevant to this decision include:</p> <ul style="list-style-type: none"> <li>• Future mechanisms in respect of the predator-reduction DL-SCM will need to be considered in terms of whether they comply with the terms of each DCO, as well as the approved IMPs.</li> <li>• Future amendments to the predator-reduction DL-SCM will also need to be considered in light of whether they can be accommodated within the arrangements agreed between the parties, or whether the parties are willing to amend those agreements.</li> <li>• The party/ies responsible for delivering the measure may have no appetite to take on any additional responsibilities. We envisage also that if the compensation site becomes part of the National Site Network, this could increase the ecological importance of the site, and so increase the liability associated with any breach. This may increase the risk associated with the DL-SCM beyond that which the delivery body or OWF developer can accept.</li> <li>• The developers may have no appetite for their compensation measure to form part of the National Site Network, particularly if that could place restrictions on the future operation or adaptive management potential of the DL-SCM.</li> </ul> <p>We therefore consider that long-term arrangements should be discussed with the participating OWF developers, to gauge benefits against the potential risks noted above. We note that the relevance of each of these risks is also likely to depend upon the delivery option for the DL-SCM that is progressed (i.e. option 1-4).</p> |

| TOPIC / QUERY                                                                                                                    | SOURCE OF QUERY (IF APPLICABLE) | RECOMMENDATION                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
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| <b>Proposed changes in law (the MRF) that could interact with the lawfulness of DL-led SCM</b>                                   | <a href="#">2.3.32</a>          | We recommend that OWIC keeps a close watching brief on the development of the MRF (and the Scottish MRF) to track that the secondary legislation, once it comes forward, is consistent with, and does not exclude, a DL-led SCM.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| <b>Proposed changes in law (the habitats regulations) that could interact with the lawfulness of DL- SCM</b>                     | <a href="#">2.3.47</a>          | We recommend that OWIC keeps a close watching brief on the development of any changes to the Habitats Regulations made pursuant to the Environment Act 2021 and Energy Act 2023, if those changes come forward, to review whether they are consistent with a DL-SCM.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| <b>Ensuring developer agreement on methodologies, documents and the capacity study relating to the predator-reduction DL-SCM</b> | <a href="#">3.7</a>             | Agreement between developers (and their consultants) on the suite of compensation documents, particularly the methodologies and evidence of capacity, will be key to the predator-reduction DL-SCM suite of compensation documents. We understand that OWIC has commissioned a study to confirm the available capacity of the predator-reduction SCM. The results of this study, once known, will need to be scrutinised to ensure it makes a robust case that there is sufficient capacity for all parties seeking to rely upon the predator-reduction DL-SCM, including their reasonable worst case impact assessment scenarios.                                                                                                                                                                                        |
| <b>Ensuring engagement with SNCBs to confirm the feasibility and effectiveness of the DL-SCM</b>                                 | <a href="#">3.5.7</a>           | In addition to agreement between developers, it will be important to consult with the relevant SNCBs with an aim to receiving their confirmation that the DL-SCM will be feasible and effective. It will need to be clear how parties are consulting with SNCBs throughout all stages of the predator-reduction DL-SCM, particularly in response to the interim capacity study OWIC has instructed, and engaging in receiving letters of intent or support with development partners. Letters of support or intent should seek to be consistent, subject to site-specific impacts.                                                                                                                                                                                                                                        |
| <b>Ensuring a DL-SCM can effectively address capacity concerns and secure adequate compensation</b>                              | <a href="#">3.5.7</a>           | At the time of writing this Note it is not known when the interim results of the capacity study will conclude there is sufficient capacity in the measure to compensate for the impacts of all projects seeking to rely upon the predator-reduction DL- SCM. In the worst-case scenario that the study concludes there is insufficient capacity, or that it is marginal or, in future, if the Secretary of State concludes more capacity than is in the SCM is required to compensate for the impacts of all projects, we anticipate that each project would take steps to secure a precautionary level of compensation in the SCM for their own project. It will be important for a DL- SCM mechanism to be able to address questions of capacity in order to maintain the overall integrity and feasibility of the SCM. |
| <b>Ensuring projects relying on predation reduction compensation propose a</b>                                                   | <a href="#">3.6</a>             | We recommend the projects seeking to rely on the predator-reduction DL-SCM put forward their preferred form of compensation condition to their respective DCO. That condition should be drafted to make sure that the pre-commencement of development element is clear and achievable, such as forming a group and submitting the detailed plan. In our experience, it is vital for project delivery to seek that the pre-operation                                                                                                                                                                                                                                                                                                                                                                                       |

| TOPIC / QUERY                                                                                                                                                               | SOURCE OF QUERY (IF APPLICABLE) | RECOMMENDATION                                                                                                                                                                                                                                                                                                                                                                                                        |
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| <b>clear and achievable compensation condition</b>                                                                                                                          |                                 | element is based on the compensation being in place, rather than being effective or successful. The various developers seeking to rely on the predation-reduction DL-SCM could work together to draft a mutually acceptable draft consent condition, so that each project is putting forward a consistent approach into the decision-making process.                                                                  |
| <b>Evaluating the complexities of joint working group within the proposed operational framework of the predator-reduction DL-SCM</b>                                        | <a href="#"><u>3.7.7</u></a>    | Considering the full implications of a joint working scenario is complex and the appropriateness of joint working should be considered in light of the proposed operational framework of the predator-reduction SCM. We recommend that the structure of any joint working group is considered further as part of Phase 3, or a suitable future stage once more information on the predator-reduction DL-SCM is known. |
| <b>Maintaining option 4 (incorporation of the predator-reduction SCM into the UK MRF's LoSCM) as an ongoing discussion point while awaiting further government guidance</b> | <a href="#"><u>3.7.13</u></a>   | We recommend this option 4 is kept as a live discussion point for now, pending further information from Government. The parties may wish to draft the predator-reduction DL-SCM agreements with suitable flexibility to allow for the measure to be incorporated into the LoSCM in future – this can be discussed as part of the work under Phase 3.                                                                  |

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## 1. Introduction

- 1.1 Under the Habitats Regulations<sup>1</sup> if an offshore wind farm (**OWF**) has an adverse effect on integrity (**AEOI**) on a designated site<sup>2</sup>, the decision-maker cannot grant consent unless the requirements for a 'derogation' are satisfied. A derogation involves three-stages, the final stage of which requires the decision-maker to secure compensation to ensure the overall coherence of the designated site network.
- 1.2 Securing compensation measures for **OWF** projects has been identified by industry and Government<sup>3</sup> as a key challenge to the timely consenting and subsequent delivery of OWF projects. The reasons for those challenges are explored in more detail in subsequent sections of this Note.
- 1.3 Whilst a number of derogation cases have now been granted for OWF projects<sup>4</sup>, each with project specific compensation requirements, compensation remains a key challenge for the OWF industry. In addition to the consenting requirements, at a post-consent stage the implementation of compensation measures raises additional challenges including consent conditions that require long lead-in times and require additional land rights or planning permissions to be obtained.
- 1.4 Given the essential role that OWF projects will play in achieving the UK's low carbon and net zero statutory obligations, industry and Government have been exploring ways to improve the securing and delivery of compensation. At a government level, the UK Government is establishing a Marine Recovery Fund (**MRF**). Currently at consultation stage<sup>5</sup> (**the MRF Consultation**) the stated purpose of the MRF is "to be a voluntary mechanism that [developers] can pay into to secure appropriate and strategic compensatory measures". It aims to speed-up decision making for OWF and deliver more effective and strategic compensation measures. The MRF will apply to AEOI arising on English, Welsh and Northern Irish designated sites. For Scottish designated sites, the intention (as outlined in the MRF Consultation<sup>6</sup>) is for a separate Scottish MRF to be established and operated by the Scottish Ministers. A consultation on the Scottish MRF was launched on 19 August.
- 1.5 Separate from the MRFs, the OWF industry has been considering other options for SCMs. SCMs are compensation measures undertaken on a collaborative basis by developers for the benefit of two or more OWF projects. At present, use of SCMs between projects and developers is in the very early stages, with some initial examples coming forward on a small number of OWF projects.
- 1.6 We have been instructed by OWIC through their Strategic Compensation Studies (**SCS**) project to examine one form of DL-SCM, namely, a predator-reduction scheme to be located on the Isles of Scilly. OWIC have advised us that talks have been progressing in respect of the predator-reduction SCM, that several OWF developers are engaged in possibly relying upon the predator-reduction SCM as compensation for their projects, and that a study<sup>7</sup> has been commissioned by OWIC in respect of one aspect of the potential compensation measure. However, at this stage there is no confirmed structure for the proposed predator-

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<sup>1</sup> In this Note, the term 'Habitats Regulations' is used to mean the Conservation of Habitats and Species Regulations 2017 and the Conservation of Offshore Marine Habitats and Species Regulations 2017 as well as, in relevant scenarios in Scotland, the Conservation (Natural Habitats &c.) Regulations 1994

<sup>2</sup> In this Note, the terms 'protected site' and 'designated site' refer to a Special Area of Conservation (SAC) or Special Protection Area (SPA) as designated under the UK's National Site Network. SACs and SPAs were formerly, under the Habitats Directive, known as 'European sites', collectively forming part of the 'Natura 2000 network'

<sup>3</sup> See, e.g. Department for Environment, Food & Rural Affairs' Consultation on the establishment of the Marine Recovery Fund (MRF), March 2025 (April 2025 is stated on the cover sheet), paragraph 3– [here](#)

<sup>4</sup> To date, derogation cases have been granted for: Hornsea Project Three OWF, Hornsea Project Four OWF, East Anglia One North OWF, East Anglia Two OWF, Norfolk Boreas OWF, Norfolk Vanguard OWF, Sheringham and Dudgeon OWF, Rampion 2 OWF and, in Scotland, GreenVolt OWF

<sup>5</sup> Department for Environment, Food & Rural Affairs' Consultation on the establishment of the Marine Recovery Fund (MRF), April 2025 – [here](#)

<sup>6</sup> See, the MRF Consultation, paragraph 56

<sup>7</sup> The capacity study has now been delivered; however, we understand that the workstream remains ongoing and therefore, this has not been incorporated into the scope of the Note.

reduction DL-SCM, and its development is in the early stage. Therefore, this instruction seeks legal advice to help explore the options for establishing the proposed DL-SCM. The detail of the instruction has been outlined to us in a scope document provided to us by OWIC (the **OWIC Scope**), which scopes the various workstreams under the instruction in three phases:

- 1.6.1 Phase 1: to review whether a DL-SCM in predation reduction is legally attainable and practicable;
  - (a) Our key conclusion is set out at paragraph 2.3.19, finding that strategic compensation is in principle a lawful approach.
- 1.6.2 Phase 2: if the response to part 1 is that a DL-SCM in predation reduction is legally attainable and practicable, to review the options for the delivery, structure and functioning of the DL-SCM.
- 1.6.3 Phase 3: to create standard agreements and contractual terms to facilitate a pilot project of a DL-SCM.
- 1.6.4 Phases 1 and 2 are addressed in this Note. Phase 3 will be actioned at a later stage, on timescales to be agreed with OWIC.
- 1.6.5 The proposed DL-SCM that is currently being formulated by OWIC would support OWFs located off the coast of England that are subject to the DCO process under the Planning Act 2008. Therefore, the practical aspects of the proposed predator-reduction DL-SCM addressed under Phase 2 of this Note are considered primarily in the context of the DCO system. However, the issues and principles covered in this Note would extend to projects based throughout the UK.
- 1.6.6 This Note has been prepared solely and exclusively for OWIC and OWEC in its capacity as OWIC's funder of the SCS project. Pinsent Masons LLP assumes no responsibility or legal liability whatsoever to any other person for any information or opinion in this Note. As set out in our Letter of Engagement, OWIC may share this Note with OWIC members and their industry stakeholders on a non-reliance / without liability basis, and we will not be held responsible for any decisions or actions taken by any third party based on that advice.
- 1.6.7 This Note has been prepared to address the OWIC Scope, which relates (as outlined above) to ornithological compensation under the Habitats Regulations. This Note therefore does not address any other statutory compensation regimes or requirements including 'measures of equivalent environmental benefit' (MEEB) under the Marine and Coastal Access Act 2009.

## 2. Phase 1 – whether a developer-led SCM for predation reduction is legally attainable and practicable

2.1 There are two broad aspects to whether a DL-SCM for predation reduction is lawful and practicable:

2.1.1 **Lawfulness (see section 2.3):** Whether the DL-SCM complies with the Habitats Regulations and any other relevant legislation. In this section, it is necessary and appropriate to consider possible legislative changes that may be enacted to bring the MRF into effect as well as existing legislation; and

2.1.2 **Practicability (see section 2.4):** Whether the DL-SCM complies with applicable policy, guidance and consenting practice.

2.2 In summary, we conclude that a DL-SCM is in principle a lawful approach to satisfying the legal requirements of the Habitats Regulations.

### 2.3 Lawfulness

#### 2.3.1 Current position in law

2.3.2 The UK legislation applicable to habitats compensation is the Habitats Regulations.<sup>8</sup>

2.3.3 The Habitats Regulations give effect in UK domestic law to the Habitats Directive<sup>9</sup> which, following the United Kingdom's departure from the European Union (EU), is no longer applicable within the UK.

2.3.4 In relation to compensatory measures, the Habitats Regulations only provide as follows:



#### **68. Compensatory measures**

*Where in accordance with regulation 64-*

*(a) a plan or project is agreed to, notwithstanding a negative assessment of the implications for a European site or a European offshore marine site, or*

*(b) a decision, or a consent, permission or other authorisation, is affirmed on review, notwithstanding such an assessment,*

*The appropriate authority must secure that any necessary compensatory measures are taken to ensure that the overall coherence of Nature 2000 is protected.*

2.3.5 The phrase “compensatory measures” is not defined in the Habitats Regulations. We note however that under s.291 of the Energy Act 2023 (in a section entitled “Strategic compensation for adverse environmental effects”, which we consider in more detail below) the phrase “Environmental compensation obligation” is defined to mean:

<sup>8</sup> Whilst there are different versions of the Habitats Regulations applicable to different jurisdictions throughout the UK, the relevant compensation provision is equivalent in each version.

<sup>9</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora



### **291. Strategic compensation for adverse environmental effects**

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

*(a) a statutory duty (however expressed) to secure that measures are taken to compensate for adverse environmental effects of an activity, 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 an activity, to be satisfied that P will take or secure the taking of measures to compensate for adverse environmental effects of the act.”*

- 2.3.6 Accordingly, in accordance Regulation 68, a decision maker (or “competent authority”) may give consent for a proposed development that is likely to have an AEOL where, subject to other tests also being satisfied, the decision maker secures that any necessary compensatory measures are taken to ensure the overall coherence of the national site network.
- 2.3.7 Therefore, the legal obligation in respect of compensation under the Habitats Regulations rests on the appropriate authority (although in practice facilitated by the developer) and the obligation is to “secure” that the compensatory measures “are taken” (i.e. in future). The legislation does not prescribe by whom such compensatory measures may be taken, or impose a direct legal obligation on the person causing the AEOL to secure the compensation such that it would preclude a collaborative approach.
- 2.3.8 The Habitats Regulations do not expand on what is meant by “secured”. The High Court has considered the matter<sup>10</sup> and the following principles can be drawn from that decision:
- (a) It is not necessary for there to be a binding agreement in place for delivery of compensation before consent is issued.
  - (b) The question is whether the Secretary of State could rationally believe that s/he could fulfil their duty to secure compensation measures, or could s/he only rationally conclude that s/he would be unable to fulfil it.
  - (c) The Secretary of State has the power to issue the consent if s/he can rationally believe that the mechanism for delivery of compensation would be implemented. In that, the Secretary of State is entitled to rely on the advice of Natural England (**NE**) (then English Nature).
  - (d) The timing of the carrying out of the compensation measures to be secured depends on the timing of the events which would detract from the coherence of the network (i.e. when the impact occurs).
- 2.3.9 The law therefore requires the Secretary of State to ensure that compensation measures are secured or to be confident that they can be secured at the point of authorising the relevant project. It does not require that those measures must be secured before consent can be issued, or that they must be secured before the related harm arises<sup>11</sup>. No requirement exists in the Habitats Regulations to have

<sup>10</sup> *Humber Sea Terminal v Secretary of State for Transport* [2006] Env.L.R 4.

<sup>11</sup> We discuss later in this Note the UK Guidance, which states that: “Compensatory measures should usually be in place and effective before the negative effect on a site is allowed to occur”. We also note that Government has announced possibly amending the Habitats Regulations to make more explicit that impacts can arise before compensation is in place.

compensatory measures in place at the time of decision-making or even on implementation of the development.

- 2.3.10 Whether compensation proposed by a developer satisfies the Habitats Regulations is a question for the competent authority, which relevant to a planning application will most often be the consent decision-maker. Answering that question requires the exercise of a decision-maker's discretionary judgment, subject to the supervisory jurisdiction of the courts through the traditional grounds of judicial review, i.e. on legal process error, irrationality or unreasonableness grounds.
- 2.3.11 We note also that the UK Government has published guidance on the interpretation of the Habitats Regulations (the **UK Guidance**)<sup>12</sup>. In terms of compensatory measures, the UK Guidance does not define 'compensation' or 'compensatory measures' and states that "these measures will need to fully offset the damage which will or could be caused to the site".
- 2.3.12 Whilst the UK is no longer a member of the EU, given the origin of the Habitats Regulations, EU guidance (although non-binding)<sup>13</sup> (the **EU Guidance**) on the Habitats Directive can still help to interpret the Habitats Regulations. The EU Guidance states that compensatory measures, whilst not defined under the Habitats Directive, are independent of the project and must be additional to the actions that are normal practice required for the designation, protection and management of protected site (the 'additionality principle').
- 2.3.13 In considering whether a DL-SCM is lawful then, a first legal question is whether the SCM satisfies the requirements of Regulation 68. As mentioned, 'Compensation' and 'compensatory measures' are not defined in the legislation, UK Guidance or EU Guidance, however the compensation that is deemed "necessary" must ensure the overall coherence of the national site network is protected.
- 2.3.14 The EU Guidance considers the 'overall coherence' phrase and considers that:
- (a) From the perspective of individual plans and projects: "...*compensation should refer to the site's conservation objectives and to the habitats and species negatively affected in comparable proportions in terms of number and status. At the same time the role played by the site concerned in relation to the bio-geographical distribution has to be replaced adequately*";
  - (b) The Birds Directive does not provide for biogeographical regions, or selection at EU level. However, by analogy, it could be considered that the overall coherence of the network is ensured if:
    - (i) compensation fulfils the same purposes that motivated the site's classification under Article 4(1) and 4(2) of the Birds Directive;
    - (ii) compensation fulfils the same function along the same migration path; and
    - (iii) the compensation areas are accessible with certainty by the birds usually occurring on the site affected by the project.
  - (c) In order to ensure the overall coherence of [the National Site Network], the compensatory measures proposed for a project should therefore: a) address, in comparable proportions, the habitats and species negatively affected; and b) provide functions comparable to those which had justified the selection criteria for the original site, particularly regarding the adequate geographical distribution. Thus, it would not be enough for the compensatory measures to concern the same biogeographical region in the same Member State. The distance between the original site and the place of the compensatory measures is not

<sup>12</sup> Habitats regulations assessments: protecting a European site (2021): <https://www.gov.uk/guidance/habitats-regulations-assessments-protecting-a-european-site#derogation>

<sup>13</sup> Managing Natura 2000 sites: <https://op.europa.eu/en/publication-detail/-/publication/11e4ee91-2a8a-11e9-8d04-01aa75ed71a1>

necessarily an obstacle as long as it does not affect the functionality of the site, its role in the geographical distribution and the reasons for its initial selection.

- 2.3.15 In terms of how the decision-maker may reach their determination as to whether compensation is legally acceptable the existing successfully made derogation cases for OWFs provide useful examples. So far as we are aware, no grant of consent for a OWF project has been successfully challenged through the courts for reasons relating to the derogation case element (including the compensation element of the derogation case).
- 2.3.16 Some of those derogations require compensation including predation reduction measures; namely:
- (a) **East Anglia ONE North Offshore Wind Farm and East Anglia Two Offshore Wind Farm (the East Anglia Projects):** predator-reduction controls to compensate for AEOL on the Lesser Black-Backed Gull (LBBG) feature of the Alde-Ore Estuary SPA.
  - (b) **Norfolk Boreas Offshore Wind Farm and Norfolk Vanguard Offshore Wind Farm (the Norfolk Projects):** predator-reduction controls to compensate for AEOL on the LBBG feature of the Alde-Ore Estuary SPA.
- 2.3.17 The compensation measures for the East Anglia Projects and the Norfolk Projects include predation reduction measures that comprise fencing to reduce the predation by foxes of nests within the LBBG colony. It is notable that the East Anglia Projects and the Norfolk Projects are now working together to deliver the required compensation collaboratively. This collaborative approach has been approved by the decision maker (the Secretary of State)<sup>14</sup>.
- 2.3.18 Neither of the Development Consent Orders (**DCOs**) granting approval for the East Anglia projects or the Norfolk Projects contemplated delivery of the predation reduction in a strategic manner. However strategic compensation has been contemplated in more recent DCOs, including the Sheringham Shoal and Dudgeon Extension Offshore Wind Farm Order 2024<sup>15</sup> and the Rampion 2 Offshore Wind Farm Order 2025.<sup>16</sup> In both of the Sheringham Shoal and Rampion 2 DCOs, the compensation conditions contemplate two forms of strategic compensation: the Government MRF; and strategic compensation with one or more other OWF projects. See, e.g.:
- (a) **Sheringham Shoal and Dudgeon Extension Offshore Wind Farm Order 2024** – the compensation and implementation measure is to include details of either of the following:
    - (i) **MRF:** Schedule 17 Part 1 paragraph 4 (i) provision for the option to be exercised by the undertaker, following consent in writing of the Secretary of State, to pay a contribution to the Strategic Compensation Fund wholly or partly in substitution for the nesting habitat improvements and restoration of lost breeding range compensation measure or as an adaptive management measure for the purposes of paragraphs 4(2)(f) and (g) of this Part of this Schedule. The sum of the contribution to be agreed between the undertaker and Defra or other Government body responsible for the operation of the Strategic Compensation Fund in consultation with the STCSG [i.e. the Sandwich Tern Compensation Steering Group].
    - (ii) **SCM:** Schedule 17 Part 1 paragraph 4 (j) provision for the option to be exercised by the undertaker, following consent in writing of the Secretary of State, to pay a financial contribution towards the establishment of compensation measures by another party wholly or partly in substitution for the nesting habitat improvements and restoration of

<sup>14</sup> See, the approved LBBG Implementation and Monitoring Plan for the East Anglia Projects [here](#) and the LBBG Implementation and Monitoring Plan for the Norfolk Projects [here](#)

<sup>15</sup> See, Schedule 17 :[https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010109/EN010109-002390-SADEP%20DCO%20DESNZ%20170424\\_Redacted.pdf](https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010109/EN010109-002390-SADEP%20DCO%20DESNZ%20170424_Redacted.pdf)

<sup>16</sup> See, Schedule 17 :<https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010117/EN010117-002453-Development%20Consent%20Order%20as%20Made%20by%20the%20Secretary%20of%20State.pdf>

lost breeding range compensation measure or as an adaptive management measure for the purposes of paragraphs 4(2)(f) and (g) of this Part of this Schedule. The sum of the contribution to be agreed between the undertaker and the other party in consultation with the STCSG. The Secretary of State shall consult with the relevant statutory nature conservation body prior to granting consent in terms of this paragraph.

(b) **Rampion 2 Offshore Wind Farm Order 2025**

- (i) MRF: Schedule 17 Part 1 paragraph 9: Where the undertaker has confirmed that it intends to make a payment to the Marine Recovery Fund there shall be no operation of a wind turbine generator unless and until the undertaker has received confirmation from Defra or the operator of the Marine Recovery Fund that suitable measures are available, the Marine Recovery Fund Payment has been quantified, such payment has been made by the undertaker and the Secretary of State has confirmed in writing that such payment fulfils the requirement for compensation measures. Following such payment the undertaker shall not be required to implement any further compensation measures for kittiwake pursuant to this Part 1 of Schedule 17.
- (ii) SCM: Schedule 17 Part 1 paragraph 6 of the Rampion 2 DCO: Where the Final KIMP [Kittiwake Implementation and Monitoring Plan] identifies the provision of artificial nesting structures in collaboration with one or more other offshore wind farm projects the details submitted pursuant to paragraph 5(b) and (e) shall identify how the effectiveness of the compensation measures and any requirement for adaptive management measures are to be attributed to the authorised development.

2.3.19 Drawing together the above law, guidance, case and DCO examples, we conclude that DL-SCM is in principle a lawful approach to satisfying the legal requirements of the Habitats Regulations. Subject to the relevant ecological and ornithological evidence regarding the specific SCM, from a legal perspective the question of legality of the compensation is whether it is rational and reasonable for the decision-maker to conclude that the relevant SCM will secure the overall coherence of the affected site, not the delivery mechanism of the compensation.

2.3.20 **The Planning Act 2008 and the Energy National Policy Statements (NPS EN-1, NPS EN-3, NPS EN-5) (applicable to relevant projects in England and Wales)**

2.3.21 Under s.104 Planning Act 2008, where a National Policy Statement (**NPS**) has effect, the Secretary of State must have regard to that NPS in deciding the consent application (as well as, amongst other, any marine policy document and other matters the Secretary of State thinks are both important and relevant to their decision). The Secretary of State must decide the application in accordance with the relevant NPS, except to the extent certain exceptions apply.

2.3.22 There is a suite of NPSs in effect relating to energy developments – those directly applicable to an OWF application are NPS EN-1 (the overarching NPS for Energy); NPS EN-3 (the NPS for renewable energy infrastructure) and NPS EN-5 (the NPS for electricity networks infrastructure, relevant in respect of an OWF's networks connection).

2.3.23 In terms of how the Energy NPSs approach strategic compensation, the NPSs contain strong policy support for strategic compensation. The key text is set out within NPS EN-3, as follows (emphasis added). This text does not explicitly name the MRF or developer-led strategic compensation, however it does envisage the prospect of strategic compensation being delivered by bodies other than Government, as well as developers continuing to pursue other means of compensation where required:



*2.8.48: Applicants are encouraged to **work collaboratively** with those other developers and sea users on co-existence/co-location opportunities, shared mitigation, **compensation** and monitoring where appropriate. Where applicable, the creation of statements of common ground between developers is recommended. Work is ongoing between government and industry to support effective collaboration and find solutions to facilitate to greater co-existence/co-location*

*2.8.217: Where several developers are likely to have cumulative impacts on the same species or feature it may be **appropriate to collaborate on mitigation and compensation measures**.*

*2.8.246: Strategic compensation is defined as a measure or a series of measures that can be delivered at scale and/or extended timeframes, which cannot be delivered by individual offshore wind and/ or offshore transmission project developers in isolation. Any measure(s) would usually be led and delivered by a range of organisations, including government, industry and relevant stakeholders. Strategic compensation measures would normally be identified at a plan level and applied across multiple offshore wind projects to provide ecologically meaningful compensation to designated site habitats and species adversely impacted.*

*2.8.251: Not every impact for every project will initially fall within the strategic compensation proposals, so applicants should continue to discuss with SNCBs and Defra the need for site specific or strategic compensation at the earliest opportunity.*

- 2.3.24 The Government has consulted upon a suite of revised Energy NPSs, via a consultation that ran until 29 May 2025. Government has not yet published its programme for introducing the revised NPSs, although it is anticipated that it would seek to do so relatively soon. We have reviewed the consultation draft Energy NPSs and do not consider these to alter our analysis as set out above.
- 2.3.25 **Scottish national planning policy**
- 2.3.26 The applicable planning documents for projects in Scotland are the National Planning Framework 4 (**NPF4**), the National Marine Plan (**NMP**), and the Sectoral Marine Plan (**SMP**). None of these documents address SCM. The Scottish Ministers recently launched a consultation on a draft updated SMP (**SMP2**) which, in respect of strategic compensation, addresses the following aspects at a high level.<sup>17</sup>
- (a) Introduces the possibility of a Strategic Compensation Policy to support future offshore wind development; and
  - (b) Highlights the potential need for strategic intervention by government and records that a Marine Recovery Fund in Scotland is “*under consideration*” as a mechanism for delivering SCM.
- 2.3.27 In addition, the draft SMP2 Screening and Appropriate Assessment Report suggests that an expert working group could be established with the support of developers which acknowledges and participates in programmes of work developing potential strategic compensation measures by bodies such as Defra and OWIC.<sup>18</sup>

<sup>17</sup> Draft Updated Sectoral Marine Plan for Offshore Wind Energy “Strategic Environmental Assessment Environmental Report” prepared for the Scottish Government dated May 2025 at [6.3.1].

<sup>18</sup> Draft Updated Sectoral Marine Plan for Offshore Wind Energy “Strategic Habitats Regulations Appraisal – Screening and Appropriate Assessment Information Report” dated May 2025 at [12.5.8].

- 2.3.28 In August 2025, the Scottish Government published a consultation on the proposed Scottish MRF<sup>19</sup>. Given the timing of this publication and the date of this Note, the Scottish MRF Consultation has not been reported upon in this iteration of the Note.
- 2.3.29 We also observe that the Scottish Government commissioned a study on the feasibility of strategic ornithological compensatory measures, suggesting possible support for such initiatives.<sup>20</sup> However, at the time of writing this Note we are not aware of any further workstreams underway in respect of this study.
- 2.3.30 **Law in development**
- 2.3.31 **The Marine Recovery Fund under the Energy Act 2023, and the Planning and Infrastructure Bill**
- (a) As noted at paragraph 2.3.46 the Energy Act 2023 introduced powers under which regulations may be made to introduce the MRF. A consultation commenced earlier this year on the introduction of a UK MRF, applicable to relevant OWF projects located in England, Wales and Northern Ireland. The Scottish Government intends to introduce a separate Scottish MRF for impacts arising from OWF developments located in Scotland.
  - (b) The UK Government's MRF consultation closed on 12 May 2025, following which secondary legislation is expected to be introduced before the MRF goes live later in 2025. It will be important to track the development of the MRF secondary legislation (and the Scottish MRF) to understand the detail of the law as it is brought forward, and to ensure it is consistent with, and does not exclude, DL-SCM. However given the consultation draft was clear that it proposed the MRF to be voluntary, we think it is unlikely that the MRF once introduced will exclude DL-SCM.
  - (c) In monitoring the development of the MRF secondary legislation, it will be important to keep close attention to the role of statutory nature conservation bodies (**SNCB**), particularly Natural England. We say this in light of one aspect of Natural England's role under the **draft Planning and Infrastructure Bill** (the **PIB**).<sup>21</sup>
  - (d) In summary, among the measures in the PIB are provisions introducing a nature restoration levy to be administered by Natural England and payable by developers. The levy would operate similarly to the MRF but is applicable to non-OWF projects. Through the levy, developers will provide contributions to a Nature Restoration Fund (**NRF**), which will be used by Natural England to produce Environmental Delivery Plans (**EDPs**). EDPs will set out strategic action to be taken to provide a more holistic approach to nature mitigation and enhancement. Where an EDP is in place and is relied upon by a developer, the developer will no longer undertake their own assessments or deliver project-specific interventions for issues to be addressed by the EDP. Given the underlying similarities between the purposes of the MRF and the NRF (i.e. as strategic nature recovery mechanisms), it will be important to track the drafting and development of the PIB as it progresses through Parliament.
  - (e) The aspect of the PIB that we believe warrants close attention is under draft section 61 (4). This provides that an EDP (which is drafted by Natural England and confirmed by the Secretary of State) may provide that payment of the NRF is mandatory. If the EDP does make the NRF mandatory and the relevant habitats feature is a protected feature of a SAC

<sup>19</sup> See consultation document: <https://www.gov.scot/binaries/content/documents/govscot/publications/consultation-paper/2025/08/scottish-marine-recovery-fund-consultation/documents/scottish-marine-recovery-fund-consultation/scottish-marine-recovery-fund-consultation/govscot%3Adocument/scottish-marine-recovery-fund-consultation.pdf>

<sup>20</sup> RSPB Science "Feasibility of strategic ornithological compensatory measures in the Scottish context" dated November 2024.

<sup>21</sup> Planning and Infrastructure Bill, Bill 196 2024-24, as introduced (11 March 2025): <https://publications.parliament.uk/pa/bills/cbill/59-01/0196/240196.pdf>

or SPA (or Ramsar site), the developer does not have an option of taking alternative compensation action – they must pay into the NRF. This obligation to pay into the NRF would be absolute, with no provision for a developer to pursue their own compensation (even if the developer has identified an ecologically preferable measure).

- (f) *If a similar mandatory provision were to be introduced into the MRF secondary legislation, a developer would not be permitted to rely upon a DL-SCM.*
- (g) However, we consider this to be a low-probability/risk point for the MRF. The MRF Consultation states (paragraph 4) that the MRF is a “voluntary mechanism” and not contain any reference to the MRF becoming mandatory. However, as the MRF secondary legislation has not yet been published, we highlight this aspect of the draft PIB as an important piece of drafting to watch out for as the MRF legislation is introduced.

### 2.3.32 **Proposed operation of the MRF**

- 2.3.33 As the secondary legislation to implement the MRF has not yet been published it is not yet possible to confirm if or how a DL-SCM will interact with the MRF. This section of the Note considers the currently proposed operation of the MRF and its potential interaction with DL-SCM, insofar as information on the MRF has been made available in the MRF Consultation. This Note is not intended to give a comprehensive summary of the proposed MRF.
- 2.3.34 If a developer is seeking to rely upon the MRF, prior to submitting its consent application it is to agree the suitability of that compensation with a SNCB then submit an application to the MRF, specifying the amount and type of compensation required. Developers will only be able to utilise the MRF if suitable compensation is available in the Government’s LoSCM (please see more at paragraph 2.3.41 below). If not, the developer is expected to source their own compensation, retaining the right to use the MRF at a later date if a suitable compensation measure is added to the LoSCM.
- 2.3.35 The developer is expected to pay a non-refundable reservation fee<sup>22</sup>. In exchange, the developer will have secured the allocated compensation and will be able to refer to this within their application for development consent. Defra will then supply the developer with the necessary documentation on their use of the MRF, with SNCBs advising during examination on the scale of the impact and quantity of compensation required.
- 2.3.36 If the developer requires additional compensation, this can be requested from the MRF via a variation for the additional amount. Of particular note, the MRF Consultation states that if the additional compensation is not obtained via the MRF, “the [developer] can address the shortfall by securing and delivering any outstanding compensation themselves, as per current industry practice”.<sup>23</sup> Therefore, the MRF Consultation contemplates developers continuing to obtain their own compensation project where required, separate to the MRF, in accordance with ‘current industry practice’ (which, as per the examples above, includes DL-SCM).
- 2.3.37 The securing of compensation via the MRF is not intended to impact the usual process for the determination of the consent.
- 2.3.38 Following grant of consent, the developer will be expected to work with Defra to finalise the required compensation and to pay a deposit fee. Following this, payment of the full balance will be required before works relating to the AEOI can commence (although the MRF Consultation also notes the potential for scheduled payments).

<sup>22</sup> This is deducted from the final compensation payment.

<sup>23</sup> See, the MRF Consultation, paragraph 65

- 2.3.39 The MRF Consultation also contains provision for adaptive management – this is the adjustment or replacement of a compensation measure if monitoring finds that it is not functioning as expected. A developer’s payment for the MRF will include a non-refundable ‘adaptive management’ charge, to cover any adaptive management costs. This fee will be set at 30% of the total estimated cost of delivering, maintaining, monitoring and decommissioning the compensation measure. The adaptive management charge does not cover the scenario where the appropriate authority decides the AEOI is greater than expected and more compensation is required – that scenario would require additional payment or compensation to be secured by the developer.
- 2.3.40 In conclusion, we see no indication that the MRF will exclude or limit the scope for DL-SCMs. Indeed, the MRF Consultation specifically notes that it is a voluntary mechanism and acknowledges that compensation sourced by developers themselves, outside the MRF and in accordance with ‘current industry practice’, will continue to play a role.
- 2.3.41 **Library of Strategic Compensation Measures (LoSCMs)**
- 2.3.42 The MRF will deliver compensatory measures deemed suitable by the Defra Secretary of State (or, where relevant, Ministers in the Devolved Governments). These measures will be drawn from the LoSCMs.
- 2.3.43 At present, there are three measures in the LoSCMs<sup>24</sup>:
- (a) Marine Protected Area designation and/or extension for benthic impacts
  - (b) Offshore artificial nesting structures for kittiwakes
  - (c) Predator-reduction, including eradication of mammalian predators from island colonies, control and exclusion of predators from mainland nesting areas, and subsequent biosecurity monitoring and incursion response
- 2.3.44 The Government has published interim guidance on the MRF (the “Interim MRF Guidance”).<sup>25</sup> The Interim MRF Guidance advises developers how they could rely upon the MRF in advance of it coming into effect.
- 2.3.45 The Interim MRF Guidance supports the use of DL-SCM, as follows (emphasis added):



*22. Applicants wishing to use predator-reduction as a compensation measure ahead of the MRF being operational will need to deliver the measure themselves **or in collaboration with other projects**. Applicants should work closely with Defra and SNCBs when developing, as normal as part of their DCO application, a without prejudice compensation plan and outline Implementation and Monitoring Plan. **Where possible, applicants should work collaboratively to deliver this measure. Evidence of collaboration should be included in applications.** Information on how developers can include a provision allowing for a contribution to be made into the MRF ahead of it being operational is provided in paragraphs 24 – 26. Note that project-specific ornithological compensation measures must be provided alongside this provision*

<sup>24</sup> <https://www.gov.uk/guidance/offshore-wind-development-library-of-strategic-compensatory-measures>

<sup>25</sup> Strategic compensation measures for offshore wind activities: Marine Recovery Fund interim guidance, published by the Department for Energy Security & Net Zero, 29 January 2025

### 2.3.46 **Energy Act 2023**

2.3.47 We note that the Energy Act 2023 introduced new statutory provisions in respect of strategic compensation and a marine recovery fund, specific to OWF. The powers include that:

- (a) **S.291 Strategic compensation for adverse environmental effects:** a public authority may determine that measures taken or secured by them can count towards discharging environmental compensation obligations.
- (b) **S.292 Marine recovery fund:** the Secretary of State may by regulations provide for the establishment, operation and management of one or more marine recovery funds.
- (c) **S.293 Assessment of environmental effects etc:** regulations may be made which make provision for the assessment of the environmental effects of OWF activities on protected sites and the securing of compensation measures for any adverse environmental effects arising from relevant OWF activities on protected sites. In particular, these regulations may make provision “*about when or how compensatory measures may be provided*”.<sup>26</sup>

2.3.48 No secondary regulations have yet been made under the Energy Act 2023 however these are the parent provisions under which the UK Government is introducing the MRF and contemplating possible amendments to the Habitats Regulations (discussed in more detail below).

### 2.3.49 **Amending the Habitats Regulations under the Environment Act 2021**

2.3.50 The Environment Act 2021 provides that the Secretary of State may, by regulations, amend the Habitats Regulations, as they apply in relation to England<sup>27</sup>.

2.3.51 These provisions have not yet been used to amend the Habitats Regulations, and no consultation has yet been announced. However clearly it will be important to track the development of any changes to the Habitats Regulations made under the powers of the Environment Act 2021.

### 2.3.52 **Defra and Scottish Government Consultations on Strategic Compensation Policy for Offshore Wind**

2.3.53 In July 2025, Defra<sup>28</sup> and the Scottish Government<sup>29</sup> each announced a consultation proposing reforms to environmental compensation (the “**Compensation Consultations**”). The geographical scope of each Compensation Consultations reflects the jurisdictional competencies of Defra and the Scottish Government, i.e.:

- (a) The **Defra Compensation Consultation:** applicable to the offshore waters area for the whole of the UK, as well as to the Secretary of State’s functions in the inshore waters areas for Northern Ireland, Wales and England; and
- (b) The **Scottish Government Compensation Consultation:** are applicable to Scotland’s inshore waters.

2.3.54 The Compensation Consultations propose to amend the Habitats Regulations under the powers of the Energy Act 2023, to deliver reforms to habitats compensation. The Compensation

<sup>26</sup> See s.293(4)(h) Energy Act 2023

<sup>27</sup> See s. 112 and s. 113 Environment Act 2021

<sup>28</sup> [https://consult.defra.gov.uk/environmental-assessment-reform/environmental-compensation-reform/supporting\\_documents/Consultation%20on%20environmental%20compensatory%20measures%20reform%20for%20offshore%20wind%201.pdf](https://consult.defra.gov.uk/environmental-assessment-reform/environmental-compensation-reform/supporting_documents/Consultation%20on%20environmental%20compensatory%20measures%20reform%20for%20offshore%20wind%201.pdf)

<sup>29</sup> <https://www.gov.scot/publications/policy-document-strategic-compensation-consultation/pages/5/>

Consultations extend to ornithological compensation measures (under the Habitats Regulations) and to MEEB compensation required under the Marine and Coastal Access Act 2009<sup>30</sup>.

- 2.3.55 One of the key changes proposed under the Compensation Consultations is to enable compensation to be delivered via “**wider compensatory measures**”, which are compensation measures that would provide benefits to the wider network of protected sites/features, rather than to the impacted species (sometimes referred to as “**non-like for like**” compensation).
- 2.3.56 The wider compensatory measures approach would be accompanied by the introduction of a set of “safeguards” including a hierarchy of compensation. The first step on the hierarchy would require the developer to fully consider the use of direct compensation – i.e. compensation that seeks to benefit the impacted species, preferably at the impacted site but failing which at a site within or which contributes to the UK national site network – before being able to move onto consideration of wider compensatory measures. This direct compensation is sometimes referred to as “**like for like**” compensation.
- 2.3.57 Key to this Note and to developer-led SCM, the Defra Compensation Consultation states its Defra’s preference that the wider compensatory measures are those that have been approved by the relevant Government Minister, including by the Defra Secretary of State via approval of the measure into the LoSCM<sup>31</sup>. The Defra Compensation Consultation does not seem to envisage DL-SCM as being “wider compensatory measures”.
- 2.3.58 The Scottish Government Compensation Consultation acknowledges that this is Defra’s consultation position and goes on to propose that the Scottish Government is minded to allow developers to propose and deliver wider measures themselves, including where those measures would qualify as strategic compensation.<sup>32</sup>
- 2.3.59 If the compensation reforms are brought forward as currently proposed under the Defra Compensation Consultation, developers would not be able to rely upon DL-SCM in circumstances where the developers seek to rely upon non-like for like compensation because no like for like compensation is available.
- 2.3.60 In terms of the predator-reduction SCM, we assume that each participating developer is seeking to rely upon the DL-SCM as like for like compensation, because historically non-like for like compensation has not been considered acceptable<sup>33</sup>. This should be clarified with the developers.
- 2.3.61 The Compensation Consultations run until 2 September 2025 (for both consultations) and it is entirely possible that the final amendments could differ substantially from the proposals set out under the consultation drafts in light of feedback from industry and SNCBs.
- 2.3.62 However, given Defra’s consultation position that “wider compensatory measures” do not include DL-SCM, we recommend that any consultation responses from OWIC, RenewableUK, or

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<sup>30</sup> MEEB compensation under the Marine and Coastal Access Act 2009 is applicable in both the inshore and offshore regions of Scottish and English waters. Please note the Defra Compensation Consultation states that it is envisaged the proposed compensatory approach relevant to MEEB can be progressed under the existing statutory regime, although small changes to the Marine and Coastal Access Act 2009 may be required in future once the final position has been determined

<sup>31</sup> See, the Defra Compensation Consultation, paragraphs 85 and 102

<sup>32</sup> See, the Scottish Government Compensation Consultation, p. 13

<sup>33</sup> See, Defra Compensation Consultation, paragraph 74

industry, raise this issue and encourage Defra to permit DL-SCM to be “wider compensatory measures”.

**Conclusion:** we conclude that developer-led strategic compensation is in principle a lawful approach to satisfying the legal requirements of the relevant legislation, guidance and policy. The question of legality for compensation is whether it is rational and reasonable for the decision-maker to conclude that the relevant strategic compensation measure will secure the overall coherence of the affected site. Subject to the relevant ecological and ornithological evidence regarding the strategic compensation measure, there is no in-principle hurdle posed by a developer-led strategic form of compensation that presents a barrier to satisfying that legal test. We also see no barrier posed by the existing policy or guidance.

*This conclusion will need to be kept under review as the future changes outlined above are brought into effect through secondary legislation.*

## 2.4 Practicability

- 2.4.1 For the purposes of this Note we have defined practicability to mean that there are no material (non-legal) barriers or risks that would either prevent a predator-reduction DL-SCM from being brought forward or give rise to unacceptable levels of commercial or project programme delivery risk.
- 2.4.2 In terms of policy, guidance and recent examples, we have analysed these in the section above and concluded they do not exclude the operation of a predation reduction DL-SCM. In terms of other practical aspects, these are considered in detail in Phase 2 below for the various delivery mechanism options open to a proposed predator-reduction SCM.

**Conclusion:** we find no indication in policy, guidance or recent DCO examples that DL-SCM aren't practicable. Indeed, the examples of recent DCOs is that the Secretary of State acknowledges and accepts the role of DL-SCMs in continuing to form part of the consenting of OWF. A key aspect of 'practicability' is how a DL-SCM would work in practice. This is considered in Phase 2 of this Note.

### 3. Phase 2 – Options for approach, structure and function of a developer-led SCM

#### 3.1 Introduction

- 3.1.1 Having concluded that DL-SCM are lawful and practicable in principle in the Phase 1 section above, in this section we consider the available options for the execution and delivery of the predator-reduction DL-SCM.
- 3.1.2 We have been advised by OWIC that the predator-reduction DL-SCM currently contemplated seeks to eradicate rats from an island habitat. Our understanding is that the aim of the measure is for delivery partners to undertake the specified rat eradication activities on behalf of identified OWF projects, each of which is currently at pre-application, DCO Examination, or post-Examination (i.e. all at pre-determination) stage. It is understood that a wildlife trust may play a role, as may a third party such as landowner<sup>34</sup>. We understand that ecological studies have been undertaken to establish the capacity of the proposed SCM to compensate for the impacts of each participating OWF project. We have not had sight of the study in preparing this Note.
- 3.1.3 We have prepared this Phase 2 of this Note based on our high-level understanding of the proposed predator-reduction DL-SCM, as outlined above. Following discussions with OWIC, we have also included some paragraphs interspersed throughout this Phase 2 section outlining how the approach for a predator-reduction DL-SCM may differ from other types of compensation, such as artificial nest structures and bycatch reduction.
- 3.1.4 In line with OWIC's scope, this Phase 2 addresses the following topics:
  - (a) [The practical use of DL-SCM in consent applications \(see section 3.2\);](#)
  - (b) [Advice on the consenting of DL-SCM \(see section 3.5\);](#)
  - (c) [Advice on management and delivery of DL-SCM \(see section 3.7\);](#)
  - (d) [Recommendations on financial delivery mechanisms for DL-SCM \(see section 4\)](#)

#### 3.2 The practical use of developer-led SCM in consent applications

- 3.2.1 This section provides an outline of how a DL-SCM could be incorporated into an application for planning consent for an OWF as part of a derogation case. This outline includes our experience of what evidence is typically provided at application-stage, and discussion of when a compensation measure can be considered "secured" for the purposes of the consenting process.
- 3.2.2 We have assumed the reader has a degree of familiarity with the consenting of OWF and other aspects of HRA within a planning application, i.e. the Report to Inform Appropriate Assessment (RIAA) and the first two stages of the HRA derogation process ('no alternative solutions' and 'imperative reasons of overriding public interest', (IROPI)).
- 3.2.3 The legal obligation for the compensation element of a Derogation Case is set out in Regulation 68 of the Habitats Regulations as discussed at paragraph 2.3.4 above. In summary, the decision-maker must secure that any necessary compensatory measures are taken to ensure that the overall coherence of the National Site Network is protected.

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<sup>34</sup> We have not undertaken any property-related diligence to verify the landowner and any other legal rights in the land.

3.2.4 There is no set formula that prescribes precisely what evidence must be submitted as part of a Derogation Case's compensation proposal. However based on the derogation cases for OWF to date, an application typically includes information to support two broad aspects of compensation, that the measure is **feasible** and **secured**:

- (a) That the measure is **feasible**:
  - (i) The UK Guidance states that in addressing feasibility the applicant should consider:
    - (1) How technically feasible and effective the measures will be (based on scientific evidence and previous examples)
    - (2) How financially viable the measures are (i.e. how the measure will be costed and financed)
    - (3) How the compensation would be delivered, and monitored
    - (4) How long the compensation will take to reach the required quality and amount
  - (ii) Based on the experience of the consented and application-stage OWF to date, there can be different views between developers, decision-makers and SNCBs as to the degree of evidence required to demonstrate that compensation is "feasible". The differing approaches can arise if a SNCB seeks a higher evidence level than an applicant feels is proportionate to provide at the point of application/prior to consent. From an applicant's perspective, data collection is expensive and involves significant time and resource demands, set in the context of finite pre-consent budgets. A high level of evidence is challenging given an application will be submitted many years before compensation is to be delivered, at a time when it is not known whether a project will be consented, or receive the necessary financial investment to proceed, whether a decision-maker will conclude compensation is required and, if so, the necessary quantum of compensation.
  - (iii) The experience of consented OWF to date demonstrates that an application does not need to provide full detailed compensation proposals at application stage, which is supported by the *Humber* decision noted above (see paragraph 2.2.11), and outline proposals are generally adequate.
  - (iv) The level of information required to demonstrate "feasibility" at application stage will vary depending on the specific measure proposed. For instance, where there is a high degree of ecological data and a large body of supporting evidence for the compensation, including experience of its use by other consented OWF, there is likely to be more confidence in the compensation measure. That may mean that the decision-maker reasonably considers the measure to be "feasible" notwithstanding comparatively more information being left to a post-consent stage (such as the need to enter into agreements with third parties and obtain further permissions).
  - (v) However, where the measure is less familiar, a decision-maker may require a greater degree of information to give them the necessary confidence that the measure is effective, feasible and secured. This is particularly the case if SNCBs are less supportive of, or disagree with, the measure proposed.
- (b) That the measure is **secured**:
  - (i) There is no statutory definition of what it means for a compensation measure to be "secured",<sup>35</sup>. In our experience, consideration of whether a measure is "secured" goes to the legal mechanisms through the consenting process that oblige the developer to

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<sup>35</sup> The Courts have given opinion on "securing" measures – see the discussion of the *Humber* case above.

deliver the compensation – those mechanisms typically being the planning permission condition, DCO article or requirement or s.106 agreement etc.

- (ii) DCO requirements, framed as suspensive conditions, have been considered as satisfactory by the Secretary of State to secure compensation proposals. For instance, on Hornsea 3 OWF the compensation was “secured” on the basis of requirements conditioned within the DCO that prevented commencement and operation of the development until further information had been approved by the Secretary of State and more elements of the compensation finalised. These elements included the need to obtain planning permission and compulsory purchase powers in order to implement the compensation measure.
- (iii) For subsequent OWF, it has become typical for the DCO to include a requirement that obliges a detailed plan to be submitted for approval prior to the commencement of the development. The DCO will likely also include a requirement that the relevant compensation measure must be in place for a set period of time before the OWF can commence operation. The Secretary of State has therefore consistently granted consent on the basis of information that has been outline. Details have been conditioned as post-consent requirements that necessitate supervisory control via further approvals at a pre-commencement and pre-operational stage. We note this approach has not been legally challenged.

3.2.5 The remainder of this section sets out the general structure of compensation packages, based on the consented OWF to date, as well as the specific information submitted on predator-reduction compensation packages submitted at application stage by consented OWF.

### 3.3 General structure and form of compensation packages on consented OWF

3.3.1 The submitted and consented OWF applications to date have typically structured their compensation packages around the following submissions:

- (a) An **Ecological Evidence Report**: this presents the ecological evidence to support the applicant’s position that the proposed compensation measure will be ecologically effective. This is a technical document setting out the scientific basis and support for the compensation, including by reference to studies, evidence and available data.
- (b) A **Compensation Plan**: proposes how the compensation measure will be implemented and monitored. Depending on the nature of the compensation proposed, this may include proposed methods of calculating the proportion or ratios of compensation required, summaries of the ecological evidence, defining the objectives of the compensation, information on how appropriate sites or locations will be finalised, proposals for how measures could be scaled up or down as required, a timeline, an explanation of how any relevant agreements and legal consents, permissions or licences will be obtained, and monitoring proposals.
- (c) An **Outline Implementation and Monitoring Plan (IMP)**: the Outline IMP submitted at application stage will set out the framework of a document to be updated and submitted for approval at a post-consent stage. The IMP will set out the detailed proposals for the compensation, to be updated once further information is known.
- (d) **Additional annexures evidencing agreement or indicating support** (if possible): it is desirable for an applicant to provide evidence of support for the compensation measure from relevant third parties, such as delivery partners, landowners or conservation bodies. This evidence of support can be important where it has not been possible for an applicant to enter into agreements for the delivery of the compensation at application stage, as they help to show that there is no in-principle impediment or barrier to such agreements being entered into at an appropriate point in future (and for this reason, these additional annexures lend weight to the case that the compensation is feasible and secured).

- (e) **A HRA and EIA of the compensation measure:** some applicants have taken the approach of submitting a HRA and EIA of the compensation measure (i.e. separate from the main HRA and EIA of the project submitted as part of the consent application). This approach is taken based on the view that the impacts and effects of the compensation measure are indirect effects of the project itself, and so need to be subject to environmental assessment. These HRA and EIA submissions are typically comparatively short and high-level, based on the necessarily more limited available information.
- 3.3.2 In general terms, it is in the applicant's interests to include as much evidence as possible at the application stage. As well as increasing the chances of the decision-maker being satisfied the derogation case is feasible, it reduces the likelihood of the decision-maker making an additional information request or refusing consent. A more fully-formed compensation package could also reduce the information required at a post-consent stage and possibly lead to a more favourable consent condition or requirement.
- 3.3.3 Specifically in terms of strategic compensation application documents, we note that the UK MRF Consultation contains some comment on the proposed information to be submitted as part of a consent application to demonstrate that compensation has been secured via the UK MRF.
- 3.3.4 Whilst the development of the UK MRF is ongoing and so the application requirements have not yet been finalised, the framework approach for the UK MRF as outlined in the consultation is for the applicant to gain in-principal acceptance into the MRF at a pre-application stage, including gaining agreement from SNCBs and paying a non-refundable reservation fee. If the applicant is accepted into the UK MRF, Defra will then supply the applicant with a letter of acceptance and a MRF IMP, which the developer can submit in their DCO application. The consultation confirms that each IMP will be based on the measure-specific IMP, but will be tailored to each project and will contain details of the amount of compensation reserved<sup>36</sup>. The UK MRF consultation goes on to state that this document *"will demonstrate that [strategic compensation] can be secured for the project. DESNZ or the relevant Devolved Ministers will still be responsible for making sure that adequate compensation is agreed and secured before consenting to an individual project"*.
- 3.3.5 Therefore, the MRF consultation proposes a framework that individual, project-specific information will be given to an applicant to lodge as part of their application, and that the decision-maker will be required to reach a conclusion that the compensation is adequate before consent for the project can be granted.

### 3.4 Predator-reduction SCM applications submitted to date

- 3.4.1 In respect of the predator-reduction SCMs consented to date, applicants have submitted the following in addition to the general compensation package of documents discussed above:
- 3.4.2 **Sherringham Shoal and Dudgeon OWF Extension Projects** (consent granted February 2025): the applicant submitted a document titled "Strategic and Collaborative Approaches to Compensation and Measures of Equivalent Environmental Benefit". This document outlined the applicant's proposed approach to strategic and collaborative delivery of compensation, should these models be available within the necessary timescales for the projects. Measures proposed as potential collaborative measures with other developers were:<sup>37</sup>

- (i) construction of new artificial breeding sites onshore or offshore for kittiwake;

<sup>36</sup> See, the UK MRF Consultation, paragraph 63

<sup>37</sup> Sherringham Shoal and Dudgeon Offshore Wind Farm Extension Projects "Strategic and Collaborative Approaches to Compensation and Measures of Equivalent Environmental Benefit" dated August 2022. Document Reference 5.8. See paragraph 72, page 23.

- (ii) bycatch reduction for guillemot and razorbill;
  - (iii) predator eradication for guillemot;
  - (iv) bycatch reduction research proposal for gannet; and
  - (v) oyster restoration within the Cromer Shoal Chalk Bed MCZ.
- 3.4.3 The applicant proposed delivery of predator eradication at a guillemot breeding colony as part of a potential collaborative compensation delivery model, working with other OWF developers to deliver the measure as compensation or adaptive management through a partnership arrangement.<sup>38</sup> This measure would serve as an alternative compensation option, delivered wholly or partially in place of other required compensation measures.
- 3.4.4 The DCO facilitates the collaborative approach by requiring the Guillemot CIMP to be based on the strategy set out in the Guillemot Compensation Plan, including:
  - (a) a provision for the Applicant to pay a financial contribution towards compensation measures established by other parties, wholly or partly in place of project-led measures or as part of adaptive management;<sup>39</sup> and
  - (b) a provision for the Applicant to collaborate with another developer(s) to jointly deliver compensation measures, again wholly or partly in substitution for project-led measures or as an adaptive management measure.<sup>40</sup>
- 3.4.5 Additionally, the DCO provides that the applicant is not required to undertake the bycatch reduction compensation measure to the extent that the Secretary of State consents to the applicant electing to:
  - (a) provide a financial contribution towards the compensation measures by another party, wholly in substitution for the bycatch reduction compensation measure; or
  - (b) collaborate with another party to deliver compensation measures, wholly in substitution for the bycatch reduction compensation measure.<sup>41</sup>
- 3.4.6 The outline Guillemot CIMP explains that if a viable opportunity for collaborate compensation delivery becomes available within the necessary timescales, the CIMP will specify the nature of the compensatory measure/s to be delivered wholly or partly in place of the applicant's project-led measures or as part of an adaptive management measure.<sup>42</sup>
- 3.4.7 **The Norfolk Projects** submitted a "compensation funding statement" detailing how the applicants proposed to fund the compensation measures. The statement provided assurance that the ultimate parent company would continue to provide financial support to the extent of enabling the applicants to deliver the compensation measures set out in the respective DCOs.

### 3.5 Advice on the consenting of developer-led SCM

- 3.5.1 We anticipate that an individual project application that is seeking to rely upon DL-SCM will be required to submit evidence that the developer-led compensation proposed to be relied upon is feasible and is/can be secured. To date, OWF planning applications have typically submitted suites

<sup>38</sup> Sheringham Shoal and Dudgeon Offshore Wind Farm Extension Projects "Appendix 4 Guillemot Compensation Document (Revision E)" dated December 2023. Document Reference 5.5.4. See paragraph 153, page 53.

<sup>39</sup> Sheringham Shoal and Dudgeon Extension Offshore Wind Farm Order 2024, schedule 17, part 1, paragraph 26(h).

<sup>40</sup> Sheringham Shoal and Dudgeon Extension Offshore Wind Farm Order 2024, schedule 17, part 1, paragraph 26(i).

<sup>41</sup> Sheringham Shoal and Dudgeon Extension Offshore Wind Farm Order 2024, schedule 17, part 1, paragraph 27(b) and (c).

<sup>42</sup> Sheringham Shoal and Dudgeon Offshore Wind Farm Extension Projects "Annex 4A – Outline Guillemot Compensation Implementation and Monitoring Plan (Revision C) (Clean)" dated December 2023. Document Reference 5.5.4.1. See paragraph 18, page 9.

of compensation documents that are in the form of the documents listed at paragraph 3.3 above. As this approach has been consented on recent OWF, it gives a good indication of the structure and form of an acceptable compensation package.

- 3.5.2 The question for developers seeking to rely upon the predator-reduction DL-SCM is what information they will be able to submit as part of their planning application and how is that coordinated across multiple projects (potentially on different timelines). Will that be a full suite of documents similar to the list at paragraph 3.3 each made specific to the individual project, or is there an opportunity to take a more streamlined approach? In our view, the two broad options are as follows:
- 3.5.3 **Option 1 – Individual project application suite of compensation documents, agreed or aligned for consistency**
- 3.5.4 The overall intention of option 1 is for each project to present a similar, and consistent, suite of compensation documentation into its consent application.
- 3.5.5 Under this option 1, each developer would prepare and lodge a complete suite of compensation documents, similar to the documents listed at paragraph 3.3 above. The documents could be based on a template agreed between the various developers and their consultants, then made specific to each project. We note that each developer's consultants may also have their own position on the information required to address effectiveness and feasibility. Therefore, if option 1 is progressed, a key aspect to factor in is the necessity to reach agreement between different developers, and their consultants, with the suite of compensation documents.
- 3.5.6 Alternatively, a single consultant could be appointed to draft the templates for use by the developers, although in this instance we envisage that it would need to be clear that any conflicts of interest could be managed, existing developer-consultant relationships would not be infringed and that the "client" for the instruction would be clear (for instance, OWIC may be better placed than the developers to be the "client"). The documents could explicitly reference the other projects seeking to rely on the predator-reduction DL-SCM, or annex joint letters of support, to further demonstrate the joined-up approach.
- 3.5.7 In terms of the content of the documents, in addition to the information outlined above at section 3.3, it may be useful for the predation-reduction DL-SCM compensation package to address the following points.
- (a) **Feasible:** the documents ought to address the aspects of feasibility that may be impacted by compensation being delivered jointly rather than project-alone. In addition to the general points on feasibility listed at 3.3.2 above, this could include:
    - (i) **Technical feasibility and effectiveness:** as with project-alone compensation, a key aspect of the compensation package is demonstrating the robust technical and ecological case that the compensation will be effective. Specifically, from a DL-SCM perspective we anticipate the central question a decision-maker may have is whether there is sufficient capacity in the measure to compensate for the impacts of all projects looking to rely upon the measure. The compensation documents ought to include robust evidence demonstrating that there is adequate capacity to compensate not only for the worst-case impact scenario assessed under each developer's RIAA, but also that there is adequate headroom allowing for the SCM to be 'scaled up' if the decision-maker concludes that a greater number of birds needs to be compensated.
    - (ii) We understand from discussions with OWIC that a study has been commissioned to provide an indication of how many breeding seabirds the archipelago could support if the pressure from rats were removed by implementing the proposed predator-reduction DL-SCM. This habitat assessment report will contribute to a wider viability report to be completed in autumn 2025.

- (iii) We note that an ecological study is the sort of evidence that is critical in demonstrating sufficient capacity in the measure. In addition to the study, the following questions arise:

- (1) does other evidence on the predator-reduction SCM exist to confirm its effectiveness and feasibility in compensating for the relevant species that are impacted by each project seeking to rely upon the predation reduction SCM?
- (2) Have SNCBs been consulted on the predator-reduction SCM and the study?
- (3) Will the SNCB comments be submitted into each developer's examination, and will the developers have a chance to discuss with the SNCBs directly in advance?

We suggest these points be addressed in advance of the interim results of the study being published.

- (iv) **Financial feasibility:** this information would give an overview of how the predation-reduction SCM will be funded (i.e. jointly or otherwise). We do not anticipate this would need to address specific aspects of the underlying commercial and inter-developer funding arrangements – instead, the aim should be to give confidence to the decision-maker that the measure has adequate financial support even in the event that one or more projects were to drop out of the measure<sup>43</sup>.
- (v) **Operation and monitoring:** this information would give an overview of how the predation-reduction SCM will be delivered and the different roles and responsibilities, specifically from a joint-compensation perspective. As for the financial feasibility aspect, we do not envisage that details would need to be provided at application stage, as these will likely be covered in future in the detailed IMP. The key aspect will be to confirm any additional operational structure, approval mechanisms and controls that are specific features of a strategic compensation model.
- (b) **Secured:** in order to give confidence to the decision-maker that the compensation is secured, the suite of compensation documents could include evidence of agreements in place, or letters of intent signed by all projects, stating the commitment of the projects to work together to deliver the DL-SCM. These documents could be between the developers themselves, as well as between any relevant third parties such as delivery partners and SNCBs.
- (c) As mentioned above at paragraph 3.3.1(d), letters of support from SNCBs and third-party delivery partners are persuasive evidence that in principle there will be no impediment to bringing forward the DL-SCM. The exact form of these documents will likely be based on the interim results of the predator-reduction SCM capacity study as well as the views of SNCBs in response to the study and the proposed SCM as a whole. In terms of the mechanics of drafting, finalising and submitting such letters into consent applications, it will need to be clear whether such letters are being negotiated via OWIC, or with the projects directly. A key aspect will be to avoid inconsistent messaging, therefore whilst impact levels and compensation requirements may vary project-to-project, the text of the letters should be consistent. It will therefore be important to explore who is best placed to approach the SNCBs and third-parties in respect of negotiating letters of support, and that all parties are clear how any letters of support will be published into each party's DCO examination.

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<sup>43</sup> See, for example, the submitted Compensation Funding Statement for the in-Examination North Falls Offshore Wind Farm [here](#)

### 3.5.8 Option 2 – Lead project submission, with subsequent projects to follow

- 3.5.9 We have considered whether there is a viable alternative approach to option 1. Whilst there could be different structures to this alternative, the overall intention behind option 2 is for subsequent projects seeking to rely upon the predator-reduction DL-SCM to submit a shorter, more streamlined submission on compensation than the full suite of documents set out at paragraph 3.3 above. This could see a “lead” developer lodging a full suite of compensation documents, with subsequent developers cross-referring to that submission and lodging a draft IMP, perhaps supported by a letter from the lead developer / delivery partner(s) agreeing to bringing the subsequent project into the DL-SCM, a short-form report confirming the specific impacts and compensation needs of that project, and a project-specific EIA and RIAA of the indirect effects of the compensation measure.
- 3.5.10 A benefit of option 2 could be to simplify the documentation requirements for subsequent projects. It would put the predator-reduction DL-SCM more on a par with the current proposals for the draft MRF, which could be attractive to subsequent projects and, possibly, streamline consenting requirements.
- 3.5.11 However, option 2 poses potentially substantial risks, as follows:
- (a) **Consent risk:** The experience of the consented and application stage OWF projects to date has been to lodge a complete suite of compensation documents specific to each application, even where reliance upon strategic compensation is foreseeable. A decision-maker could take the view that each application ought to be entirely standalone and contain sufficient information to allow that application to be considered on its own methods or there may be delivery concerns linked to applicant’s reliance on other parties. It is noted that this element of the UK MRF is still at consultation stage and is untested in applications/examination or the courts. We anticipate that a developer may be reluctant to rely upon another project’s application for information relating to their compensation measure. Taking the approach of relying on another project’s compensation submissions is untested from a consents perspective<sup>44</sup>. Therefore, pending planning ‘precedent’ from decision-makers, we consider developers may find this an unattractive option and one that carries substantial consenting risk.
  - (b) **Developer control:** Some developers, particularly their funders and shareholders, may take the view that allowing another developer to have such a strong degree of control over a key aspect of a subsequent developer’s project is an unacceptable risk for the subsequent project.
  - (c) **Reliance/conflicts challenges:** From a contractual perspective, option 2 could pose contractual difficulties if subsequent projects are seeking to rely upon the work of the lead developer, including the work of the consultant acting for the lead developer. Typically, consultants would extend reliance only to their client. Option 2 could also cause conflict of interest issues between the different projects and consultants. Submissions would seem to require subsequent projects placing reliance upon the documentation of the lead developer. Whilst not insurmountable, these challenges would likely need to be addressed as part of a “lead/subsequent” developer option.
- 3.5.12 Our view at this stage is that Option 1 is likely to be preferable to developers, i.e. for each developer participating in the predation reduction DL-SCM to provide a complete, but consistent, suite of compensation package documents. Discussion of the information that could be included in the consent application documents is detailed above, alongside analysis of contractual aspects, letters

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<sup>44</sup> We are aware of an application-stage OWF project in Scotland that is seeking to rely upon the compensation measures already consented (but not yet implemented) by another OWF. In this example, the application-stage project has submitted an outline seabird compensation strategy into the application, which seeks to evidence that there is sufficient capacity for both projects’ AEOL to be compensated by the measure, alongside other information that argues the compensation is feasible and secured.

of intent and other matters to be agreed between OWIC and the parties to the predator-reduction DL-SCM.

- 3.5.13 Although this analysis is presented in the context of a predator-reduction DL-SCM, it is likely to be applicable to other forms of potential DL-SCM, such as bycatch reduction or artificial nesting structures. In terms of those two options, artificial nesting structures are now a relatively well-established form of SCM, having been consented and now, recently, in use, to compensate for several UK OWF (including Hornsea 3 OWF). In contrast, whilst bycatch reduction has been consented on a number of UK OWF (such as Hornsea Four OWF and Sheringham Shoal and Dudgeon Extension OWFs) its development is still in early stages. The different evidence basis for a compensation measure and whether that compensation is already established may influence the approach to documentation that is taken by the later project (i.e. if a later project acquires compensation capacity in an operational artificial nest, the later project could decide to seek to rely to some degree upon the submissions of the earlier project that originally consented the artificial nest compensation measure).

### 3.6 Consent conditions and requirements

- 3.6.1 Another aspect to consider is the consent requirements (**DCO**) and conditions (other consents, including S.36 consents) that will control the details of the predator-reduction DL-SCM. Whilst it is ultimately a matter for the decision-maker to decide how to condition a project's compensation requirement, an important part of a consent application is to put a persuasive case forward that a suitably workable consent condition is appropriate. It can be a substantial risk to a project, both in terms of implementing the consent and in obtaining financial investment, if an unduly onerous or unachievable consent condition is imposed.
- 3.6.2 For DCO projects the applicant produces and maintains the draft Order throughout Examination, therefore has multiple opportunities throughout pre-application and Examination to put forward its version of a proposed requirement. We have set out above examples of the relevant DCO requirements from consented OWF at paragraph 2.3.18.
- 3.6.3 For S.36 consents and other types of non-DCO consent, an applicant does not typically draft the consent and has limited opportunities to put forward its preferred wording. However given the importance of the compensation condition to the project overall, it has become more common in s.36 consent applications for an applicant to propose its favoured form of compensation condition, outside of a formal mechanism for doing so. At the time of writing, four derogation cases have been granted by the Scottish Ministers as part of consenting a S.36 consent OWF<sup>45</sup>. Therefore, there is a more limited pool of examples of compensation conditions for Scottish OWF projects.
- 3.6.4 Based on our experience, the key aspects of consent conditions we would recommend seeking to insert for the predator-reduction compensation mechanism is:

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<sup>45</sup> GreenVolt Offshore Wind Farm, West of Orkney Offshore Wind Farm, Salamander Offshore Wind Farm and Berwick Bank Offshore Wind Farm

- (a) **Pre-commencement element:** the pre-commencement of development element of the condition should be limited to works specific to the ornithological impact and preliminary activities necessary as part of the compensation, such as forming an ornithology group of relevant stakeholders. For instance, the Hornsea Project 4 OWF DCO requirement (Schedule 16 Part 1) states (emphasis added):



*Work nos. 1, 2, 3, 4 and 5 together with any associated development offshore may not be commenced until a plan for the work of the H4 OOEG has been submitted to and approved by the secretary of state...*<sup>45</sup>

- (b) **Pre-operation element:** the pre-operation of the project element of the condition is critical to the viability of the project, therefore the steps to satisfy the requirement should be clear. The practice in consented OWF has been to tie this to the relevant compensation being in place for a relevant period of time, i.e. Minimum number of breeding seasons. For instance, the Hornsea project 4 OWF DCO (Schedule 16 Part 2 paragraph 4) states (emphasis



*The undertaker must implement the measures set out in the KCIMP [Kittiwake Compensation Implementation and Monitoring Plan] approved by the Secretary of State, unless otherwise agreed by the Secretary of State in consultation with the relevant SNCB, MMO and the relevant local planning authority. No operation of any turbine forming part of the authorised development may begin until the KCIMP has been approved by the Secretary of State and four full breeding seasons following the implementation of the measures set out in the KCIMP have taken place. For the purposes of this paragraph each breeding season is assumed to have commenced on 1 April in each year and ended on 30 September.*

added):

- (c) The relevant condition on the Norfolk Boreas OWF DCO (Schedule 19 Part 2 paragraph 16) states the following. Please note that this is largely the same condition as in the Norfolk Vanguard OWF DCO and in the East Anglia Projects:



*The undertaker must implement the measures as set out in the LBBGIMP [Lesser Black-Backed Gull IMP] approved by the Secretary of State, unless otherwise agreed in writing by the Secretary of State in consultation with the relevant statutory nature conservation body and the relevant local planning authority. In particular, no operation of any turbine forming part of the authorised development may begin until four full breeding seasons following the implementation of the measures set out in the LBBGIMP have elapsed. For the purposes of this paragraph each breeding season is assumed to have commenced on 1 March in each year and ended on 30 September.*

- (d) OWIC has informed us that the Department for Energy Security and Net Zero (**DESNZ**) is working with Natural England on proposed wording for a predator-reduction SCM DCO condition. We understand this text is due by the end of July. It is not yet known whether a draft of this condition text will be circulated for approval to industry or stakeholders, and whether it will be acceptable to developers. We note that to the extent the condition is not acceptable to developers, developers will likely continue to seek to propose their preferred alternative form of DCO requirement, and will need to make the case that it is appropriate for their DCO to depart from the DESNZ-NE agreed text.

3.6.5 **Compensation being in place, rather than success criteria:** As set out in the Hornsea Project 4 example above, the condition is satisfied by the KCIMP being satisfied and four full breeding seasons have taken place since the implementation of the measures. The satisfaction of the condition is therefore tied to time passing (four breeding seasons) rather than the compensation measures being found to be successful or effective. It is important to seek to tie satisfaction of the condition to delivery of the measure, rather than success or effectiveness, given that a number of intervening factors can hinder the population of seabird colonies (such as HPAI avian influenza).

3.6.6 **Number of breeding seasons:** there is currently different approaches between OWF developers, decision-makers and SNCBs over the number of breeding seasons that compensation need be in place for as part of a compensation condition. The earlier consented projects (such as Hornsea Project 4 OWF) were consented with four full breeding seasons, which was tied to the specific breeding lifecycle of that species (kittiwake) and the time taken for a chick to reach breeding maturity. However more recently the Hornsea Project 4 DCO has been granted a non-material change to reduce the breeding seasons from four, to two. More recent OWF DCO applications have also sought consent for shorter periods (ranging from one to three). In terms of auk species, the predator eradication measure for guillemot that was consented under the Hornsea Project 4 DCO requires the predator eradication measure to have commenced no later than two years prior to the commencement of the offshore works.

3.6.7 **Duration of compensation:** to date, the compensation requirements of consented DCO projects have been granted in perpetuity (for instance, kittiwake nesting sites and fencing being erected on a permanent basis). In a strategic-compensation scenario, this will need careful consideration, potentially making allowance for the varying operational periods and stages of different projects.

### 3.7 Advice on the management and delivery of developer-led SCM

3.7.1 This section addresses the options for managing and delivering the predator-reduction DL-SCM. It includes consideration of who should manage and deliver the SCM and gives an outline of the different roles and responsibilities. We have considered this structure specifically from the perspective of the proposed predator-reduction DL-SCM. As discussed with OWIC it is noted that other DL-SCM

may have alternative possible structure options, and these are considered at a high level below to help give a holistic view.

3.7.2 We have considered four possible options for management and delivery, as follows:

- (a) Option 1 - Equal responsibility
- (b) Option 2 – Lead/Subsequent developer
- (c) Option 3 – Third party-led
- (d) Option 4 - Incorporation into the UK MRF's LoSCM

3.7.3 We summarise in the table below the requirements (and differences) between these options

**Table 1: Options Summary Table**

|                                                             | Option 1 – Equal responsibility | Option 2 – Lead/Subsequent developer | Option 3 – Third party-led | Option 4 – UK MRF |
|-------------------------------------------------------------|---------------------------------|--------------------------------------|----------------------------|-------------------|
| Consenting required                                         | ✓                               | ✓                                    | ✓                          | ✓                 |
| Private agreements between developers                       | ✓                               | ✓                                    | ✓                          | x                 |
| Private agreements between developers and delivery partners | ✓                               | ✓ (possibly lead developer only)     | x                          | x                 |
| Land agreements                                             | ✓                               | ✓ (possibly lead developer only)     | x                          | x                 |

3.7.4 To further illustrate the four options, we have appended structure charts to this Note and recommend the reader has these to hand whilst reading this section.

3.7.5 The discussion below is intended to provide an overview of the options based on the information currently available. A detailed view of the optimal delivery structure can be provided once further information of the proposed predator-reduction DL-SCM are known. The details likely to influence this future view include: the parties involved; the activities to be undertaken; the existence and role of any delivery partners; funding arrangements; comments from SNCBs; and relevant applicable planning conditions.

#### 3.7.6 **Option 1 - Equal developer responsibility**

3.7.7 Under option 1, developers have equal or roughly equal control for the management and delivery of the compensation measure. The equal developer responsibility model could be structured either as each developer remaining entirely functionally independent, or multiple developers coming together to form a joint operational working group. The joint working group could range in structure, from an informal arrangement with no separate legal responsibility to a formal corporate vehicle that is legally carved off from the separate developers. Overall, however, the intention behind this structure is for each developer to be functionally involved in bringing forward the compensation measure.

- 3.7.8 The analysis below is given specifically in view of the proposed predator-reduction DL-SCM. In general terms, this analysis is likely to be similar to other SCMs that share similar broad features, such as a post-consent need to continue developing methodology and the evidence base; potentially substantial start-up costs; need for land rights; working with a third-party delivery body; possible additional consents, licences and permissions; and a significant ongoing management role – such as a bycatch reduction SCM. For other types of DL-SCM, such as artificial nesting structures, the factors below may be more relevant only where a new nesting structure is required. If a later developer is seeking instead to rely upon an established artificial nest, the considerations for the later developer could be significantly simpler and better suited to the Option 2 model discussed further below.

**Table 2: Option 1 considerations**

| Factors to consider under Option 1 Equal developer responsibility |                                              |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
|-------------------------------------------------------------------|----------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1.                                                                | <b>Consenting</b>                            | <p>Subject to the precise wording of the relevant consent conditions imposed, we see no consenting barriers to option 1.</p> <p>To the extent the different projects remain entirely operationally independent, option 1 is similar to existing consented OWF. Were a formal joint working group to be proposed in the consent application this would be a new structure for the Secretary of State to become comfortable with. Subject to demonstrating a robust case on feasibility and that the compensation is secured, in principle we see no reason that a joint working group is a risk to the granting of consent. As noted above, the experience to date is that detailed aspects of compensation are addressed through approval of the post-consent documents (such as the IMP). We anticipate that decision makers would seek to understand, via this document, how the parties intend to manage the day to day management, responsibility and control proposals for the delivery of the measure, particularly any joint working group. The IMP can therefore be used to communicate the necessary information through the consents process. We note also that there are existing examples of joint delivery in DCO OWF projects, such as the East Anglia 1 North OWF and Norfolk projects. These projects each submitted their own IMP to discharge the relevant conditions of the compensation schedules for their respective DCOs. These IMPs detailed a collaborative approach to delivering compensation, outlining how the parties proposed to work together to deliver a combined solution to meeting the compensation requirements for the respective projects. This approach allows for coordinated SCM while maintaining individual accountability within the regulatory framework. As mentioned above, the SoS has approved the respective IMPs and this approach.</p> |
| 2.                                                                | <b>Private agreements between developers</b> | <p>Sitting behind the public-facing position, the parties will enter into private agreements to document the commercial terms of the arrangement. We note that the drafting of this documentation forms part of Phase 3 of this advice. For the purposes of this Phase 2, it is worth noting that commercial agreements can have wide flexibility in accommodating the agreed position between the parties. We envisage the agreements will include provisions setting out how the parties intend to interact, manage the day to day running and more strategic operational decision making, costs apportionment and payment mechanisms, relationships with third parties, attendance at meetings, approval of other parties' submissions, process during a judicial review as well as for developments that do not come forward for development and dispute resolution mechanisms.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |

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|    |                                                                           | <p>A key aspect of these agreements will be the mechanism for developers “reserving” sufficient capacity in the compensation measure that is required for their project. If the agreements are entered into at a pre-consent stage, it will not be known precisely how much compensation each project needs, or how much capacity the decision-maker considers there to be in the measure. Each project will likely consider it essential that their project has a precautionary level of compensation reserved, i.e. a level of compensation that includes their worst-case scenario ornithological impact figures. There will also need to be provision for releasing capacity where a project is able to do so, or where a project does not get consent or does not come forward for development. In our experience, these clauses are complex and will require detailed working through between the parties.</p>                                                                                             |
| 3. | <b><i>Private agreements between developers and delivery partners</i></b> | <p>Another class of documents that we envisage would sit as private agreements behind the public-facing position are agreements with relevant third-party delivery partners. These partners would typically include the eradication expert organisation that would carry out the compensation activities. In the equal responsibility scenario, we envisage these agreements either being multi-party agreements between all developers and the third parties or, alternatively, a series of mirrored bilateral agreements, one per developer with the relevant third parties. The agreements will likely cover the respective roles and responsibilities of each party, information sharing, cooperation provisions (i.e. not to act detrimentally to the OWFs), payment terms, data and intellectual property provisions for the ownership of any ornithological data, attendance at meetings with SNCBs and lodging submissions with the consent decision-maker, and dispute resolution mechanisms.</p>       |
| 4. | <b><i>Land agreements</i></b>                                             | <p>If the predator-reduction DL-SCM requires the parties to enter into a land agreement, such as a lease or licence to access, have rights in and carry out activities over land, this will need to be reflected in a land agreement. As it is not possible for multiple parties to have a lease over the same area of land, the equal responsibility option may require a more nuanced legal structure such as a Special Purpose Vehicle (SPV) that enters into the lease, with each developer sitting above the SPV as a shareholder. It may however be the case that the predator-reduction measure is structured so that no land powers are required to carry out the predation reduction measures – for instance, where no infrastructure or access is required or the landowner carries out the activities themselves or gives rights to a third party delivery body to do so. We will consider this position further under Phase 3 once further details of the predation reduction measure are known.</p> |

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|-----------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>5. <b><i>Additional consents, licences and permissions</i></b></p> | <p>The predator-reduction SCM may require additional consents, permissions and licences to be granted. Subject to the activities to be undertaken as part of the predator-reduction SCM, if the activities comprise “development” then planning permission to be determined by the Council of the Isles of Scilly will be required (unless the activities can be consented by other means such as permitted development). Planning permission, unless explicitly made personal to an applicant (which is rare) runs with the land and can be relied upon by parties other than the applicant. Species licences may also require to be granted by Natural England, and typically these are granted to a named applicant for a specific activity. Subject to learning further details of the predator-reduction SCM, it may however be the case that it is the third-party delivery partners who obtain any necessary planning permissions, consents and licences. This may be simpler from an operational perspective and would ensure the party undertaking the activities benefits from the permissions and consents and can discharge the necessary requirements. This would need to be factored into agreements with the delivery partners, in terms of the developers obtaining suitable supervisory controls over the permission and consent applications, and discharging of requirements or other controls, for instance in the event of a judicial review to the grant of permission.</p> <p>If the developers seek to rely upon the planning permission, the private agreements will need to address aspects such as who will make the application; protocol in the event of a judicial review challenge; process for discharging the permission conditions; responsibility for ongoing monitoring and obligations; and approach in the event of enforcement. The planning permission may also require an ancillary agreement, such as a s.106 agreement and biodiversity net gain agreement. Under the option 1 equal responsibility model the developer parties will need to agree how such contracts are to be structured and entered into.</p> |
| <p>6. <b><i>Structure of the joint working group:</i></b></p>         | <p>We note at paragraph 3.7.7 that under an equal responsibility measure, the parties could seek to structure the collaboration either by remaining entirely independent and operationally distinct, or by seeking to form a joint working group. If a joint working group is formed, it could be established as an informal arrangement with no distinct legal powers or, alternatively, a separate legal vehicle could be created. These options can be explored in more detail with the developers involved in the predator-reduction SCM, as we envisage, they are likely to have a preferred structure that suits their operational framework. However, for the purposes of this Note, we raise some factors to consider. For instance, an informal working group may be quicker and easier to establish for all parties, although in practice the decision-making powers and funding controls are likely to remain with the developers (or their parents). This could lead to longer approval periods, and there would need to be clear assignation and change of control provisions in the event of changes in the operational structure or composition of the developers and their parent companies. Alternatively, if a separate legal vehicle is established this could be a more streamlined decision-making body suitable for on-the-ground delivery. However, there would need to be careful detailed checks to ensure that a separate delivery vehicle is consistent with the powers and responsibilities of the consent. For instance, this entity would not hold a generation licence under the Electricity Act 1989 (so would not hold survey access or compulsory acquisition powers) and would not benefit from the powers under the planning consent.</p>                                                                                                                                                                                                                                                                                                                                                                               |

### 3.7.9 Option 2 – Lead/Subsequent Developer

- 3.7.10 Under option 2, a lead developer will take control for establishing, managing and monitoring the measure. Subsequent developers would then rely upon the measure, and contribute towards the cost of the measure, but would not have day to day involvement or responsibility. Subject to the agreements to be reached between the developer parties, we imagine the subsequent developers would seek to retain some level of overall supervisory approval and control.
- 3.7.11 As discussed above at paragraph 3.7.8, the analysis below is applicable to the proposed predator-reduction DL-SCM and is likely to be similarly applicable to other DL-SCM that share the same broad characteristics as mentioned above. We envisage that the option 2 lead/subsequent developer model could be substantially more streamlined for other DL-SCM such as artificial nesting structures, where a later developer seeks to reserve nesting spots in an established artificial nest. Under that scenario the lead/subsequent developer option could be a relatively simple approach with the key factor being the private commercial agreement between the developers.

**Table 3: Option 2 considerations**

| Factors to consider under option 2 lead/subsequent developer |                                              |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
|--------------------------------------------------------------|----------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1.                                                           | <b>Consenting</b>                            | Similar to our comment under option 1, subject to the precise wording of the relevant consent conditions imposed, we see no consenting barriers to option 2. The IMP will explain the detailed arrangement for the delivery of the compensation, which in principle could be satisfied by a lead / subsequent developer model. The IMP and other condition discharge documentation will need to demonstrate that each project will satisfy the requirements of its specific condition, notwithstanding that the “lead” developer will be undertaking responsibility for delivering the compensation.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| 2.                                                           | <b>Private agreements between developers</b> | <p>Broadly the same as under option 1. The additional points to consider under option 2 are the legal mechanisms to govern any involvement that subsequent developers do have, including the scenario where the “lead” developer falls away or their project comes forward later than a “subsequent” developer. For instance, we envisage that subsequent developers will seek some degree of supervisory control, such as approval of decisions, review of financial spending mechanisms and checking of any documents or submissions for compliance with the terms of their project’s consent.</p> <p>Under option 2, the lead developer may seek to recoup costs associated with any seed funding or initial outlays associated with their initial support of the measure.</p> <p>Similar to option 1, a key term is likely to be the reservation of sufficient capacity in the compensation measure for each project. Under the lead / subsequent developer model, there may be more of a hierarchical approach to reserving that capacity. For instance, the lead developer may consider their capacity ought to be reserved first, with subsequent developers allowed into the compensation mechanism only where the lead developer agrees there is sufficient capacity. This is a complex and critical aspect to strategic compensation and will require detailed working</p> |

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|----|---------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|    |                                                                           | through, particularly once the results of the capacity study being part-funded by OWIC and the compensation requirements of the various developer projects are known.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| 3. | <b><i>Private agreements between developers and delivery partners</i></b> | <p>With option 2, it may be that an initial agreement between the lead developer and third parties/delivery partners is entered into in the first instance, following which subsequent developers could either enter into an agreement with the lead developer only (see line item above) or the subsequent developers could enter into an agreement direct with the third parties/delivery partners. Subsequent developers may find the latter approach more secure from a legal perspective, in the event the lead developer falls away or more generally in any circumstances to ensure there is a direct contractual nexus between the delivery partner and the project. These agreements between individual projects and developers are likely to also include provisions on reservation of capacity, as discussed above.</p> <p>An additional aspect under the lead / subsequent developers is the degree to which landowners, third parties and delivery partners will be aware of or have rights of approval over the subsequent developers that join the compensation. For instance, on one view, adding subsequent developers into the compensation could be a purely commercial arrangement between the lead and subsequent developers, particularly if the latter's role is confined to making a financial contribution to the compensation. However, based on our experience, third parties, particularly SNCBs or other nature conservation charities who may be involved in the compensation to some degree (such as the Wildlife Trust, for the predation reduction DL-SCM) will seek to have full awareness of the developers relying upon the compensation. They may take this view based on their own internal governance, reputational risk and supply chain commitments. Landowners may also seek a premium for each subsequent developer that joins the compensation.</p> |
| 4. | <b><i>Land agreements</i></b>                                             | Under the lead/subsequent developer model, it is envisaged that any necessary land agreements would be entered into between the landowner and lead developer only, as only the lead developer would be undertaking operational activities to implement the compensation. However, this could pose a risk to subsequent developers in the event the lead developer falls away or their project comes forward on a slower programme than a subsequent developer. We anticipate this risk would need to be addressed to give suitable comfort to subsequent developers, i.e. contractually via step-in rights.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |

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| 5. | <b><i>Additional consents, licences and permissions</i></b> | Under the lead / subsequent developer model, it is anticipated that any additional consents, licences and permissions would be obtained via the lead developer if required, or by the relevant delivery partner via a contractual relationship with the lead developer only. |
| 6. | <b><i>Structure of the joint working group</i></b>          | Under the lead/subsequent developer model, where the intention is for the lead developer to undertake responsibility for implementing and operating the compensation, we do not envisage there being a role for a joint working group.                                       |

### 3.7.12 Option 3 – Third Party-led

- 3.7.13 In discussions with OWIC, the prospect of a third party-led delivery mechanism specific to the predator-reduction has been raised. Under this option, our understanding is that the organisational responsibility for the compensation would sit with the third-party, who would contract the day-to-day delivery to an identified body, and the developers making a financial contribution to the measure.
- 3.7.14 As discussed above at paragraph 3.7.8, the analysis presented below is applicable to the proposed predator-reduction SCM and is likely to be similarly applicable to other DL-SCM that share the same broad characteristics as mentioned above. As also discussed at paragraph 3.7.11, where the DL-SCM involves a later developer seeking to rely upon an established measure, such as an operational artificial nest, it is likely that the key factor to consider will be the private commercial agreement between the parties.

**Table 4: Option 3 considerations**

| Factors to consider for option 3 |                          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
|----------------------------------|--------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1.                               | <b><i>Consenting</i></b> | The distinction between option 3 from the other proposed options is that the party responsible for the delivery mechanism is neither a Government-backed body nor a developer whom can be controlled via requirements of the DCO. There is a potential risk that the Secretary of State may feel they have inadequate control over the compensation measure, therefore that the measure is inadequately secured. This risk could be mitigated by the developers offering additional controls in the DCO - for instance, by way of a DCO requirement conditioning a more prescriptive IMP. The OWF developers would likely also need to include additional information in the application to demonstrate that this structure is capable of complying with DCO requirements; that assurances, agreements and |

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|----|--------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|    |                                                                    | <p>letters of support from the relevant third party are in place; and that the developers have an ability to step-in to the compensation mechanism if required.</p> <p>We are not aware of a similar structure having been consented on any of the existing OWF, i.e. one where a delivery partner/landowner is named as the key party responsible for delivering the compensation.</p> <p>Therefore, as this mechanism is untested and will likely require additional controls via the DCO, and an enhanced level of evidence in the application, we consider there is a moderate risk from a consents perspective for option 3. This risk may be reduced depending on the level of additional supporting information that can be provided by developers. The detail of that additional supporting information, particularly the position of the third party, will need to be tested as part of Phase 3.</p> |
| 2. | <b>Private agreements between developers and delivery partners</b> | As outlined above, we anticipate that option 3 would require an enhanced level of information to be provided to evidence that a third party-led SCM is feasible and secured. This additional information will need to be reflected in the private agreements between the developers and the third party, on commercial terms to be negotiated between the parties. In particular, there will need to be a mechanism in place to maintain the continuation of the compensation in the event the third party can no longer lead the compensation. This step-in mechanism will require the agreement of the participating OWF developers in terms of who will step in, at what stage, what responsibilities will be taken by each developer and what financial input would be required by each party to ensure the compensation continues.                                                                       |
| 3. | <b>Land Agreements</b>                                             | In the event the third party is the landowner, and implements and operates the predation reduction DL-SCM, we envisage that no additional land agreements would be required. However the OWF developers may look to secure the right to any necessary land powers as part of the step-in mechanism discussed above.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| 4. | <b>Additional consents, licences and permissions</b>               | Under option 3, it is anticipated that any additional consents, licences and permissions would be obtained via the third party if required. The OWF developers may seek to have a level of supervisory control or approval over the relevant applications (including discharge of condition applications).                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| 5. | <b>Structure of the joint working group</b>                        | Although no joint working group would be required in the first instance under option 3, the OWF developers may wish to draft for the possible existence of one as part of the step-in mechanism discussed above (i.e. if a step-in is required, the OWF developers may look to take forward the operation and management of the predator-reduction DL-SCM in the form of a joint working group).                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |

### 3.7.15 **Option 4 - Incorporation into the UK MRF's LoSCM**

- 3.7.16 In addition to the three options above, a fourth potential option is for the long-term management and delivery of the predator-reduction SCM to be incorporated into the UK MRF's Library of Strategic Compensation Measures (**LoSCM**). This option 4 therefore envisages that the predation-reduction SCM would be handed over to the Government-backed MRF Operator at a suitable point in future in order that the Operator undertakes the long-term management of the SCM. Under option 4 it is anticipated that the developer's respective compensation obligations would be discharged by making a simple payment, or phased series of payments, into the MRF. Please note that given the uncertainties noted below we have not provided a structure matrix for option 4.
- 3.7.17 As the LoSCM and MRF remain subject to consultation and are not yet in force, we raise this option 4 as a horizon-watching item, to be kept under review whilst Government policy evolves. At the time of writing this Note it is not yet known how further compensation measures will be added to the LoSCM, whether existing compensation activities could be incorporated into the LoSCM, and the terms associated with any such incorporation. Therefore it is not known at this stage whether this proposed option 4 is available to the predation-reduction SCM, or, if it is an available option, whether the terms would be commercially acceptable to the developers.
- 3.7.18 If it is possible **for** the predator-reduction SCM **to** be incorporated into Government's SCM and the LoSCM in future-, the principal benefit would be a Government-body becoming responsible for the operation of the measure. As well as eliminating the operational responsibilities required of the developers, this would also remove the risks associated with a developer withdrawing from the measure and the increased operational and financial burden that could create for the other developers.

## 4. **Recommendations on financial delivery mechanisms**

- 4.1 In line with our tender response to the OWIC Scope (dated February 2025) our comment on this section covers recommendations for how costs provided to us by the OWIC team could be apportioned.
- 4.2 At the time of writing, no information as to possible costs has yet been provided by the OWIC team. We note also that the financial delivery mechanism is integrally connected to the proposed structure of the predator-reduction compensation DL-SCM, the options for which are discussed above. At this stage, we flag the following for aspects of financial delivery to consider, and we would be happy to develop this section further once more information is provided:

### 4.2.1 **Apportionment of costs**

- (a) In our view, there are two primary options for apportioning the costs of the predator-reduction DL-SCM:
- (i) ***Proportionate to OWF project's AEOL***: under this option, each project would contribute a share of the cost of the predator-reduction DL-SCM that is proportionate to the level of the AEOL arising from their project. Under this scenario, ancillary costs related to any seed funding, research and development and adaptive management may be apportioned separately to the AEOL impact. For instance, ancillary costs could also seek to be recovered based on AEOL-impact, or a flat rate could be charged depending on the model of the DL-SCM – i.e. under the lead / subsequent developer model or third party-led model, the lead developer / third party may seek to recover their anticipatory investment from subsequent developers.

- (ii) **Portion of total running cost:** under this option, the total running cost of the project, including seed funding, research, and adaptive management would be apportioned equally by each developer project.
- (b) These options should be explored with the participating OWF developers, particularly in light of the delivery-options discussed above and the proposed structure of the fund set out below.

#### 4.2.2 Structure of Fund

- (a) **Independent SCM Fund:** it may be necessary for funds paid by developers to be held by an independent fund, which is administered separately from any one OWF project. This approach has been proposed by some OWF to date, particularly in a strategic-delivery model. This framework would allow developers to pay their contribution into a centralised fund, and the fund would then pay out the delivery partners in accordance with an agreed protocol.
- (b) The challenge to such structures is identifying a party willing and able to hold the funds for the necessary duration (which could be at least three decades, to reflect the operational periods of the respective OWF). Such a party would need to have the legal capacity to administer significant levels of funding, to have robust financial control mechanisms, and hold sufficient insurance to reflect the value of the fund. However, it will need to be clear that any delivery body has the necessary legal framework in place or whether they would be willing to take on the required degree of responsibility and risk. This option would need to be subject to thorough legal due diligence if progressed.
- (c) It may be possible that the option 3 third party has an appropriate legal structure and financial control mechanisms to fulfil the role, however there may be a conflict of interest if they are also the main landowner. Further diligence on these queries and exploring other options will be required as part of establishing the options for financial delivery.
- (d) **Lead developer or third party – led delivery model:** in the event that the predator-reduction DL-SCM takes the form of a lead / subsequent developer or third party-led delivery model, it may be that either the lead developer or the third party also takes on the role of holding the funds. These options would be subject to either party being willing and able to undertake the role, which, in respect of a developer, we imagine may not be possible or viable given the developer would be required to become a regulated financial entity. We have also flagged above the potential of a conflict of interest between the third party acting as both landowner and fund operator.
- (e) **Escrow or other independent financial institution:** the simplest mechanism may be identifying an existing financial institution that is content to take on the role and has the necessary financial and legal controls in place to do so. It is likely this institution would charge a fee, which would need to be factored into the cost of the predator-reduction DL-SCM.

#### 4.2.3 Seed funding

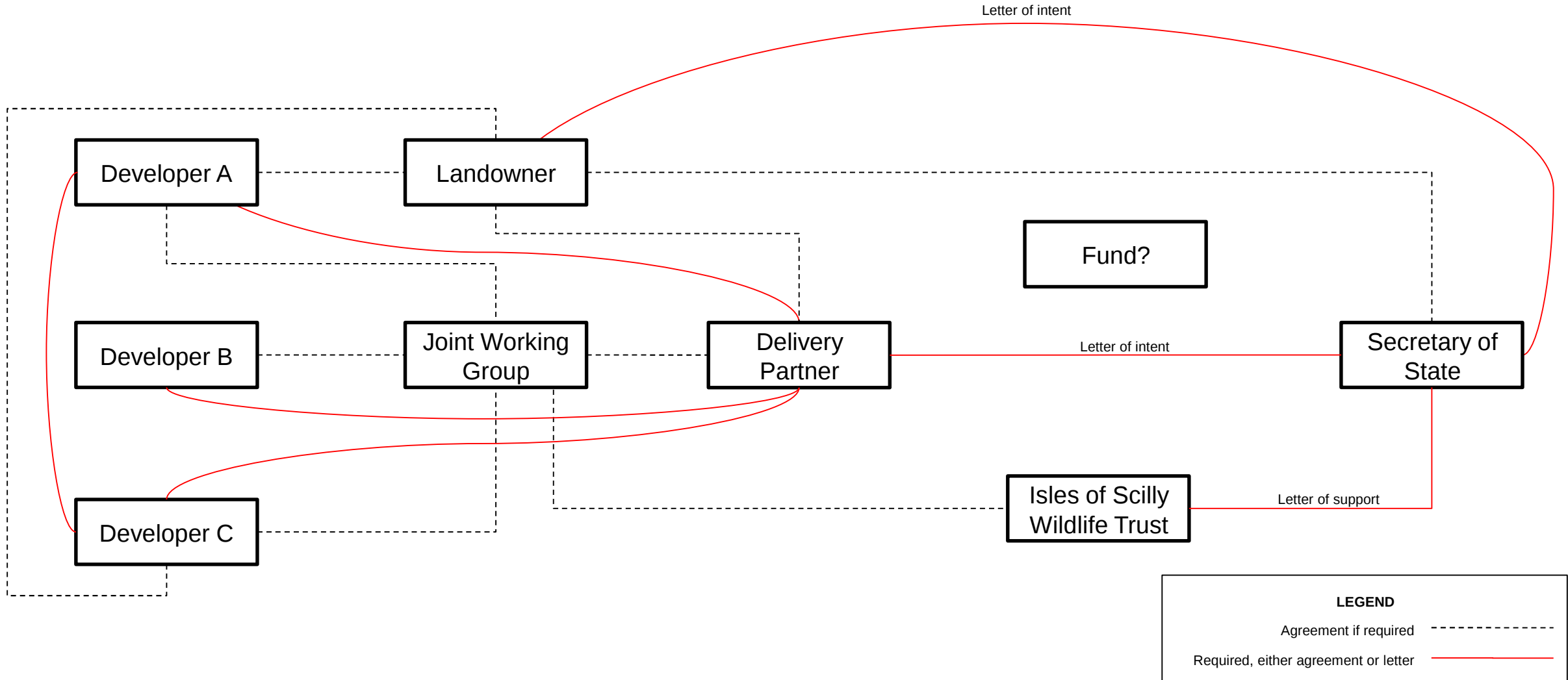
- (a) The predator-reduction DL-SCM will require initial seed funding to become established. If such funding is required, it will be necessary to consider whether and if so by how much the participating OWF developers would be responsible for this funding. For instance, under a lead / subsequent developer model, the lead developer could provide the entirety of the seed funding and seek to reclaim this expenditure from subsequent developers (at the lead developer's risk). Alternatively, under an equal-responsibility

model, the developers could agree a proportionate share of a seed funding contribution.

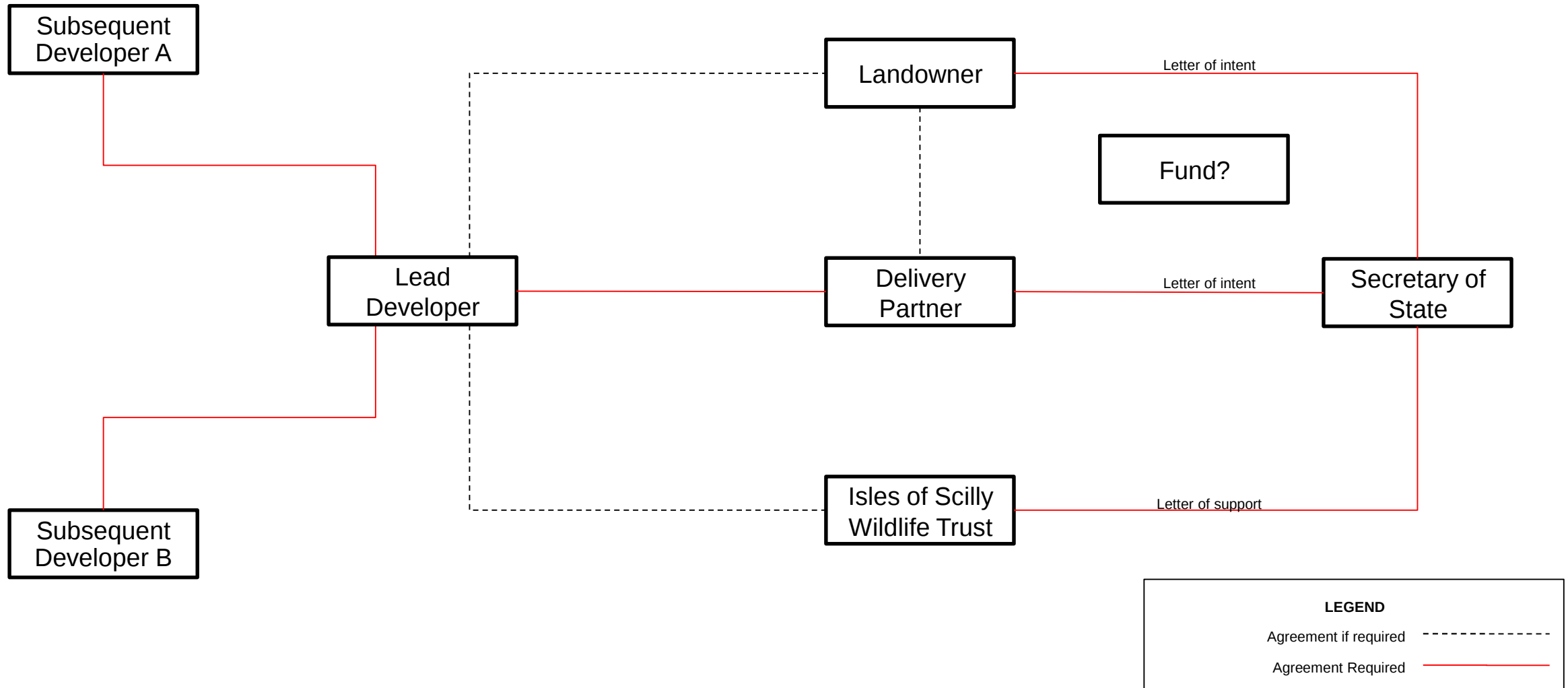
**Pinsent Masons**

**November 2025**

# Option A – Equal Responsibility



# Option B – Lead/Subsequent Developer



# Option C – Third Party-led

