THE PLANNING ACT 2008

THE INFRASTRUCTURE PLANNING (EXAMINATION PROCEDURE) RULES

2010

East Anglia ONE North Offshore Wind Farm

Appendix B4 to the Natural England Deadline 4 Submission

Natural England's Deadline 4 Boreas Submission – SIP Position Statement

[REP4-041]

For:

The construction and operation of East Anglia One North Offshore Windfarm, a 800MW windfarm which could consist of up to 67 turbines, generators and associated infrastructure, located 36km from Lowestoft and 42km from Southwold.

Planning Inspectorate Reference: EN010077

13th January 2021

Natural England's Deadline 4 Boreas Submission - Position Statement Regarding the Proposed Site Integrity Plan for the Haisborough Hammond and Winterton Special Area of Conservation [REP4-041]

This document is applicable to both the East Anglia ONE North and East Anglia TWO applications, and therefore is endorsed with the yellow and blue icon used to identify materially identical documentation in accordance with the Examining Authority's (ExA) procedural decisions on document management of 23rd December 2019. Whilst for completeness of the record this document has been submitted to both Examinations, if it is read for one project submission there is no need to read it again for the other project.

This document was originally submitted into the Boreas examination and has been introduced into the East Anglia ONE North and East Anglia Two examinations at deadline 4 to support comments raised by Natural England in our Deadline 4 response Appendix B3. These concerns relate to the use of a Site Integrity Plan (SIP) to manage project alone impacts. With exception of these two explanatory paragraphs the original submission is unaltered from that submitted into the Boreas examination.

Introduction

1. Natural England ('NE') wishes to repeat and further explain its concerns about Norfolk Boreas Limited (the 'Applicant')'s proposed use of a pre-commencement ('Grampian') condition that would have the effect of deferring a full assessment of the impacts of its proposals on the Haisborough, Hammond and Winterton ('HHW') Special Area of Conservation ('SAC') until after the making of a DCO.

2. The crux of the issue is the Applicant's suggestion that cable installation across HHW should not commence until a future 'site integrity plan' ('SIP') establishes sufficient mitigation measures (including cable location) to allow it to be concluded that the works will not have an adverse effect on the integrity of the SAC, having regard to its conservation objectives. On the basis of information currently available there can be no knowing whether this conclusion can be reached.

3. If, on the basis of facts and proposals that are not yet available, it cannot be concluded that the cable works can be carried out in a benign way they can only be granted consent if, there being no alternative solutions, there are shown to be imperative reasons of overriding public interest (IROPI) for the project to go ahead and if measures are put

in place to satisfactorily compensate for the harm to the SAC that will be caused. This latter requirement raises complex and novel issues that could take a long time to resolve. NE believes that it is best to bite this bullet now, in examination, rather than leave it to the future.

4. It is important for NE to stress that in taking this stance (which is consistent with its approach in other wind farm cases and with other industries) it is trying to prevent this difficult and (at the moment) essentially un-knowable issue from being pushed into the indefinite future, where (depending on the ultimate resolution of the question) there is a risk of project delay or even of electricity generating infrastructure being stranded without a viable cable route to landfall. Natural England is very appreciative of the Applicant's real desire to ensure that its proposals do not harm HHW and it is with reluctance that NE finds itself in disagreement with the Applicant on this point.

5. The correctness of NE's position can be expressed in both project management and in legal terms, but NE wishes to make it clear that, even if the law were not on its side, its stance is based on sound and helpful common sense and is the opposite of being nit-picking or overly-legalistic.

6. The same issue has recently been raised on behalf of the Secretary of State (S of S) in the Vanguard case (letter dated 6 December 2019, paragraph 6)[1]. It appears that the S of S shares NE's concerns that mitigation solutions do not yet, and might not, exist and feels that it is appropriate to tackle the issues of alternatives, IROPI and compensation within the examination.

7. This is a single-issue position statement and should not be taken as affecting or diminishing the status of NE's other representations. Detailed technical issues are outside the scope of this document but can be raised directly with appropriate officers of NE.

The Applicant's proposal

8. Paragraphs 11 and 12 of the Applicant's 'Outline Norfolk Boreas Haisborough Hammond and Winterton Special Area of Conservation Site Integrity Plan version 2'

[1] Though this letter appears to suggest that NE has agreed that the SIP approach is suitable; for clarity, this is not NE's position.

(DCO Document 8.20) ('the outline SIP') explain that **(original emphasis)**:

> 11. Condition 9(1)(m) of Schedules 11 and 12 (The Transmission Deemed Marine Licences (DMLs)) of the Norfolk Boreas draft Development Consent Order (DCO) state:
>
> *"The licensed activities, or any phase of those activities must not commence until a site integrity plan which accords with the principles set out in the outline Norfolk Boreas Haisborough, Hammond and Winterton Special Area of Conservation Site Integrity Plan has been submitted to the MMO and the MMO (in consultation with the relevant statutory nature conservation body) is satisfied that the plan provides such mitigation as is necessary to avoid adversely affecting the integrity (within the meaning of the 2017 Regulations) of a relevant site, to the extent that sandbanks and Sabellaria spinulosa reefs are a protected feature of that site."*
>
> 12. Due to the long lead in times for the development of offshore wind farms it is not possible to provide final detailed method statements for construction prior to consent, and as a result, the detail of any required mitigation also cannot be finalised prior to consent. Key outstanding areas of uncertainty that will be addressed post consent through the SIP include:
>
> • **The precise extent and location of the Annex 1 reef feature**. Due to the ephemeral nature of S. spinulosa reef which has the potential to vary greatly. This will be informed by pre-construction surveys which must be undertaken no earlier than 12 months prior to cable installation;
>
> • **The detailed installation methodology, cable crossings and requirement for any cable protection**. This will be informed by pre-construction surveys which must be undertaken no earlier than 12 months prior to cable installation; and
>
> • **The design of cable and pipeline crossings**. These will be determined by crossings agreements with cable and pipeline owners or operators which will be progressed post consent.

9. If this condition came into law as part of a DCO it would mean that cable could not be lawfully laid across the SAC until the MMO, in consultation with NE, is 'satisfied' that the following things have been resolved in a way that will prevent cables and their associated works and features from harming the protected Annex 1 sandbank and reef features of the SAC:

- *Sabellaria spinulosa* reef has been clearly mapped in the relevant part of the SAC; and
- A technically viable minimum-impact cable route has been found; and
- Minimum-impact methods of laying and protecting cable have been established;

- Site preparation design works have been identified to reduce the impacts on the site.

10. What this fails to mention is that:

- The correct legal test is not '*satisfaction*' but '*certainty*', beyond reasonable scientific doubt[2];
- *Sabellaria spinulosa* reef is hard to map and its precise location within the proposed corridor is not yet well understood, though the proposed corridor falls within a fisheries management area within which there is confidence that *Sabellaria spinulosa* has been observed to be present across data sets, and existing survey evidence reveals sediment types favourable for *Sabellaria spinulosa*;
- Fisheries management within the proposed corridor has, as one of its aims, the protection of *Sabellaria spinulosa* and its recovery from damage by fishing gear;
- Without knowledge of where the reef is, and where it might grow or recover, it cannot be known whether it is actually possible to navigate cable around it.

11. And above all, what this fails to mention is any possibility that these unknowns will be resolved in such a way as to allow the MMO, acting in its capacity as competent authority, to ascertain that they will prevent adverse effect on the integrity of the SAC. In the absence of the necessary information it is not logically possible to be sure, at this point in time, that harm can be avoided simply by tweaking the route and the methodologies.

12. As an aside (and without prejudice to NE's main position) if NE's position is not accepted it is submitted that the wording of the proposed condition could helpfully be amended to make clear that the condition may only be satisfied if the MMO (in consultation etc.) is able to '… *ascertain on the basis of an appropriate assessment that the plan provides such mitigation as is necessary to avoid an adverse effect on the integrity of the HHW SAC having regard to the conservation objectives for that site and within the meaning of the 2017 Regulations'*.

[2] See, for instance, Waddenzee and Cooperatie Mobilisation for the Environment UA and others v College van gedeputeerde staten van Limburg and others.

What if harm cannot be avoided?

13. The Applicant recognises that it may not be possible to avoid harm by adjusting the route and methods involved. See, for instance, paragraph 77 of the outline SIP, where it is said that (emphasis added):

> 77. As shown in Plate 5.1, should there not be sufficient space to route cables around reef identified during the interim and pre-construction surveys the route which would result in the least temporary disturbance would be proposed. This route would then be subject to further assessment and a conclusion of no AEoI would have to be reached by the MMO in consultation with Natural England. If such a finding could not be reached, construction could not commence and the onus would be on Norfolk Boreas Limited to consider alternative solutions. For example, this could include: minor amendments to the redline boundary in discrete areas where the cable route interacted with reef to provide space for micrositing; or a variation to the Transmission DML Condition 9(1)(m) to allow a finding of AEoI should the project satisfy the HRA Assessment of Alternatives, Imperative Reasons of Overriding Public Interest (IROPI) and Compensatory Measures tests.

14. Based on the current state of knowledge, it cannot yet be known whether feasible alternative solutions might exist. Thus attention must inevitably turn to the provisions of Regulations 29 and 36 of the Conservation of Offshore Marine Habitats and Species Regulations 2017 ('the 2017 Regs') which provide that a plan or project which will harm an SAC can be allowed to go ahead if:

- There are no alternatives that are not harmful; and
- There are imperative reasons of overriding public interest ('IROPI') in favour of the plan or project; but
- '*The appropriate authority must secure that any necessary compensatory measures are taken to ensure that the overall coherence of Natura 2000 is protected*.'[3] and
- The appropriate authority is the Secretary of State[4].

15. The Applicant rightly recognises that this position could be reached and says (in the red text boxes at Plate 5.1 of the outline SIP):

- *Construction cannot commence.*

[3] Reg. 36 (2) of the 2017 Regs
[4] Reg. 36 (3)(d) of the 2017 Regs.

- *Norfolk Boreas Limited must consider alternatives.*
- *If no alternatives can be identified that can be agreed with the MMO, in consultation with Natural England, Norfolk Boreas Limited would be required to consider a DCO variation or Marine Licence application.*

16. If the Applicant's proposed DCO/DML condition cannot be satisfied, then a further procedure will be needed to amend that condition to bring it into a form that can be complied with. NE's view at this point is that the correct procedure would be to apply for a DCO variation, rather than a marine licence. The Infrastructure Planning (Changes to, and Revocation of, Development Consent Orders) Regulations 2011 (as amended) ('the 2011 Regulations") provide different procedures for 'material' and 'non-material' changes to DCOs. Natural England believes that any suitable amendment to the proposed DCO/DML condition will be 'material' for these purposes and ought therefore to be made by the S of S pursuant to the 2011 Regulations, with the power for a further examination to be held.

17. As regards materiality, it is clear from Govt. guidance that a change should be considered material if it would require an updated Environmental Statement or if it would invoke a need for a Habitats Regulations Assessment. In order to allow the Applicant to comply with the proposed condition it might (for instance) be necessary to adjust the red line boundary enclosing the proposed cable corridor within the SAC, inevitably requiring its own Habitats Regulations.

    Assessment and requiring an update to the Environmental Statement. And in the event of a conclusion that adverse effect on the integrity of the SAC cannot be avoided (and that no alternative solutions and IROPI exist) the timing of the damaging works would need to be coordinated with the implementation of the necessary compensatory measures by way of a modified condition (and perhaps other measures involving third parties). The novelty of such a situation places such a modification outside the scope of 'non-material' and its importance for the protection of the Natura 2000 network of sites reinforces this conclusion.

18. To put this another way, the DCO will be a statutory instrument and its amendment ought to be a highest-level matter. Furthermore, the necessary amendment to the condition might involve either a further appropriate assessment, or the granting of consent to harm the integrity of a SAC, which is a matter requiring judgements about IROPI (which lie better with the S of S) and the securing of compensatory measures

(for which the appropriate authority is the S of S). This would bring us back to where we are at the moment, but some years down the line. It would be better to get to the bottom of this now.

What if mitigation measures can be devised?

19. Even if the Applicant, at some time after the making of a DCO, is able to improve the state of knowledge about *Sabellaria spinulosa* in the cable corridor, and is able to develop methods for satisfactorily reducing impacts, the process of formally confirming whether the pre-commencement condition has been satisfied will have to be a rigorous one, involving an 'appropriate assessment' within the meaning of the 2017 Regulations and case law. Rolling this up with the making of the DCO would appear to yield economies of scale, as well as keep the decision within a formal procedural framework with access to diverse expertise and a single overarching decision-maker.

The Secretary of State's appropriate assessment

20. It is, of course, for the S of S to make the final decision on the DCO. That element of the decision that concerns cables laid in the HHW SAC will have to be supported by an 'appropriate assessment' that allows him or her to ascertain that the DCO and its DMLs will not lead to an adverse effect on the integrity of the SAC, having regard to its conservation objectives. Where evidence is lacking at the point of decision it is open to the S of S, and entirely reasonable, to ask whether it is yet evidentially and logically possible to reach such a conclusion.

21. The leading domestic case on what constitutes an 'appropriate assessment' is *Champion*[5], a judgment of the Supreme Court. It was observed (para 41 of the judgment) that

> '"Appropriate" is not a technical term. It indicates no more than that the assessment should be appropriate to the task in hand: that task being to satisfy the responsible authority that the project "will not adversely affect the integrity of the site concerned" taking account of the matters set out in [Article 6.3 of the Habitats Directive]'. As the court itself indicated in *Waddenzee* the context implies a high standard of investigation."

22. From this it is clear that while there may be an element of flexibility as to whether or not to accept as 'appropriate' an assessment that contains elements that have yet to fall

[5] R (on the application of Champion) v North Norfolk District Council and another [2015] UKSC 52.

into place there is no discretion to accept as 'appropriate' an assessment that does not allow a conclusion to be reached because important imponderables have yet to be resolved. The S of S is hardly to be criticised if, as appears to be the case in Vanguard, s/he wants to understand the situation rather better before making a judgement that requires certainty.

23. Further guidance on the nature and content of an appropriate assessment has been given in

Grace and Sweetman[6] and in *Holohan*[7]:

> '[An appropriate assessment] may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of dispelling all reasonable scientific doubt as to the effects of the proposed works on the protected area concerned.'
>
> And
>
> 'Article 6.3 of [the Habitats Directive] must be interpreted as meaning that the competent authority is permitted to grant to a plan or project consent which leaves the developer free to determine subsequently certain parameters relating to the construction phase, such as the location of the construction compound and haul routes, only if that authority is certain that the development consent granted establishes conditions that are strict enough to guarantee that those parameters will not adversely affect the integrity of the site.'

24. In NE's submission, the omission of the effects of cabling in the HHW SAC from the DCO/DML appropriate assessment is an obvious lacuna, not filled by the proposed pre-commencement condition because there can be, at the date of the DCO/DML appropriate assessment, no certainty that a subsequent appropriate assessment will reach a conclusion of no adverse effect on site integrity.

Grampian conditions

25. Law, policy and guidance relating to pre-commencement conditions is as much applicable to cases arising under the Planning Act 2008 as under the Town and Country Planning Act 1990 (as amended).

26. Paragraph 55 of the National Planning Policy Framework (July 2018) states that:

[6] Grace and Sweetmand v An Bord Pleanála CJEU C-164/17.
[7] Holohan and others v An Bord Pleanála CJEU C-883/18

> *55. Planning conditions should be kept to a minimum and only imposed where they are necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects. Agreeing conditions early is beneficial to all parties involved in the process and can speed up decision making. Conditions that are required to be discharged before development commences should be avoided, unless there is a clear justification.*

27. These words derive from case law and common sense. Important to note are the requirements for preciseness, reasonableness and the presumption against pre-commencement conditions.

28. The *Grampian* case itself[8], which established the potential lawfulness of pre-commencement conditions, added the caveat that they have to relate to '… *something which had at least reasonable prospects of being achieved …*' and makes clear that:

> 'The test of whether such a condition is reasonable is strict; it amounts to whether there are at least reasonable prospects of the action in question being performed.'

29. In *Jones v S of S for Wales and Ogwr Borough Council*[9] Lord Justice Purchas said (emphasis added)

> 'The final test, therefore, is whether the condition is a reasonable condition. That is a condition which a reasonable planning authority would impose. In my judgment, unless there is some evidence that there is a reasonable prospect that some crucial condition to the consent may be satisfied, then, to insist that that crucial condition should be satisfied must almost always be an unreasonable imposition of a condition.'

30. Natural England's view is that since there is insufficient evidence to know whether the pre- condition of certainty of no adverse effect on the integrity of the SAC is capable of being fulfilled at all it is not possible to meet the strict test in Grampian because one cannot yet make a reasoned judgement of the prospect of fulfilment.

31. Natural England reserves the right to expand on this analysis should the question of the legality of the Applicant's proposed pre-commencement condition come to the fore.

[8] Grampian Regional Council v City of Aberdeen District Council (1984) 47 P&CR 633
[9] CA (Civ Div) (1991) 61 P&CR 238

Compensatory measures

32. It is not Natural England's role to design whatever measures may be needed to compensate for an adverse effect on the integrity of a designated site, but it is willing and able to consider any such proposals that the Applicant may make and very happy to discuss the relevant issues with the Applicant. Ultimately, Natural England's role in this is as consultee and advisor.

33. It is beyond the scope of this note to consider law and guidance relating to compensatory measures or refer to any potential proposals. However, it is relevant to note that Govt. guidance[10] indicates, reasonably, that a relationship of proportionality should exist between the amount of harm caused, and the amount of compensation provided. This provides a yet further reason to getto the bottom of whether harm is or is not going to be caused to HHW, because if harm is to be caused one will need to know how much harm before being able to put together measures to compensate for it, and to ensure that those measures are secured.

Natural England's history in relation to this matter

34. Natural England has clearly expressed concerns about the use of a pre-commencement condition in both the Vanguard and Boreas cases. See for instance pages 20 – 22 and Appendix 2 of Natural England's Relevant Representations of 31st August 2019 (Boreas) [RR-099] and NE's Deadline 8 submission (Vanguard) [REP8 – 104].

35. The Applicant's document 'Consideration of the Purpose of the Haisborough Hammond and Winterton Special Area of Conservation Site Integrity Plan", Document reference: EA; AS; 10.D7.19 of May 2019, produced in relation to Vanguard, notes instances in which pre- commencement conditions of this exact sort have been incorporated into offshore windfarm DCOs. By inference it suggests that if NE accepted these conditions in those cases it ought to accept them in this case.

36. If that inference is intended, Natural England wishes to stress that its position is always

[10] Habitats and Wild Birds Directives: guidance on the application of article 6(4). Alternative solutions, imperative reasons of overriding public interest (IROPI) and compensatory measures. December 2012

pragmatic and evidence-based: if the evidence in one windfarm case allows it to understand the effect of the project on protected features it is not going to take an obdurate position and raise unhelpful issues of process and law. However, knowledge and understanding improve with time and Natural England will always be guided by the best and most up-to-date information. The fact that NE takes the stance that it does in the Boreas and Vanguard cases, but not in others, shows (a) its improved understanding of ecological issues raised by wind farms and (b) how strongly NE feels about the difficulties of the Applicant's proposal. Looking at each of the cases mentioned in the Applicant's document (cited in the paragraph above):

37. Hornsea Project Two:

37.1. The SAC in question is the Southern North Sea SAC, and the protected features are marine mammals. The technical issues involved were fundamentally different from the situation at HHW. It is noteworthy that the condition in question is accompanied by a list of 6 potential mitigation measures, indicating the number of tools at the Applicant's disposal when designing future mitigation.

38. East Anglia Three:

38.1. Again, the SAC in question is the Southern North Sea SAC, and the protected features are marine mammals. It appears that the draft SIP already contained a number of potential mitigation measures and that NE took a reasonable and pragmatic approach toward accepting that they would work.

39. Norfolk Vanguard.

39.1. The same issues arise in relation to both Vanguard and Boreas, and NE's position has been consistent.

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