



## **NSAC Advice Ref. 09-1920**

### **NSAC Advice on lessons learned from the Dogger Bank Process**

*This advice was approved with consensus by the NSAC Executive Committee on the 17 April 2020 via written procedure.*

In April 2019 a focus group was established within the North Sea Advisory Council (henceforth NSAC) to evaluate the procedure and the stakeholder involvement in designing fisheries management measures in the Dogger Bank Special Areas of Conservation (henceforth SACs). The group included members who had been involved in the Dogger Bank process from its beginning in 2011. The final outcome of the focus group is the advice presented here on the design of MPA management proposals, monitoring and review processes, addressed to management decision-makers, practitioners and other participants.

This paper addresses, respectively, a factual historical overview of the Dogger Bank process, the full integration, transparency and functioning of the stakeholders in the context of Articles 11 and 18 of the Common Fisheries Policy, provision of recommendations on improving processes as described under Articles 11 and 18 in order to achieve the objectives stated in Article 11, Paragraph 1, and finally further advice and guidance on implementing Articles 11 and 18. The paper also considers lessons learned for the internal functioning of the AC (Annex).

The intention of this document is to retrospectively assess and suggest improvements for full stakeholder involvement in future MPA processes, and to highlight and inform the need for improved guidance on fisheries management measures. The NSAC would welcome the Commission's commitment to revisit Articles 11 and 18 in line with the present Advice and to encourage provision of sufficient scientific underpinning of measures to achieve the objectives of the conservation measures under Article 11, Paragraph 1.

Given that the conditions under which this advice is given are about to change with the departure of the UK from the EU, the NSAC appreciates that this will affect the process for establishing fisheries management measures for MPAs, and that we will have to adjust to these changes.



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# 1. Background

In 2004 Germany, in 2008 Netherlands, and in 2011 the UK, each proposed a national part of the Dogger Bank as a SAC under Natura 2000. All three Member States proposed these adjoining sites for the Habitats Directive Annex 1 Habitat Type ‘Sandbanks which are slightly covered by sea water all the time’, Code H1110. Article 11(1) of the CFP requires the adoption of conservation measures in accordance with the obligations of Article 6 of the Habitats Directive. Each Member State defined similar ‘conservation objectives’ and independently assessed as ‘unfavourable’ the status of Habitat Type H1110 at their respective sites. The purpose of fisheries measures is to reduce the pressure on the benthic habitat from bottom contacting fishing gear with a view to contributing to the achievement of the conservation objectives.

The development of fisheries management measures in the marine Natura 2000 sites (SACs) on the Dogger Bank began in 2006 with the German EMPAS project<sup>1</sup>, followed by the Dutch FIMPAS project which started in 2009. In 2011 the Federal Agency for Nature Conservancy (BfN) and the Thünen Institute developed a proposal to close 50% of the German Dogger Bank Natura 2000 site to all mobile bottom-contacting fishing gear. In 2011 the FIMPAS project concluded with the need for adaptive management to be applied, accompanied with monitoring of the habitat and human use and suggesting to “exclude beam, otter trawls, and demersal seines in specific areas; in other areas allow controlled fishing” and the areas to “include various benthic communities on the Dogger Bank ... with the purpose of conservation, understanding recovery and human impact.”

In 2008, Germany, Netherlands and the UK, along with Denmark (which has not designated the Danish part of the Dogger Bank as a Natura 2000 site but has important fishing interests there) held a series of informal talks to identify a common approach to protect the Dogger Bank area. This coincided with the then North Sea Regional Advisory Council (NSRAC) urging the need for a joined-up management approach. In 2011, in pursuit of coordinated and harmonised fishery management measures across their adjoining Dogger Bank sites, the UK, the Netherlands and Germany established the Dogger Bank Steering Group (DBSG), under the chairmanship of Ton Ijlstra (Dutch government), with the European Commission and Denmark as observers. Following the third workshop of the FIMPAS project in January 2011, and recognising a need to achieve international coherence in the approach taken by UK, Dutch, German and Danish governments, and that a stakeholder consensus on measures would be compelling, the NSRAC was invited to prepare a position paper proposing a fisheries management plan comprising of a zoning proposal covering the three national SACs. In response, the NSRAC established a Focus Group under the chair Euan Dunn of the then Spatial Planning Working Group and facilitated by David Goldsborough (University of

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<sup>1</sup> ICES (2008) summary and advice from the results of the EMPAS project  
([www.ices.dk/sites/pub/Publication%20Reports/Advice/2008/Special%20Requests/Germany%20Advice%20from%20the%20EMPAS%20project.pdf](http://www.ices.dk/sites/pub/Publication%20Reports/Advice/2008/Special%20Requests/Germany%20Advice%20from%20the%20EMPAS%20project.pdf))



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Wageningen UR Centre for Marine Policy) acting on behalf of the EU-funded MASPNOSE (Marine Spatial Planning in the North Sea) project whose aim was to ‘facilitate concrete, cross-border cooperation among North Sea countries on ecosystem-based maritime spatial planning’. The European Commission attended a number of Focus Group meetings as observers.

The position paper produced by the NSRAC in October 2011 identified “a number of constraints on the NSRAC’s progress in relation to data gaps and other uncertainties in knowledge (incomplete fisheries data, ecological data and information on conservation objectives), and also in relation to the DBSG process”. As a consequence, the NSRAC was not able to “recommend a prescriptive, quantified plan” but instead recommended that elements of a zoning proposal comprise a limited number of management categories taking account of wind farm plans and the displacement of fishing activities and favouring an adaptive management approach under a co-management structure.

An important benchmark in the process was the DBSG ‘stakeholders meeting’ attended by the NSRAC Focus Group in Dublin on 7-8<sup>th</sup> November 2011 at which the DBSG (without NSRAC input) drew up - in a relatively short drafting session - terms of reference for the NSRAC’s draft proposal. Notable under these ToR<sup>2</sup> were the stipulations to include two zones: a) a free zone where all legal gears within the CFP were allowed; b) a management zone covering between 25–55% of the total SAC area that represented all five of the benthic communities present in the Dogger Bank, where fishing was limited to fishing gears that do not cause deterioration of the natural habitats for which the site has been designated, and avoiding ‘a patchy pattern of the fisheries management zones in light of enforceability’. This range resulted from the DBSG’s question: How much of the Natura 2000 area of the Dogger Bank needs to be protected from fisheries impact in order to see an improvement on habitat conservation status for the entire SAC? To address this, the DBSG commissioned an external advisor to undertake a literature review (December 2011), from which most recommendations

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## 2. DBSG’s ToR

The Dogger Bank Steering Group invites the NSRAC focus group to develop a draft proposal for a fisheries regime on the Dogger Bank – implementing the Natura 2000 programme – within the following parameters:

- The aim of the draft proposal is that the conservation objectives (ICES, 2011) will be delivered
- Use a zoning concept with two zones:
  - Free zone: all legal gears within the CFP are allowed
  - Management zone: fishing is limited to fishing gears that do not cause deterioration of the natural habitats for which the site has been designated
- Develop a fisheries management zone covering 25%-55% of the total SAC area]
- Ensure representation of all (five) benthic communities (ICES, 2011)
- Take a holistic perspective of the entire Dogger Bank, rather than the portions belonging to individual member states
- Take into account the German proposal (Germany, 2011)
- Take into account the Chair’s conclusions of the Dublin stakeholders meeting
- Avoid a patchy pattern of the fisheries management zones in light of enforceability
- Use the existing data
- Develop a preferred method for weighing economic and socio-economic considerations



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suggested that a minimum of 20% and an optimum of 30%-50% of the Natura 2000 area where the given habitat is present be set aside in reserves. The significant breadth of this range and therefore its lack of prescription reflected the relative paucity of documented precedents for the effectiveness of restricting areas for the purposes of protecting and restoring marine habitats and associated features, resulting in the review being based largely on areas restricted for fish stock conservation purposes.

The NSRAC acknowledged (email of 7 Dec 2011) to the DBSG chair the ToR as 'guidance' but emphasised the importance of retaining the NSRAC's independence in formulating a proposal, and stated that the NSRAC 'cannot guarantee to what extent our proposal will fulfil the ToR in its entirety or in some respects go further'. While the NSRAC did not, at the time, regard the ToR as an obstacle to reaching consensus within NSRAC, it did express reservations about the ToR and would have preferred the ToR to have given more guidance on, as stated in its April 2012 report (see below) to the DBSG:

- An evidence-based approach which underpins the extent (% of total SAC area) of the fisheries management zone (the range represented in the ToR was very wide).
- Flexibility of zoning approach, i.e. the possibility of 3 zones rather than two (i.e. the NGOs favoured the fisheries management zone being divided into both a no take zone and a low impact gear zone).
- Allowable gear types in relation to these zoning scenarios.

The NSRAC also noted (April 2012 report) that it did not receive the DBSG's ToR until 7 Dec 2011, one month after the Dublin meeting, yet was invited by the DBSG to deliver a final proposal in just two months by 7 Feb 2012 at the latest. Under this unreasonable pressure of time and other constraints, the stakeholder process was put under severe strain and joint working broke down at critical stages.

The NSRAC Focus Group met several times, mostly in the Netherlands, in an intensive process between May 2011 and February 2012 and had GIS expertise available at the meetings. Following the Dublin stakeholders' meeting (see above), the Focus Group included DBSG observers. Despite the Focus Group's best efforts to create a joint zoning proposal, it became clear that the gap between the visions of the fishing sector and Other Interest Groups (OIGs)<sup>3</sup> was too large, the sector favouring a significantly smaller management zone (22%) than the OIGs (45% approximately, the OIG position being strongly influenced by Germany's stated preference in its SAC for 50% coverage of areas not accessible to mobile bottom gears). As a result, no NSRAC consensus was reached on the percentage of the Dogger Bank that should be closed to damaging fishing activities, the location of these management zones nor the fishing methods to be allowed within them. A final attempt to find consensus around a management area of 30% as a compromise between the industry and OIGs was unsuccessful. In April 2012 therefore, the NSRAC Focus Group therefore presented the DBSG with a final position paper incorporating two separate proposals from, respectively, the fishing sector and the OIGs.

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<sup>3</sup> The OIG members in the Focus Group were representatives of environmental NGOs and the European Anglers' Alliance (EAA).



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Thereafter, the DBSG asked ICES to develop a methodological framework for a third option to be developed by the DBSG, based on the two proposals and all previous preparatory work by EMPAS and FIMPAS (see above). All three options were then presented to ICES ACOM for scientific advice in September 2012. ICES delivered its advice to DBSG in November 2012.

The ICES advice<sup>4</sup> did not provide any further guidance or clarification on the extent of restrictive measures needed in order to achieve the desired conservation objectives. Rather ICES advised that “A comparison of incremental improvement after a full six-year monitoring and assessment period could improve understanding of the implication of scale and provide better scientific guidance for the appropriate location and size of areas needed to achieve the conservation objectives.” In regard to seine gear, the ICES advice was that it “considers that the effect of seine fishing gear on the Dogger Bank sandbank habitat may not significantly impede the achievement of the conservation objectives.”

In October 2012, the NSRAC’s fishing sector had submitted a revised management zones proposal (as reviewed by the School of Ocean Sciences of University of Wales, Bangor) in which they considered taking into account the restrictions on fishing access imposed by the proposed Forewind windfarms in the UK SAC and those imposed by the fishery management zones. The fishing sector proposed that, as windfarm projects are built in the UK SAC, once the combined coverage of fisheries management zones and windfarm areas exceed 30% then the coverage of fisheries management zones should be reduced in order to maintain an effective 30% coverage of areas not accessible to bottom trawl gears. However, although this information was available to the Advice Drafting Group within ICES, the proposal missed the deadline for consideration in the ICES advice. The UK also objected to the fishing sector’s proposal on the grounds that to take account of the windfarms at this stage might be legally prejudicial to the future consenting process for those windfarm development applications. Reflecting on this in a paper on behalf of the ‘MPA Coalition’ (Nov 2013<sup>5</sup>), the fishing sector highlighted, as part of the failure to achieve NSRAC consensus, ‘The complication of the simultaneous planning process for the Forewind wind farm complex on the UK part of the SAC. Here, a similar lack of clarity over proposals and the degree to which they would constitute a cumulative impact upon the fishing industry, and therefore the extent to which they should be treated as de facto or actual management zones, hampered agreement.’

The revision of the CFP in 2013 introduced a significant change in the legal basis for the Dogger Bank process. With decentralisation of the CFP to create regionalisation, the immediate focus of the now-called ‘NSAC’ advice became the ‘Scheveningen Group’ of cooperating North Sea Member States rather than the Commission. Articles 11 and 18 of the new CFP set out the procedure by which the High level Scheveningen Group should make Joint Recommendations to the Commission for subsequent adoption by delegated act, requiring the prior approval of all cooperating North Sea Member States with a ‘direct management interest’ in the Dogger Bank fisheries, rather than hitherto just the ‘initiating Member States’ (i.e. Germany, the Netherlands and UK).

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<sup>4</sup> ICES (2012) Response to special request from DGSG on ‘Proposed fisheries measures for the Dogger Bank Special Area of Conservation. ACOM advice Book 6, section 6.3.3.9. Pp 1-8.

<sup>5</sup> Evaluation of the Implementation of the Dogger Bank SAC Fisheries Management Scheme



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In March 2013, the Chair of the DBSG circulated a paper entitled 'The use of seines in the Dogger Bank management zones', concluding:

- there is no general agreement on the ecological effect of the present level of seining;
- new developments (substitution of one gear by another) may lead to a level of effort of seining which will definitely lead to impeding the achievement of the conservation objectives;
- that we do not know at which speed the substitution of traditional gears by seines will take place;
- against this background an unconditional permission for seines to be active in the management zones is undesirable. Hence, the need to investigate whether the deadlock can be overcome by the adoption of management measures.

In May 2013, on the basis of the NSRAC's recommendations (2012 report) and the aforementioned ICES advice, the Dogger Bank Member States adopted a draft proposal. 'Based on the need to ensure a key contribution to delivering the conservation objectives', they agreed 'a common approach that would result in a closure of around 1/3 of the combined candidate SACs in total, while recognising the individual approaches of the Member States'. Of the Dogger Bank Natura 2000 sites, 33.8% of the Dogger Bank SACs would thus be designated 'management zones', to be closed to mobile bottom-towed fisheries. However, flyshoot and other demersal seine fishing gear were left out of the proposal, due to disagreement on the issue of bottom impact. The 33.8% was effectively a compromise, being an average of percentages proposed by the fishing sector and the OIGs, respectively.

In accordance with CFP Article 11, the initiating Member States (UK, NL and DE) began a process of regional consultation with those Member States with a direct management interest, the first meeting of the 'Scheveningen ad hoc Group on Dogger Bank' taking place in The Hague on 13 June 2016. There followed a series of meetings of this technical group to which NSAC Dogger Bank focus group representatives were invited as 'active observers' and allowed to make interventions at the chair's discretion.

Art 11(3) states that 'The initiating Member State and the other Member States having a direct management interest may submit a joint recommendation, as referred to in Article 18(1), within six months from the provision of sufficient information'. In this context, it might have been expected that the Dogger Bank proposal would have been submitted soon after the start of this regional consultation, by which time the draft was already well advanced. However, significant delay was to follow for a variety of reasons.

Firstly, in October 2015, disagreement still existed as the UK and Denmark wanted to allow seine fisheries in the Dogger Bank Natura 2000 management zones, whereas Germany and the Netherlands considered that, due to uncertainty on the effects of seining on the Dogger Bank benthic habitat, the management zones in principle were to be closed to all bottom-impacting fisheries including seines.

At some stage between October 2015 and May 2016 the Netherlands and Germany changed their position and came to an agreement with the UK and Denmark, on, amongst other things, the proposal to allow seining in the UK and Dutch management zones. In his letter of 6 April



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2016, the chair of NSAC Executive Committee expressed the NSAC's concerns to the Dogger Bank Steering Group that in the previous months – when the Netherlands and Germany changed their position towards seining – the NSAC was not formally engaged as active observers to the process of developing the Joint Recommendation during the period of legal scrutiny of the text following provision of 'sufficient information'. The NSAC regretted that, as a result, the important issue of seining gear was not dealt with 'in a transparent way'.

In 2017, national approval of the draft Joint Recommendation was delayed by ministerial changes in the three initiating Member States, particularly in the Netherlands (where two governments had fallen since 2013) and where the Joint Recommendation ran into stiff opposition in the national Parliament.

During this increasingly politicised period of legal sign-off, the NSAC was not party to any consultation. In that regard, in March 2018 the NSAC chair wrote to the Dutch chair of the Scheveningen Group seeking clarification on the current status regarding the timing of the submission of the Dogger Bank Joint Recommendation to the European Commission, as the NSAC had been 'unsighted on progress and procedure over the past few months'.

The Joint Recommendation was finally submitted to the Commission on June 19 2019 and a delegated act is pending in the Commission unless a formal complaint to the Commission by a group of NGOs<sup>6</sup> on the grounds of underestimated seining impact is upheld.

## **2. Co-designing fisheries management measures**

### **2.1 Obstacles to achieving consensus and lessons learned**

Reflecting on the experiences of the members of NSAC, the following issues presented obstacles to achieving a stakeholder consensus-based or a compromise decision:

#### **2.1.1 Disjointed decision-making**

From the outset, there was a lack of a joined-up approach among the different bodies involved in the process (NSRAC, DBSG, ICES, EC (DG Mare and DG Envi), Member States, windfarm developers). The process for making stakeholder recommendations was maintained separate to the decision-making processes of DBSG and later the Scheveningen Group. This limited dialogue and communication between stakeholders and managers, and the ability to address challenges as they were encountered during the process.

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<sup>6</sup> WWF, ClientEarth, Seas at Risk, Oceana, Birdlife International, RSPB, Marine Conservation Society, Blue Marine Foundation, Vogelbescherming Nederland, Dutch Elasmobranch Society; note that the complaint was not submitted under the auspices of the NSAC, although some of these NGOs are NSAC members.



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### 2.1.2 Terms of reference and deliberative process

Roles and responsibilities were not clearly defined between the DBSG and the NSRAC. A process defining how decisions were to be made and at what point was not clear. The NSRAC commenced its work without a defined terms of reference from the DBSG. A terms of reference was later provided, but elements of it lacked a clear basis for NSRAC fisheries and OIG members to jointly interpret.

This hampered the pace of progress. As pressure to reach a conclusion grew, stakeholders became frustrated with what were perceived to be unrealistic deadlines. For the fishing industry members this was due to the necessity to closely engage with their constituent members on the fine scale details of proposed management zone boundaries.

Once it was clear that fishing and OIG members of NSRAC Focus Group were unable to reach consensus, no mechanism existed to generate a compromise or resolution. With the submission of separate and divergent advice to DBSG from, respectively, the fishing and OIG constituencies of the NSRAC, the process ended abruptly with no further constructive dialogue between DBSG and the NSRAC on resolving the disparity in the NSRAC advice.

### 2.1.3 Evidencing process

The lack of clarity in the terms of reference, in part, likely reflected the uncertainty that existed in the evidence base to justify measures. Particularly at the start of the process the evidence base for guiding NSRAC deliberations was limited by a lack of clarity reflected in the different conservation objectives across the Dogger Bank complex, but also over the range of coverage of management zones that needed to be closed to gears deemed to cause habitat deterioration in order to meet the conservation objectives. Efforts made to justify the percentage coverage of management zones, for example, was principally informed by comparisons with spatial fisheries management measures elsewhere. ICES advice requested by DBSG following the production of the NSRAC advice provided no further clarification. Member States also had different ambitions on what percentage coverage of management zones should apply in their waters.

Consequently, NSRAC Focus Group members lacked confidence in the objectivity and transparency of the evidence base which was key to reaching a shared understanding on the level of risk posed by fishing activities to the conservation features. The industry members were particularly critical, perceiving that as the process progressed, criteria on the design of measures became more onerous without a legitimate scientific justification. This lack of confidence therefore led both sides to draw on selective elements of the evidence base in order to justify their positions.

The scientific justification for measures ultimately lacked a structured evidence framework acceptable to and agreed to by NSRAC members. Such a framework needed to be based on a systematic assessment (equivalent to risk assessment or environmental impact assessment methodologies) of the impact of existing fishing activities across the Dogger Bank SAC complex.



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The NSAC considers that its experience with the Dogger Bank process offers important lessons for stakeholder participation in the design of fisheries management measures in MPAs, including the need for:

- A joined-up process between stakeholders, managers and scientific advisors.
- Clarity in timelines, roles and responsibilities, decision-making authority, and transparency in the decision-making process.
- A structured evidencing process set alongside and in support of the decision-making process that can effectively evaluate the risk presented by fisheries to site conservation objectives and the extent to which alternative management options are likely to mitigate that risk.
- A transboundary, strategic environmental impact assessment to examine cumulative impacts on the SAC complex and on the fisheries towards an integrated management plan, from which fisheries measures can be derived and proposed in a Joint Recommendation on conservation measures under Article 11.

Addressing these matters should bring focus and clarity to the application of the precautionary principle and proportionality in relation to the way scientific evidence is provided on the (possible) impacts of fisheries, taking into account cumulative and in-combination effects on the desired conservation status. In turn this should help to ensure confidence in the legitimacy of decisions and prevent the deliberative process from becoming overtly political.

## **2.2 Recommendations for co-designing fisheries management measures with stakeholders**

The NSAC makes the following recommendations to decision-makers when working with stakeholder groups to co-design management measures for MPAs during the preparatory phases of developing a Joint Recommendation. As legal requirements currently stand, in practical terms these recommendations are made to apply *before* the initiating Member State triggers Article 11(3), allowing for a six-month period in order to submit a Joint Recommendation:

### **2.2.1 Preliminary engagement**

The co-design process should commence once the Member State has determined that fisheries management measures are required in order to meet site conservation objectives. This may include evidence underpinning the site conservation objectives, evidence on the sensitivity and vulnerability of marine habitats and/or species with respect to fishing pressures, and site condition. Evidence may not be comprehensive at the outset but should at least be equivalent to that applied in screening for likely significance (in the context of Appropriate Assessment methodology). There should be a clear legal basis at a national and EU level for the introduction of measures.



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Using this information, the first stage of engagement should focus on communicating the legal and scientific rationale for measures towards grounding a common understanding with stakeholders.

## **2.2.2 Terms of reference and process design**

Once an understanding of the basis for measures has been established, the terms of reference and the evidence-based engagement process can be planned. This should include:

- The legal and scientific rationale for developing measures (drawing on 1 ('Background') above).
- Defining the decision-making authority over the development of the fisheries management proposal and the role of stakeholders in proposing management options and informing decisions.
- Defining the group of stakeholders and a clear scope of inclusiveness of the NSAC and potentially other stakeholders involved in the co-design process.
- Defining an independent scientific advisory process and how it will relate to informing or supporting the co-decision process.
- Evaluating the existing evidence base to determine additional evidence needs, where relevant.
- Planning how evidence gaps are to be addressed.
- Defining the anticipated scientific risk assessment methodology to be applied, leading from the preliminary evidence base towards framing management options and underpinning the final preferred management proposal.
- Time frame and anticipated staging in order to conclude the process.

## **2.2.3 Developing management options**

Potential management options should be developed with stakeholders in order to be subject to a risk assessment and to feed into impact assessments. The following considerations may be taken into account at this stage:

- Once a preliminary analysis has been carried out on the existence, extent and consequences of the identified risks that suggests significant effects of fishing activity on the conservation features, options should be scoped so that they are realistic and judged to have the potential to meet site conservation objectives. Scoping may be informed by drawing upon the existing evidence base and any additional evidence following gap analysis.
- Options need to be practical so that appropriate control measures can be implemented to ensure regulatory compliance and limit the potential of unintended compliance breaches.
- Spatio-temporal analysis of fishing pressures, drawing on positioning data of fishing activities where available combined with information on the physical effects of the fishing gears, will likely be important in understanding the overall intensity of fishing pressures and hence the risk to conservation features.
- Management options for fisheries are tested in combination and in cumulation with other (transboundary) environmental impacts.



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Information on the consequences and impacts of management scenarios may also be gathered from stakeholders at this point in order to inform the impact assessment. This may include stakeholder knowledge on where fishing activities may be displaced to (if relevant).

## 2.2.4 Options evaluation and preferred option selection

Once risk assessments have been prepared, these may be presented back to stakeholders so that the level of risk associated with each of the proposals, residual uncertainty and the effectiveness of measures in meeting conservation objectives can be understood. Impact assessment information relating to the options may also be considered in further detail at this point, including displacement considerations, and cumulative and in combination effects<sup>7 8</sup>.

In light of this, the level of consensus for a preferred option may then be tested. If it is not possible at this point to reach a consensus-based decision between the Member State and all stakeholder constituencies involved in the co-design process, it may be necessary for the Member State to facilitate either a compromise or determine a proposal based on its own view of the findings inferred from the evidence base, taking account of the views provided by stakeholders during the process. This final proposal should then be subject to scrutiny by the independent scientific advisory process (see 4<sup>th</sup> bullet in 2.2.2 above) to ensure fisheries management measures allow conservation objectives to be met.

NSAC acknowledges that it will be the responsibility of the Member State to then proceed with its preferred option as the basis for concluding a Joint Recommendation pursuant to Articles 11(2) and 11(3) of the CFP.

## 3. Recommendations on improving the process as described under Articles 11 and 18 of the Regulation (EU) 1380/2013 (the CFP)

### 3.1 Introduction

Until the reform of the CFP in 2013, only soft law guidelines of the Commission were in place to facilitate the process of managing fishing activities in Marine Protected Areas (MPAs) of Member States (see the guidance document for requesting CFP measures in Natura 2000 areas, which the Commission published in 2008<sup>9</sup>). The Dogger Bank process started with an application for measures in MPAs by the Member States to the Commission, followed by ICES advice and NSRAC opinion and subsequently the submission of the proposals for measures

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<sup>7</sup> This approach is consistent with the [guidelines](#) adopted in the interinstitutional agreement on the need for "better regulation" of 13 April 2016.

<sup>8</sup> The preparation of a fisheries risk assessment, impact assessment, monitoring and implementation measures and displacement of fishing effort are listed as elements of good practice with respect to information provided with the submission of joint recommendations ([European Commission \(2018\) Staff Working Document on the establishment of conservation measures under the Common Fisheries Policy for Natura 2000 sites and for Marine Strategy Framework Directive purposes](#)).

<sup>9</sup> 'Fisheries measures for marine Natura 2000 sites - A consistent approach to request for fisheries management measures under the Common Fisheries Policy' (EC, 2008).



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in MPAs in the EEZ to Council and Parliament for co-decision. However, the compulsory co-decision process proved to be a major obstacle.

The entry into force on 1 January 2014 of Regulation (EU) 1380/2013 of the European Parliament and of the Council on the Common Fisheries Policy (the CFP "basic regulation", or "the CFP"), brought in the current regionalised approach and new dedicated rules for the adoption of conservation measures necessary for compliance with European Union environmental legislation, comprising the obligations under Article 4 of the Birds Directive, Article 6 of the Habitats Directive and Article 13(4) of the Marine Strategy Framework Directive. These rules are set out in Article 11 of the CFP, "Conservation measures necessary for compliance with obligations under Union environmental legislation", in conjunction with the general provisions of Article 18 of the CFP, "Regional cooperation on conservation measures". The 2008 guidelines of the European Commission were updated by the 2018 Commission Staff Working Document on the establishment of conservation measures under the Common Fisheries Policy for Natura 2000 sites and for Marine Strategy Framework Directive purposes.

The current CFP regime requirements and procedures are different: Article 11 is a hard law provision; co-decision is no longer compulsory, and the group of Member States to be consulted is expanded from neighbouring states to Member States with a direct management interest. The consensus-based nature of the decision-making process by the Member States involved in the Article 11 procedure is a given and a result of the regionalisation of the process. However, it makes the procedure sensitive to the risk of Member States not reaching agreement on a Joint Recommendation.

There also exists a lack of a definition of essential terms in the Articles 11 and 18 and the lack of clear rules for stakeholder engagement, especially with the Advisory Councils<sup>10</sup>. The Article 11 procedure for the Dogger Bank Natura 2000 sites has highlighted these challenges as it has not been possible for Member States to come to agreement without severe delays in the procedure, and this has resulted in a Joint Recommendation that lacks a methodical scientific underpinning, and which has not been subject to transparent stakeholder consultation.

### **3.2 Recommendations on improving the process as described under Articles 11 and 18 of the CFP**

In the following, the NSAC provides recommendations for improving the process as described under Articles 11 and 18 by means of (a) further clarification by and adaptation of the 2018 Commission Staff Working Document (SWD (2018) 288 final), or (b) a future Commission Guidance on Articles 11 and 18 of the CFP, or (c) in a future Regulation guiding Articles 11 and 18 of the CFP:

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<sup>10</sup> In this respect, see also the NSAC Advice Ref 5-1516, 'Reflections and recommendations on the consultation procedure by Member States regarding Article 11 of the CFP (Regulation 1380/2013)'.



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### **3.2.1 Clarifying timelines and deadlines of the subsequent stages of the Article 11 process**

- Make explicit which elements of information in the (non-exhaustive) ‘Elements of Good Practice Box’ need at least to be provided to meet the ‘sufficient information’ criterion for the purpose of Article 11(3), such as to trigger the start of the six-month period.
- Include a provision that the Commission, if requested by the initiating Member State(s), by a direct management interest Member State, and/or by the regional Member States group, may determine whether sufficient information is provided or that additional information is needed, and that this is done in a timely manner to ensure the delivery of the measures.

### **3.2.2 Ensuring sufficient scientific underpinning of measures to achieve the objectives of the conservation measures under Article 11 (1). See also recommendations for stakeholder consultation hereunder:**

- Clarification is needed on what is meant by ‘any available scientific advice’ which according to Article 11(3) the Commission must take into account when adopting the measures.
- With respect to Article 11(3) and/or Article 18(2), include guidance that the Commission, after receiving a Joint Recommendation from the Member States – at the start of the Commission’s 3 months leading up to adoption – should allow the relevant Advisory Council(s) and other appropriate stakeholders to provide the Member States, when formulating the Joint Recommendation, with any available scientific evidence additional to the scientific contribution which was already provided by the ‘relevant scientific bodies’, in accordance with Article 18(2).

### **3.2.3 Full integration, transparency and functioning of stakeholders, within NSAC and in relation to Member States in the context of Articles 11 and 18**

- Include guidance for engaging with stakeholders in the informal stages of planning the management proposal and the application of scientific evidencing to allow for the provision of a co-design process as identified in this advice (section 2.2, above), including planning and timescales of consultation stages in the application of Article 11 and Article 18 procedures with Advisory Councils and other appropriate stakeholders, prior to submission of Joint Recommendations. This should also help to ensure that the approach taken by the Member States will be uniform and consistent.
- With respect to Article 11(3) and/or 18 (2), a provision should require that consultation of the relevant Advisory Councils on *inter alia* the scientific rationale of the measures should take place prior to the start of the 6 months period referred to in Article 11(3).

### **3.2.4 Involvement of the Commission**

Provide further guidance on the division of roles of respectively DG Mare and DG Envi in the Article 11 procedure:



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- Secure involvement of DG Mare, in their role of overseeing the process, in the informal period (prior to the provision of sufficient information), in the 6 months period (following provision of sufficient information) prior to submitting the proposal, to check that the process outlined in Article 11, including consultation of the relevant Advisory Councils, is followed.
- Secure involvement of DG Envi in the informal period (prior to the provision of sufficient information), in the 6 months period prior to submitting the proposal and during the Commission's deliberations after the proposal is submitted to the Commission, to assess whether the proposed measures comply with the EU environmental legislation.



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## **Annex: Recommendations on the internal functioning of the AC – lessons learned**

The chair of the former Dogger Bank Steering Group conceded at the NSAC Ecosystem Working Group of 19<sup>th</sup> March 2019 that the biggest ‘loss’ of the initiative was that a ‘stakeholder-driven process lost its stakeholders along the way’ and that lessons should be learned from this. Although external factors beyond NSAC’s control contributed in large measure to the breakdown of the stakeholder process and the failure of the NSAC to reach a consensus on fisheries management measures, the internal functioning of the NSAC was also a significant factor.

The task of trying to reach consensus was delegated to a NSAC Dogger Bank Focus Group, led by the chair of the then Spatial Planning Working Group. Focus Group workshops and related meetings were facilitated by David Goldsborough (at the time of Wageningen UR Centre for Marine Policy) under the remit of Dogger Bank as a case study for delivery of MASPNOSE (see Background section 1, above). The lessons listed below draw on David Goldsborough’s later reflections on the entire NSAC process and its interaction with the Dogger Bank Steering Group and other actors.

### **a) Capacity for NSAC to engage**

Delivering fishery management measures across three adjoining Natura 2000 sites, each under a different national jurisdiction, was highly complex, requiring multiple workshops – a challenge for which the NSAC was not equipped in capacity terms of funding, scientific knowledge and other support. Accepting the Dogger Bank Steering Group’s (DBSG) invitation to provide stakeholder advice on such a zoning proposal was only possible thanks to the fortuitous coincidence of timing with MASPNOSE which provided a budget and facilitation. As David Goldsborough put it: ‘Without MASPNOSE this process would never have happened’.

**Lesson:** The scope and scale of issues on which NSAC can effectively engage and its ability to deliver quality advice have always been – and continue to be – heavily constrained by internal capacity and skills. The Dogger Bank was a rare example of NSAC linking with an external enabling agency. NSAC must seek comparable alliances if it chooses to engage with future challenges of similar scale to Dogger Bank.

### **b) Rules of engagement**

The NSAC Dogger Bank Focus Group had no precedent for trying to agree fisheries management measures on such a large trans-boundary scale. As such, there should have been more preliminary attention to project planning. Despite excellent facilitation at meetings, the NSAC’s Dogger Bank focus group lacked a clear initial ‘script’ defining roles, responsibilities, timelines and agreed outputs; timelines were at times unrealistic (though meeting them was made more difficult by lack of a clear ToR from the DBSG).



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**Lesson:** Conditions must be clear from the outset in terms of budget, access to evidence etc; clarity is needed on who decides on what and when.



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