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David Boyd  
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Your ref:

15 April 2021

Dear Mr Boyd

## **PLANNING ACT 2008**

### **APPLICATION FOR A NON-MATERIAL CHANGE TO THE EAST ANGLIA THREE OFFSHORE WINDFARM ORDER 2017**

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 East Anglia Three Limited (“the Applicant”) on 21 July 2020 for a change which is not material to the East Anglia THREE Offshore Wind Farm Order 2017 (“the 2017 Order”) under section 153 of, and Schedule 6 to, the Planning Act 2008. 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 in November 2015 and was granted development consent on 7 August 2017. Consent was granted for the construction and operation of an offshore wind farm, situated approximately 69km from the coast of Suffolk in Lowestoft at its closest point to land with a gross electrical output of up to 1,200MW and comprising up to 172 wind turbines (“the Development”). The 2017 Order was subsequently corrected by The East Anglia THREE Offshore Wind Farm (Correction) Order 2018 on 12 July 2018. A Non-Material Change Application was granted on 6 June 2019 to increase the maximum generating capacity from 1,200MW to 1,400MW.

3. The Applicant is seeking consent to make changes to the 2017 Order (as amended) relating to the Offshore Substations (“OSSs”) and Wind Turbine Generators (“WTGs”) to reflect the changes set out in paragraphs 4 and 5. The Applicant also proposes to update the Order by deleting the definition of ‘discrete jacket foundation’ which is no longer required, and by amending the requirements regarding radar mitigation proposals.
4. The proposed changes to the OSS parameters are:
  - To reduce the number of OSSs from 6 to 1;
  - To increase the number of legs for the OSS from 4 to 6; and
  - To increase the number of pin piles per OSS jacket leg from 1 to 4.
5. The proposed changes to the WTG parameters are:
  - To increase the maximum tip height of 247m to 262m (relative to Lowest Astronomic Tide (LAT));
  - To increase in the minimum air draft of all WTGs from 22m to 24m (relative to (Mean High Water Springs (MHWS));
  - To increase in maximum rotor diameter from 220m to 230m; and
  - To reduce the maximum, total number of WTGs from 172 to 121.

### **Consideration of the materiality of the proposed change**

6. 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 2017 Order.
7. 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.
8. 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”)<sup>1</sup>, which makes the following points. First, given the range of infrastructure projects that are consented through the Planning Act 2008, 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 types of change would be material or non-material. Second, there may be 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 development consent order was made) to take account of likely significant effects on the environment;
  - (b) whether there would be a need for a Habitats Regulations Assessment, or a need for a new or additional licence in respect of legally protected species;
  - (c) whether the proposed change would entail compulsory acquisition of any land that was not authorised through the existing development consent order; or
  - (d) whether the proposed change have a potential impact on local people and businesses.

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

9. Third, that 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.
10. The Secretary of State began his consideration of the materiality of the proposed variation by considering the 4 matters lettered (a), (b) (c) and (d) above:
  - (a) The Applicant supplied a document entitled 'DCO Non-Material Change – Supporting Statement' ("the Supporting Statement") providing further information which concludes that the proposed changes will not have any new significant effects or materially different effects from those already assessed in the original Environmental Statement for the 2017 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) The Secretary of State has concluded that, given the nature and impact of the change proposed, there is not likely to be a significant effect greater than those originally identified. Therefore, the Secretary of State is satisfied that a Habitats Regulations Assessment is not required. Furthermore, in respect of the legally protected species, the Secretary of State is satisfied that the proposed change does not bring about the need for a new or additional licence as the amendments sought are not anticipated to give rise to any new or different effects from an ecological perspective.
  - (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 2017 Order.
11. 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 considered 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.
12. 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**

13. The Applicant publicised its Application in accordance with regulation 6 of the 2011 Regulations and on 21 July 2020 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 September 2020.
14. The Application was made publicly available on the Planning Inspectorate's website on 21 July 2020, such that there was opportunity for anyone not notified to also submit representations to the Planning Inspectorate.
15. Representations were received from Anglian Water Services, The Crown Estate, East Suffolk Council and Suffolk County Council (joint response), Historic England, the Ministry of Defence ("MOD"), the Marine Management Organisation ("MMO"), the Maritime & Coastguard Agency, NATS, Natural England, and Trinity House. East Suffolk Council, Suffolk County Council, the MOD, NATS, and the MMO raised specific concerns which are considered below.

16. The Maritime & Coastguard Agency confirmed it had no concerns on the understanding that the worst case scenario remains as is assessed in the Navigation Risk Assessment (“NRA”), and that no other parameters detailed in the NRA will change. There should be no change in risk with regards to safe navigation of vessels and/or search and rescue, and the Emergency Response Cooperation Plan (“ERCoP”) should be updated with the revised parameters where appropriate once a decision has been made.
17. East Suffolk Council and Suffolk County Council commented that if the reduced number of turbines are to be spread over the same area, then the efficiency of the use of a finite resource such as the seabed should be considered in determining this Application. They also raised concerns that if turbines are confined to a smaller area, the seabed could then become available for a later extension project, which would result in further onshore infrastructure, which in their view could be to the detriment of local communities and the environment.
18. The MOD’s representation noted that the proposed changes to the parameters relating to the OSSs do not affect MOD safeguarding requirements and they therefore had no comments or concerns. However, regarding the proposed changes to the parameters concerning the WTGs, the MOD noted that they could not accept the amendment of Requirement 33 of the 2017 Order as proposed by the Applicant at that time. Requirement 33 relates to MOD surveillance operations, and the MOD commented that the proposed amendments would serve to redefine the maximum heights that wind turbines deployed in specific areas of the offshore development envelope could be built up to without requiring a technical mitigation, which would impact radar detectability of turbines. In their initial response, the MOD proposed an alternative version of Requirement 33 which they viewed to be acceptable. The Applicant rejected the MOD’s version of Requirement 33, and prepared a new alternative. The Applicant and the MOD subsequently agreed on a new version of the requirement, and the MOD confirmed that they were content with this on 14 December 2020.
19. NATS did not make a formal objection to the proposed changes, but noted that they anticipate that the East Anglia THREE turbines will be visible to the Cromer radar on some occasions. NATS acknowledged that although the proposed height increase will exacerbate this impact, it is not the cause.
20. In their initial response to the Application, the MMO raised various concerns regarding the Application, related to, amongst other things, the amount of scour, impacts on benthic communities and ecology. The Applicant responded to the MMO in writing to address their concerns and subsequently held a meeting with the MMO to discuss the points raised. The MMO confirmed on 13 January 2021 that it is content that the Applicant has addressed the concerns raised in their previous correspondence and are satisfied with the proposed non-material changes to the East Anglia THREE Offshore Windfarm.
21. 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. The Secretary of State is satisfied that the concerns raised by the MOD and the MMO in their initial responses have now been resolved.

## **Environmental Impact Assessment**

22. 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 2017 Order.
23. 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.
24. 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 2017 Order and as such considers that there is no requirement to update the Environmental Statement.
25. As there are no new significant environmental impacts or materially different environmental effects 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 in accordance with regulation 32 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017.

## **Habitats**

26. 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 ("the Habitats Regulations") and the Conservation of Offshore Marine Habitats and Species Regulations 2017 ("the Offshore Habitats Regulations"), which transpose the Habitats Directive (92/43/EC) into UK law. The Habitats Regulations and the Offshore Habitats Regulations require the Secretary of State to consider whether the Development would be likely, either alone or in combination with other plans and projects, to have a significant effect on a Special Protection Area ("SPA") or Special Area of Conservation ("SAC"), as defined in the Habitats Regulations and Offshore Habitats Regulations. If likely significant effects cannot be ruled out, then an Appropriate Assessment must be undertaken by the Secretary of State, pursuant to regulation 63(1) of the Habitats Regulations, and regulation 28 of the Offshore Habitats Regulations, 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 such a site.
27. The Secretary of State has considered the Supporting Statement submitted with the Application, alongside the response from Natural England, and the MMO and is satisfied that the changes set out in the Application will not have a likely significant effect on any SPA or SAC. Following consent of the 2017 Order, the Outer Thames Estuary SPA and Flamborough and Filey Coast SPA have been designated as Special Protection Areas. As both of these sites were assessed as potential SPAs in the Application for the 2017 Order, and because their conservation objectives remain unchanged, further assessment of these sites are not required for this Application. The Secretary of State is therefore satisfied that there is sufficient evidence to conclude that allowing the change set out in the Application to the development authorised by the 2017 Order will not have a likely significant effect upon any sites in accordance with regulation 63 of the Habitats Regulations or regulation 28 of the Offshore Habitats Regulations; and a further Habitats Regulations Assessment is therefore not required.

## **General Considerations**

### **Equality Act 2010**

28. 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; sex and sexual orientation; gender reassignment; disability; marriage and civil partnerships;<sup>2</sup> pregnancy and maternity; religion or 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.
29. 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

30. 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

31. 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 amended development consent. The Secretary of State is of the view that biodiversity has been considered sufficiently in this Application for an amendment to accord with this duty.

#### **Secretary of State's conclusions and decision**

32. 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 continuing need for new electricity generating plants of the type proposed by the Applicant. The Secretary of State considers, therefore, that the ongoing need for the project is established given the contribution it will make to securing energy supply. On 27 June 2019, following advice from the Committee on Climate Change, the UK Government announced a new carbon reduction 'net zero' target for 2050 which resulted in an amendment to the Climate Change Act 2008 (the target for the net UK carbon account for 2050 changed from 80% to 100% below the 1990 baseline). The Secretary of State notes that the energy National Policy Statements continue to form the basis for decision-making under the Planning Act 2008. The Energy White Paper, Powering our Net Zero Future, was published on 14 December 2020. It announced a review of the suite of energy National Policy Statements but confirmed that the current National Policy Statements were not being suspended in the meantime. The relevant energy National Policy Statements therefore remain the basis for the Secretary of State's consideration of the Application. The Secretary of State considers, therefore, that the ongoing need for the Development is established and that granting the non-material change would not be incompatible with the amendment to the Climate Change Act 2008.
33. The Secretary of State has considered the nature of the proposed change, noting that the proposed change to the Development would not result in any further environmental impacts

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

and will remain within the parameters consented by the 2017 Order. He concludes that the proposed change is not material. Having considered the effects of any change and the benefits of the change in facilitating the deployment of the development, the Secretary of State has concluded that it would be appropriate and advantageous to authorise the proposed change as detailed in the Application.

34. 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 2017 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 2017 Order, and has decided under paragraph 2(1) of Schedule 6 to the Planning Act 2008 to make a non-material change to the 2017 Order so as to authorise the change detailed in the Application.

#### **Modifications to the draft Order proposed by the Applicant**

35. Minor changes have been made by the Secretary of State to the draft Order proposed by the Applicant to conform with current drafting practice. These changes do not materially alter the terms of the draft Order.

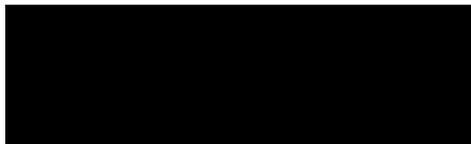
#### **Challenge to decision**

36. 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**

37. 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  
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/eastern/east-anglia-three-offshore-wind-farm/?ipcsection=overview>

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)