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Penny Pickett,
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2 Eastbourne Terrace
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Your ref: 2 505-TKN-CON-K-LO-0003

03 August 2018

Dear Ms Pickett

PLANNING ACT 2008

**APPLICATION FOR A NON-MATERIAL CHANGE TO THE TRITON KNOLL OFFSHORE
WIND FARM ORDER 2013**

1. I am directed by the Secretary of State for Business, Energy and Industrial Strategy (“the Secretary of State”) to advise you that consideration has been given to the application which was made by Triton Knoll Offshore Wind Farm Limited (“the Applicant”) on 19 February 2018 for a change which is not material (“the Application”) to the Triton Knoll Offshore Wind Farm Order 2013 (“the 2013 Order”) under section 153 of, and Schedule 6 to, the Planning Act 2008 (“the 2008 Act”). This letter is the notification of the Secretary of State’s decision in accordance with regulation 8 of the Infrastructure Planning (Changes to, and Revocation of, Development Consent Orders) Regulations 2011 (as amended) (“the 2011 Regulations”).
2. The original application for development consent under the Planning Act 2008 was submitted to the Planning Inspectorate by the Applicant on 31 January 2012 and was granted development consent on 11 July 2013. Consent was granted for the construction and operation of an offshore wind turbine generating station located in the North Sea approximately 33km off the coast of Lincolnshire and 46km off the coast of Norfolk with a gross electrical output of up to 1,200MW and comprising up to 288 wind turbines.

3. The Applicant is seeking consent for a change to:
 - reduce the maximum electrical output capacity from 1,200MW to 900MW;
 - reduce the number of wind turbine generators from 288 to 90;
 - reduce the number of collector substations from 4 to 2;
 - remove the provision to allow for meteorological stations; and
 - remove the provision to allow for any high voltage direct current substations.

Consideration of the materiality of the proposed change

4. The Secretary of State has given consideration to whether the Application is for a material or non-material change. In doing so, he has had regard to paragraph 2(2) of Schedule 6 to the Planning Act 2008 which requires the Secretary of State to consider the effect of the change on the development consent order (“DCO”) as originally made.
5. There is no statutory definition of what constitutes a 'material' or 'non-material' amendment for the purposes of Schedule 6 to the Planning Act 2008 and Part 1 of the 2011 Regulations.
6. So far as decisions on whether a proposed change is material or non-material, guidance has been produced by the then Department for Communities and Local Government, the “Planning Act 2008: Guidance on Changes to Development Consent Orders” (December 2015) (“the Guidance”)¹. Given the range of infrastructure projects that are consented through the 2008 Act, and the variety of changes that could possibly be proposed for a single project, the Guidance cannot, and does not attempt to, prescribe whether any particular type of change would be material or non-material. However, it sets out certain characteristics that indicate that a change to a consent is more likely to be treated as a material change, namely:
 - (a) whether an update would be required to the Environmental Statement (from that at the time the original DCO was made) to take account of likely significant effects on the environment;
 - (b) whether there would be a need for a Habitats Regulations Assessment (“HRA”), or a need for a new or additional licence in respect of European Protected Species (“EPS”);
 - (c) whether the proposed change would entail compulsory acquisition of any land that was not authorised through the existing DCO; or
 - (d) whether the proposed change would have a potential impact on local people and businesses.
7. Although the above characteristics indicate that a change to a consent is more likely to be treated as a material change, these only form a starting point for assessing the materiality of a change. Each case must depend on thorough consideration of its own circumstances.

¹ <https://www.gov.uk/government/publications/changes-to-development-consent-orders>

8. The Secretary of State began his consideration of the materiality of the proposed variation by considering the 4 matters referred to in paragraph 6 above:

(a) The Applicant supplied supporting documents providing further environmental information which concludes that the reduction of the gross electrical output, number of wind turbine generators, collector substations, meteorological masts and high voltage direct current substations will not have any new significant effects or materially different effects from those already assessed in the original Environmental Statement for the 2013 Order. In the light of the analysis supplied by the Applicant and the responses to the consultation, the Secretary of State concludes that an update to the Environmental Statement is not required.

(b) There has been no increase in the extent of any environmental impact nor are there any new impacts from the proposed change to the 2013 Order. However, in the light of five new or proposed European sites located in the southern North Sea, the Secretary of State has undertaken an HRA of the likely effects of the Development (the 2013 Order, including the proposed change) on each of those site's qualifying features. However, the Secretary of State does not consider the need for this HRA to have been triggered by a change in environmental impacts resulting from the proposed change to the 2013 Order. In addition, there is no indication from Natural England (NE) or any other consultee that there is a need for any new or additional EPS licence to be granted before the change requested by the Applicant could be put into effect.

The Secretary of State's HRA is appended to this decision letter and a summary of this assessment is provided in paragraphs 26 - 34. His conclusion is that the Development, alone and in-combination with other plans and developments, will not have an adverse effect on the integrity on any of the above listed European sites.

(c) The proposed change does not entail any new compulsory acquisition of land.

(d) The potential impacts on local people and businesses are no greater than those that arise from the development permitted by the 2013 Order.

9. The Secretary of State therefore concludes that none of the specific indicators referred to in the Guidance, or other relevant considerations, suggest that this proposed change is a material change. He has also had regard to the effect of the change to consider whether there are any other circumstances in this particular case which would lead him to conclude that the proposed change is material but has seen no evidence to that effect.

10. The Secretary of State is therefore satisfied that the change proposed in the Application is not material and should be dealt with under the procedures for non-material changes.

Consultation

11. The Application was made publicly available on the Planning Inspectorate's website on 20 February 2018, such that there was opportunity for anyone not notified to also submit representations. The Secretary of State sought further environmental information from the Applicant in order to undertake an HRA of the likely significant effect of the Development. This information was published on the Planning Inspectorate's website on 29 June 2018.

12. The Applicant publicised this Application in accordance with regulation 6 of the 2011 Regulations and on 20 February 2018 consulted the persons required by regulation 7 of the 2011 Regulations, in the manner prescribed. The deadline for receipt of representations on the Application was 30 March 2018. The Secretary of State conducted a further consultation to seek views on further environmental information submitted by the Applicant on potential impacts and effects on new protected areas to protect a range of marine habitats and species in the southern North Sea that have been introduced by the UK Government after the development consent order was granted in 2013. The deadline for receipt of representations on this information was 12 July 2018.
13. Representations with no comments on the proposed change were received from Norfolk County Council, the Marine Management Organisation, Historic England, Maritime and Coastguard Agency, Trinity House, and the Crown Estate.
14. EDF, while not objecting to the proposed change, responded to raise concerns about a good neighbour agreement negotiated between EDF and the Applicant during the examination of the 2013 Order, which remains unsigned. The Applicant responded on 30 April 2018 to confirm that discussions with EDF had re-commenced and the draft good neighbour agreement addresses all of the issues raised by EDF in their response to the consultation on the Application. EDF did not submit any further comments following the Applicant's response.
15. Representations specific to HRA matters were received from NE, the Joint Nature Conservation Committee ("JNCC"), the Wildlife Trusts and Whale and Dolphin Conservation. These comments are summarised in paragraphs 28 – 34, below. The Secretary of State also consulted the Royal Society for the Protection of Birds, but the organisation did not respond.
16. No representations were received from any private individuals.
17. The Secretary of State has considered the representations received in response to the consultation and does not consider that any further information needs to be provided by the Applicant or that further consultation of those already consulted is necessary.

Environmental Impact Assessment

18. The Secretary of State has considered whether the Application would give rise to any new significant effects or materially different effects when compared to the effects set out in the Environmental Statement for the development authorised by the 2013 Order.
19. The Secretary of State is satisfied that the Supporting Statement provided by the Applicant is sufficient to allow him to make a determination on the Application.
20. The Secretary of State has considered the information provided and the views of consultees. The Secretary of State agrees with the Applicant's conclusions that there will not be any new or materially different likely significant effects when compared to the effects set out in the environmental statement for the development authorised by the 2013 Order and as such considers that there is no requirement to update the Environmental Statement.

21. As there are no new significant environmental impacts as a result of the proposed change, the Secretary of State does not consider that there is any need for consultation on likely significant transboundary effects.

Habitats

22. The Secretary of State has considered the relevant and important policies in respect of the United Kingdom's obligations as set out in the Conservation of Habitats and Species Regulations 2017 and the Conservation of Offshore Marine Habitats and Species Regulations 2017 (collectively known as "the Habitats Regulations"). The Habitats Regulations require the Secretary of State to consider whether the development would be likely, either alone or in combination with other plans and developments, to have a significant effect on a European site, as defined in the Habitats Regulations. If likely significant effects cannot be ruled out, then an Appropriate Assessment must be undertaken by the Secretary of State to address potential adverse effects on site integrity. The Secretary of State may only agree to the Application if he has ascertained that it will not adversely affect the integrity of a European site.

23. As the proposed change reduces the total number of structures and activities originally consented, the Secretary of State has concluded that any impacts associated with the implementation of the Application would be the same or less than those already assessed.

24. However, since the publication of the HRA for the 2013 Order, UK Government has increased the number of protected areas within the marine environment. This includes several new Special Areas of Conservation ("SACs") and Special Protected Areas (SPAs), which have been identified to protect a range of marine habitats and species in the southern North Sea. Due to the timings, several new sites have not been fully considered before. As such, the Secretary of State has undertaken an HRA of the likely effects of the 2013 Order - including the changes requested within the Application on habitats, designated species and wild birds within five new European Sites in the southern North Sea:

- Greater Wash Special Protection Area
- Southern North Sea candidate Special Area of Conservation
- Flamborough and Filey Coast proposed Special Protection Area
- Outer Thames Estuary Special Protection Area extension
- Hamford Water Special Protection Area extension

25. Upon completing his assessment the Secretary of State has concluded that the Development is not likely to have a significant effect on the four SPAs, either alone or in combination with other plans or developments. However, in view of the information provided, the Secretary of State concluded that underwater noise generated during the construction of the Development is likely to have a significant effect on harbour porpoise – the sole qualifying feature of the Southern North Sea candidate SAC ("SNS cSAC").

26. As likely significant effects could not be excluded, the Secretary of State undertook an Appropriate Assessment. Within this he considered the effect of underwater noise generated during construction on harbour porpoise in view of the site's conservation objectives. His Appropriate Assessment concluded that:

- The Marine Mammal Mitigation Protocol in the deemed Marine Licences provides sufficient mitigation that minimises the potential for risk of mortality and injury from underwater noise from the construction of the Development.
- Underwater noise from the construction of the Development will not result in an adverse effect on site integrity due to the location of the Development and the relatively small area of the Southern North Sea cSAC predicted to be impacted.
- There would be no adverse effect from underwater noise from the construction of the Development on harbour porpoise prey as potential impacts on fish receptors would be localised, short term and reversible.

27. On this basis, the Secretary of State has concluded that the Development will not have an adverse effect alone and in-combination with other plans or developments. In coming to this conclusion he has considered all the information submitted with the application, alongside the consultation responses submitted by the consultees. The Secretary of States' consideration of all the consultation responses relevant to his HRA is provided below.

Natural England and the Joint Nature Conservation Committee

28. The JNCC responded to consultation only to say that it would be advising Natural England 'behind the scenes' and would not submit a separate response. Natural England provided technical comments on the Applicant's Report to Inform Appropriate Assessment on 19th April 2018. The Applicant responded to all comments in a letter to Natural England dated 25th May 2018. The letter provided evidence that all matters had been agreed between the two parties in light of the Applicant's responses. Natural England provided no further comment during the second consultation period. The Secretary of State is content that no further matters need to be resolved.

The Wildlife Trusts

29. In a letter dated 28th March 2018, the Wildlife Trusts commented that it does not support the assessment approach to harbour porpoise disturbance referred to in the HRA as "draft advice from SNCBs".

30. It has been noted in the Secretary of State's HRA that this advice from the SNCBs is still in draft form and is not yet published. While the draft advice is subject to ongoing discussion among the relevant bodies, the Secretary of State considers that it can be used as an indicative management tool to limit the spatial distribution of noise from offshore wind operations within the SNS cSAC. In coming to his conclusion for this HRA the Secretary of State has taken account of several factors, including the Development's location (22.93 km from the SNS cSAC) and the results calculated using the draft advice from the SNCBs.

Whale and Dolphin Conservation

31. In a letter dated 12th July 2018, Whale and Dolphin Conservation commented on a reduced impact to cetacean species due to the reduced project parameters proposed within the Application. However, in line with the Wildlife Trusts submission, Whale and Dolphin Conservation also indicated its lack of support for the draft advice from the SNCBs on harbour porpoise disturbance.
32. Whale and Dolphin Conservation also referenced the Secretary of State's forthcoming review of offshore wind farm consents and highlighted the requirement to consider all developments cumulatively within the review. Whale and Dolphin Conservation also provided a paper with several of recommendations for the review.
33. The Secretary of State's review has not yet been published and it would be inappropriate to comment on its conclusions at this time. However, it is noted that the recommendation paper provided by Whale and Dolphin Conservation has already been submitted as part of the review's call for information, which took place in October 2017. As such the Secretary of State will consider these recommendations as part of the review of consents process.
34. At this time the Secretary of State can confirm that, on the basis of his HRA conclusions, the Triton's Knoll's project consent does not require further review against the SNC cSAC conservation objectives. However, the effects of Development on the SNS cSAC will be considered cumulatively as part of the review's in-combination assessment.

General Considerations

Transboundary Impacts

35. Under Regulation 32 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (as amended), the Secretary of State has considered whether the proposed development is likely to have a significant effect on the environment in another European Economic Area ("EEA") State. In the application for the 2013 Order, the Secretary of State concluded that there would be no likely significant effects on the environment of another EEA State. The Secretary of State has considered whether the change sought through this Application will have any potential impacts on another EEA State and, as set out above, has concluded that there is no change in the environmental impacts considered within the existing environmental statement for the Development. Consequently, the Secretary of State has concluded that there would not be likely significant effects on the environment of any other EEA state whether the Application is considered of itself or cumulatively with the environmental effects already considered for the 2013 Order.
36. The Secretary of State has also considered whether there may be potential impacts on European sites in other EU Member States, known as transboundary sites, from this Application. Noting that the Secretary of State has reached a conclusion that there will be no adverse effect on European sites, the Secretary of State has also concluded that there is no route whereby sites in other EU Member states may be impacted by this Application.

37. The Secretary of State therefore concludes there is no need for transboundary consultation with other EEA States.

Equality Act 2010

38. The Equality Act 2010 includes a public sector equality duty. This requires a public authority, in the exercise of its functions, to have due regard to the need to (a) eliminate discrimination, harassment and victimisation and any other conduct prohibited by or under the Act; (b) advance equality of opportunity between persons who share a relevant protected characteristic (e.g. age; gender; gender reassignment; disability; marriage and civil partnerships;² pregnancy and maternity; religion and belief; and race) and persons who do not share it; and (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

39. The Secretary of State has had due regard to the need to achieve the statutory objectives referred to in s149 of the Equality Act 2010, and is satisfied that there is no evidence that granting this Application will affect adversely the achievement of those objectives.

Human Rights Act 1998

40. The Secretary of State has considered the potential infringement of human rights in relation to the European Convention on Human Rights, by the amended development. The Secretary of State considers that the grant of development consent would not violate any human rights as enacted into UK law by the Human Rights Act 1998.

Natural Environment and Rural Communities Act 2006

41. The Secretary of State, in accordance with the duty in section 40(1) of the Natural Environment and Rural Communities Act 2006, has to have regard to the purpose of conserving biodiversity, and in particular to the United Nations Environmental Programme Convention on Biological Diversity of 1992, when granting development consent. The Secretary of State is of the view that the Application considers biodiversity sufficiently to accord with this duty.

Secretary of State's conclusions and decision

42. The Secretary of State notes that the Applicant was awarded a Contract for Difference for a generating capacity of 860MW and is therefore seeking to reduce the maximum electrical output from 1,200MW to 900MW, reduce the number of wind turbine generators from 288 to 90, reduce the number of collector substations from 4 to 2, remove the provision to allow for meteorological stations and remove the provision to allow for any high voltage direct current substations.

43. The Secretary of State has considered the ongoing need for the development. The Secretary of State notes that the Overarching National Policy Statement for Energy (EN-1) and the National Policy Statement for Renewable Energy (EN-3) both set out that for the UK to meet its energy and climate change objectives, there is an urgent need for new

² In respect of the first statutory objective (eliminating unlawful discrimination etc.) only.

electricity generation plants such as offshore wind farms. The Secretary of State considers, therefore, that the ongoing need for the Development is established.

44. The Secretary of State has considered the nature of the proposed change, noting that it would have no additional significant environmental effects. He notes that the proposed change relates to reduction in the total number of structures and associated activities across all phases of the Development and will therefore remain within the parameters consented by the 2013 Order. He concludes that the proposed change is not material and that it would be appropriate and advantageous to authorise the proposed change as detailed in the Application.

45. For the reasons given in this letter, the Secretary of State considers that there is a compelling case for authorising the proposed change to the 2013 Order as set out in the Application. The Secretary of State is satisfied that the change requested by the Applicant is not a material change to the 2013 Order, and has decided under paragraph 2(1) of Schedule 6 to the 2008 Act to make a non-material change to the 2013 Order so as to authorise the change detailed in the Application.

Modifications to the draft Order proposed by the Applicant

46. Minor drafting improvements and amendments have been made by the Secretary of State to the draft Order proposed by the Applicant. These changes do not materially alter the terms of the draft Order.

Challenge to decision

47. The circumstances in which the Secretary of State's decision may be challenged are set out in the note attached at the Annex to this letter.

Publicity for decision

48. The Secretary of State's decision on this Application is being notified as required by regulation 8 of the 2011 Regulations.

Yours sincerely,

Gareth Leigh

Gareth Leigh

Head of Energy Infrastructure Planning

LEGAL CHALLENGES RELATING TO APPLICATIONS FOR DEVELOPMENT CONSENT ORDERS

Under section 118 (5) of the Planning Act 2008, a decision under paragraph 2(1) of Schedule 6 to the Planning Act 2008 to make a change to an Order granting development consent can be challenged only by means of a claim for judicial review. A claim for judicial review must be made to the Planning Court during the period of 6 weeks beginning with the day after the day on which the Order is published. The Amending Order as made is being published on the date of this letter on the Planning Inspectorate website at the following address:

<https://infrastructure.planninginspectorate.gov.uk/projects/east-midlands/triton-knoll-offshore-wind-farm/>

These notes are provided for guidance only. A person who thinks they may have grounds for challenging the decision to make the Order referred to in this letter is advised to seek legal advice before taking any action. If you require advice on the process for making any challenge you should contact the Administrative Court Office at the Royal Courts of Justice, Strand, London, WC2A 2LL (0207 947 6655)