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Your ref:

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When telephoning please ask for: Elizabeth Dunn

Dear Sirs

**Vattenfall Wind Power Limited - proposed Kentish Flats Extension off-shore wind farm
Application reference EN010036**

We write further to the Examining Authority's letter of 28 June 2012 in relation to the above application, and in particular R17[3]-9, which relates to the Environmental Statement (ES) and Habitats Regulations Assessment (HRA) information submitted by Vattenfall. As well as setting out Vattenfall's position on the points raised by the Examining Authority (ExA), this letter contains a number of questions to the ExA that are requests for advice under section 51 of the Planning Act 2008.

Question R17[3]-9 asks Vattenfall to confirm:

"How it wishes to address any update and addition to the ES including necessary or advisable publicity and consultation requirements?"

The context to this question is provided in the preceding paragraphs where it is stated that:

"In response to information emerging at the hearings together with various questions raised by the ExA, the Applicant has provided substantial additional information regarding the likely effects of the proposed Kentish Flats Extension upon the Outer Thames Estuary SPA, including the HRA Addendum Report running to 111 pages including annexes and references"

In addition, that;

"The ExA notes that the recently submitted HRA Addendum Report and its assessment of the likely effect of the Kentish Flats Extension upon the Red Throated Diver and the Outer Thames SPA do not form part of the submitted Environmental Statement. The latest HRA submissions do alter the assessment submitted within the Environmental Statement which has previously been the subject of public consultation."

Vattenfall is unclear as to the reason for the ExA's question and the basis for its conclusions that (1) "substantial additional information regarding the likely effects of the proposed Kentish Flats Extension upon the Outer Thames Estuary SPA" has been provided in response to the questions and issues raised during the examination of the application; and (2) that "the latest HRA submissions alter the assessment submitted within the ES". As we have not been able to meet with you to discuss this further this letter sets out Vattenfall's position on the points raised and requests formal advice under s51.

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“Additional information”

As noted above, Vattenfall is not clear as to the basis for the ExA’s conclusion that it has provided “substantial additional information regarding the likely effects of the proposed Kentish Flats Extension upon the Outer Thames Estuary SPA” during the examination of the application.

The examination of the Kentish Flats Extension has involved four rounds of questions from the ExA, as well as two days of hearings. In relation to the potential effects of the proposal on the Outer Thames Estuary SPA, the ExA has raised questions relating to the conclusions reached in the HRA and the relevance of matters raised by other parties. In order to assist the examination, Vattenfall has endeavoured to provide detailed and thorough responses to those questions and to fully reference and, where appropriate, supply any supporting documentation. For the most part, this has involved further explanation of points made in the HRA. Any additional information not already in the HRA has been provided in response to questions raised by the ExA, or matters raised by other parties to the examination. The provision of the HRA addendum report was not initiated by Vattenfall, but was requested by the ExA in the Technical Advice Note¹ issued prior to the Issue Specific Hearing relating to Habitats issues. The ExA’s Technical Advice Note states:

“The submitted HRA report and ES (Section 9) present two differing models for calculating flight density (on which displacement and collision calculations are based) and it is unclear where peak counts or mean counts have been used. The baseline data used also varies. In light of the agreed method and results in the SoCG it may be appropriate to update these documents via an addendum, so that the methodology, calculations, and results are clearly presented in line with what has been agreed.”

Vattenfall was unclear as to why an ES update was necessary and what should be included in such an update, hence its request for clarification from the case officer on 18 June 2012. No clarification has been provided, therefore Vattenfall’s response to the points raised in the Technical Advice Note is set out below.

Flight density

Flight density has been calculated consistently throughout the assessment process. The methodology is detailed in ES sections 9.5.6 - 9.5.11 (and HRA report sections 7.1.2 – 7.1.4), and is based on mean counts in order to properly reflect the overall usage of the airspace through the whole season (not just a single peak) as is required for a collision risk assessment.

Peak/mean counts

The assessment of disturbance risk has been presented in relation to both peak and mean counts, as both are important in the assessment process. The peak count has been used as a measure of the importance of a particular area (such as the Kentish Flats Extension wind farm site) for each species at any one time, whilst the mean count gives an overall integrated value of the use that birds make of an area. The key cumulative assessment of disturbance of red-throated diver, as explained in the ES section 9.11.8 and the HRA report section 8.3.9, is based on analysis of the mean densities of divers extracted from the JNCC data set, as agreed in section 5.5 of the SoCG with Natural England.

Baseline data

The baseline data used does not vary and the results presented within the ES and HRA are the same as those presented within the HRA Addendum.

¹ Topic Specific Hearing Habitats Regulations Assessment, Proposed Kentish Flats Offshore Wind Farm Extension, Technical Note, May 2012

Vattenfall provided the HRA Addendum to assist the ExA, taking the opportunity to draw together its responses and the relevant parts of the Statement of Common Ground agreed with Natural England into one document.

The scope of the HRA Addendum is set out below:

- 1 Summary of the baseline and analysis used in the submitted HRA and ES. This confirms that the JNCC dataset used in both assessments is appropriate and that the citation population levels considered in those documents should be the primary basis on which potential effects are considered.
- 2 Full workings for figures presented in the ES and HRA for displacement from JNCC data and interaction figures at request of Natural England. These workings do not alter the assessments undertaken and are not necessary to explain or understand the displacement calculations applied in the ES.
- 3 Inclusion of numbers of displaced birds (alongside the percentages set out in the ES and HRA) at request of Natural England.
- 4 Further explanation of statement regarding the under-estimation of the SPA population and ecological significance of displacement for the purposes of the HRA using publicly available references.
- 5 Calculations of alternative pre-construction baseline – Natural England requested these numbers were produced, they are discussed in the note of 22 March but are not relied upon by Vattenfall and are not included in the analysis presented in the HRA Addendum.
- 6 Consideration of the existence of threshold levels of acceptability in determining whether there is the potential for an adverse effect on integrity for the purposes of the HRA, based on published documents and guidance.
- 7 Discussion of the potential for loss of habitat as a result of displacement. Direct habitat loss is considered in the ES and in relation to indirect habitat loss it is Vattenfall's position that this is the effect same as displacement and is therefore fully considered in the ES assessment undertaken.
- 8 In response to a direct request from Natural England further clarification was provided of the sources of the collision mortality calculations used in the ES and HRA.
- 9 Updates to typographic errors as requested by the ExA – none of these affect the conclusions reached in either assessment undertaken.

The HRA Addendum and Vattenfall's responses (contained in Documents Ex1-Ex4) have not included the assessment of any additional data or material. Any information provided, not already in the HRA (such as calculations or explanation) has been in response to a direct request by either the ExA or another party, such as Natural England.

It is also relevant that Natural England's position was only revealed late on in the examination process, in its submission of 11 May. Vattenfall consequently sought to develop its arguments about the potential for the proposed development to affect the integrity of the Outer Thames Estuary SPA and in particular Natural England's suggestion of a threshold for displacement of 12.6%. This involved drawing on publicly available documents (such as the London Array Appropriate Assessment) but has not included the provision of any additional assessment of the impacts of the proposal. In the case of the London Array Appropriate Assessment (which appears to be the source of the 12.6% threshold), this was a document on which Natural England has sought to rely, but did not provide a copy for the examination.

Given the inquisitorial process followed in the examination of a nationally significant infrastructure project, it is inevitable that there will be a need to draw on material outside of the application documents to respond to issues and points raised. The examination process ensures that all those who are interested in the proposal are able to comment and make representations on any such material.

S51 request: please provide specific details of where substantial information regarding the effects of the proposed Kentish Flats Extension upon the Outer Thames Estuary SPA, not included within the application documents, has been provided in Vattenfall's responses to ExA questions and comments on other parties' responses.

Update/ addition to the Environmental Statement

As set out above, Vattenfall is unclear as to the basis on which the ExA has concluded that "the latest HRA submissions alter the assessment" set out in the Environmental Statement. The information provided during the examination, which is drawn together in the HRA Addendum, does not alter the ES assessment or the conclusions reached.

Focussing on red-throated diver, which is the conservation interest species for the Outer Thames Estuary SPA and has been the focus of the HRA during the examination, the conclusions of the EIA are that:

- 1 From the Kentish Flats Extension alone, there would be a negligible effect upon a very highly sensitive receptor resulting in a minor adverse (and not significant) impact (see table 9.19 of the ES); and
- 2 From the Kentish Flats Extension in-combination with other consented and operational schemes, the conclusion is that "much the greatest disturbance effect on the red-throated diver is likely to come from London Array. The Kentish Flats Extension would add only a very small amount to this (a 1.6%² increase in overall interaction) and it is not considered to result in any materially different outcome to the in-combination impact of the other consented sites" (see ES para 9.11.10).

Neither of these conclusions is affected by the information within the HRA Addendum document or any other documents submitted by Vattenfall during the examination.

The only information, not within the HRA or ES, but provided within the HRA Addendum, is the introduction of the "under construction" layout for London Array Phase 1. This information does not materially change the assessment or conclusions of the ES and has only come to light during the examination process. By itself this is not considered to merit an update to the ES and for the purposes of considering the likely significant effects of the proposal for EIA purposes, Vattenfall is content for the ExA to rely on the information within the ES in assessing the likely effects of the project which presents a "worst-case".

It is Vattenfall's position that no update to the ES is necessary and no further publicity or consultation is required in relation to the HRA Addendum or other material provided during the examination of the Kentish Flats Extension application.

² Applying the 1km buffer model. The interaction is also 1.6% applying the 2km buffer proportionate model and 1.9% applying the 2km buffer density model. As Vattenfall has maintained throughout – whichever model makes no material difference to the magnitude of effect of KFE.

Procedural requirements

It should also be noted that the consideration of environmental effects under the EIA Directive³ and the assessment of effects on European sites as required by the Habitats and Wild Birds Directives⁴ and the regulations relevant to each are separate processes which should be considered as such.

The relevant requirements in relation to EIA are set out in the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009⁵. These require formal public consultation to be undertaken on an environmental statement following submission⁶. Whilst there is no formal process prescribed in these regulations for the submission of additional environmental information by the applicant ("any other information"), it is clear that this information must be considered by the decision-maker⁷, along with the ES, representations, and any further information formally requested in determining the application⁸.

The Habitats Regulations⁹ require the applicant to provide the Competent Authority with such information as is necessary to complete an appropriate assessment, and for the Competent Authority to seek the views of the statutory nature conservation bodies. Consultation with the public is at the Competent Authority's discretion.¹⁰

The purposes of each assessment also differ. The EIA is focussed on the identification and assessment of likely significant effects of a project, and focusses on the magnitude of likely impacts. The HRA material is provided to assist the Competent Authority in undertaking its Appropriate Assessment of the proposal, and is focussed on the ecological consequences of identified impacts.

The Planning Inspectorate's advice note on Habitats Regulations Assessment¹¹ recognises that information may be sought during the examination to inform the appropriate assessment process which is separate to the ES.

"Either before or after consulting with the appropriate nature conservation bodies, the ExA may require the developer to provide further information reasonably required for the ExA to make a shadow assessment. The information may relate to additional environmental information, or further clarification about the proposal, including:

- *New information from surveys that need to be carried out, or*
- *Interpretation or analysis of existing data.*

If information, which is reasonably required to carry out the appropriate assessment, cannot be produced and consulted on within the examination period, the ExA will have to consider either seeking an extension to the timetable or the decision maker may need to consider refusing consent.

If the further information sought is also information which the ExA thinks should be included in the ES, the ExA must suspend the examination until the information is provided."

³ Council Directive 85/337/EEC

⁴ Council Directives 92/43/EEC and Council Directive 2009/147/EC (codifying Council Directive 79/409/EEC)

⁵ 2009/2263

⁶ *Ibid*, Reg 13

⁷ *Ibid*, Reg 3

⁸ For the purposes of the Regulations, 'environmental information' includes the environmental statement, including any further information and any other information, and other representations. 'Further information' means additional information which in the view of ExA or the Secretary of State is required to be included in a statement in order for it to be an environmental statement or an updated environmental statement. The procedure for the ExA to request further information is set out in Reg 17.

⁹ Conservation of Habitats and Species Regulations 2010/490

¹⁰ *Ibid*, Reg 61(2)-(4)

¹¹ Advice note ten: Habitats Regulations Assessment relevant to nationally significant infrastructure projects, p18

S51 request: in light of the explanation provided above and if the ExA still considers an update to the ES is necessary, please provide further clarification and a full list of instances where the recently submitted HRA addendum report alters the assessment submitted within the Kentish Flats Extension ES.

Further publicity/consultation

If, which for the reasons given above it is not accepted, the additional information provided by Vattenfall is considered by the ExA to trigger the EIA Directive, the obligation as confirmed in *Finn-Kelcey*¹², is that such information is made available to the public in accordance with the requirements of the Directive.


In so far as it is necessary, the information contained within Vattenfall's responses to the ExA's questions and requests (including the request for an update to the HRA), and the submissions of other parties, has been available for comment by the parties to the examination and, through publication on the Planning Inspectorate's website and being made available in hard copy in a number of deposit locations, has been made available to the public. The ExA has not sought to disbar anyone from taking part in the examination of the Kentish Flats Extension, regardless of whether they registered as an Interested Party in accordance with the statutory requirements.

We note the reference to regulation 17 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2008 in the ExA's question. This allows the ExA in certain circumstances to request further environmental information from an applicant and in doing so "stop the clock" on the examination of an application, and provide for public consultation on the additional environmental information.

In order to invoke regulation 17 the ExA must consider that a submitted environmental statement is "inadequate", and caselaw¹³ indicates that a document must be seriously deficient for this conclusion to be reached. However, if the ExA considers that without an update the ES for the Kentish Flats Extension project is "inadequate", then the appropriate means of requesting that information would be under regulation 17 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009.

We look forward to your response.

Yours faithfully



BURGESS SALMON LLP

¹² *Finn-Kelcey v Milton Keynes BC* [2008] EWCA Civ 1067

¹³ *R (on the application of Blewett) v Derbyshire County Council* [2003] EWHC 2775 (Admin)