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The Planning Inspectorate
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By email to: NIEnquiries@pins.gsi.gov.uk

Our ref: Necton/AC
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17 July 2018

Dear Sirs

Norfolk Vanguard Offshore Wind Farm DCO – Vattenfall UK Ltd

We are instructed to write to you on behalf of our clients Necton Parish Council, with support from Bradenham Hall Farms, Philip Hayton and Necton Substation Action Group, regarding the adequacy of the environmental information which has been provided by the applicant Vattenfall UK Ltd in their application for a development consent order for Norfolk Vanguard Offshore Wind Farm ("the Project").

On 15 June 2018, our firm wrote to Vattenfall UK Ltd ("Vattenfall") on the basis that the pre-application community consultation carried out by Norfolk Vanguard Ltd was inadequate and set out our reasons for considering this to be the case. On 27 June 2018, Womble Bond Dickinson on behalf of Vattenfall replied to our letter, maintaining that the consultation had been conducted lawfully. Copies of both letters are enclosed with this letter.

We have subsequently sought the advice of leading counsel, Simon Bird QC, on the issues raised in these letters. That advice is also enclosed. Counsel's view is that the environmental information as put forward in the Environmental Statement is inadequate and fails to comply with the requirement of Regulation 14 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 in that the selection of Necton as the choice of the location for the new substation is not explained, nor is there any description of the alternatives considered and an explanation as to why those alternatives were discarded.

As the Planning Inspectorate will be aware, the location of the new substation (in addition to an extension to the existing substation and a proposed additional further substation extension for the subsequent Norfolk Boreas project) has caused great concern and controversy in Necton. These are extremely large infrastructure developments, measuring up to 25m high and occupying a total footprint of over 14 hectares (excluding the existing substation). They will have a significant impact on the local landscape and residential amenity. It cannot be disputed that local residents

have an interest in understanding the rationale behind the choice of Necton and why any alternatives have been discarded.

We therefore ask that the DCO is not formally accepted by the Inspectorate and no consideration of the application begins until further information addressing the issue has been provided. Local residents, including our clients, must then be given sufficient opportunity to consider this information and comment further.

Should the DCO be accepted without this taking place, our clients may bring a further challenge on the basis that the EIA Regulations have not been complied with and the consultation on the DCO application is unlawful.

Yours faithfully

[redacted]

Richard Buxton Environmental & Public Law

cc. Womble Bond Dickinson (john.houghton@wbd-uk.com)

IN THE MATTER OF THE NORFOLK VANGUARD DCO APPLICATION

A D V I C E

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1. Necton Parish Council ("the Parish Council") and Residents of the village seek my advice on the adequacy of the approach taken by the promoters of the Norfolk Vanguard Offshore Wind Farm DCO to alternatives to the Project, having particular regard to the requirements of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 ("the Infrastructure Regs"). They are particularly concerned over the decision to select Necton as the location for a proposed Substation.

Background

2. Norfolk Vanguard is a Nationally Significant Infrastructure Project ("NSIP") under the Planning Act 2008 ("the Act"), promoted by Norfolk Vanguard Limited ("the Applicant"), an affiliate of Vattenfall Wind Power Limited ("Vattenfall").

3. In summary, if consented the Project would involve the erection of between 90 and 257 wind turbines on sites in the south North Sea known as Norfolk

Vanguard East and Norfolk Vanguard West. To transmit the generated electricity to the National Grid, subsea cables are proposed to run to a landfall at Happisburgh South where they will be jointed to onshore cables; the onshore connection point ("the OCP"). The cables will then be undergrounded across Norfolk to an onshore project substation ("OPS") near the existing Necton National Grid substation ("the Substation").

4. Some modification will be required at the existing substation to effect the ultimate connection to the Grid. This will include the erection of an "extension" to serve the Project which, depending on the technology deployed, will be between 15 and 25m high on a site of approximately 250m x 300m.

5. Vattenfall are also promoting a related NSIP, Norfolk Boreas, which is to be pursued separately through the DCO process. However, the Norfolk Vanguard DCO seeks consent for some enabling works for this "sister project". These include cable ducting and a further extension at the Substation of capable of accommodating the requirements of the Boreas proposal with some additional overhead line modification.

6. The Applicant consulted on its proposed application between 7 November and 11 December 2017. That consultation was supported by various documents including a Preliminary Environmental Information Report ("PEIR") in the form of a draft Environmental Statement and a Consultation Summary Document. These documents provided some explanation as to the evolution of the Project.

7. The application for the DCO has now been submitted to PINS supported by an Environmental Statement and its decision on whether the application should be accepted is presently awaited.

8. As far as the Parish Council and residents are concerned I understand that it is the siting and size of the proposed Substation which is their principal concern, although they also object to the disruption which would result from the laying of the cables in the lengthy cable route between the OCP and the Substation. They are not satisfied that the PEIR or Environmental Statement have adequately explained why the location of the Substation at Necton has been chosen. This clearly has implications for the other elements of the Project.

9. These points and others have been made to the Applicant but they have been rejected. This rejection is contained in a letter from Womble Bond Dickinson dated 22 June 2018. In summary, the Applicant contends that the OCP location (including the Substation location was previously determined by National Grid and Vattenfall and was not part of the agreed scope of the Project. My advice is sought on the correctness of that assertion.

The Infrastructure Regulations

10. Regulation 14 provides:

> *"(1) An application for an order granting development consent for EIA development must be accompanied by an environmental statement.*

> *(2) An environmental statement is a statement which includes at least—*
>
> *.....*
>
> *(d) a description of the reasonable alternatives studied by the applicant, which are relevant to the proposed development and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the development on the environment;...."*

11. This requirement is supplemented by paragraph 2 to Schedule 4 of the Infrastructure Regulations which details the matters which should be included within an Environmental Statement and which include:

> *"A description of the reasonable alternatives (for example in terms of development design, technology, location, size and scale) studied by the developer, which are relevant to the proposed project and its specific characteristics, and an indication of the main reasons for selecting the chosen option, including a comparison of the environmental effects".*

12. It should be noted that the obligation is to describe the reasonable alternatives studied by the developer and not an obligation to study all reasonable alternatives. Further, it is not a requirement that full reasons are given for selecting the options chosen (and implicitly for rejecting any discarded option); it is sufficient that the Applicant gives *"an indication of the main reasons"* for the selections made.

13. The primary obligation under the Infrastructure Regulations is that an Environmental Statement must accompany *the application* for a DCO (see regulation 14(1)). Without it, the application cannot lawfully be determined. The Preliminary Environmental Information Report, is a precursor to the

Environmental Statement with no prescribed format as to what it needs to contain. Regulation 12 of the Infrastructure Regulations defines Preliminary Environmental Information as:

> *"information referred to in Regulation 14(2) which –*
> *(a) has been compiled by the applicant; and*
> *(b) is reasonably required for the consultation bodies to develop an informed view of the likely significant environmental effects of the development (and of any associated development)".*

14. PINS Advice Note 7 "*EIA: Process, Preliminary Environmental Information and Environmental Statements"* describes the role of PEIR:

> *"7.4 There is no prescribed format as to what PEI should comprise and it is not expected to replicate or be a draft of the ES. However, if the Applicant considers this to be appropriate (and more cost-effective) it can be presented in this way. A good PEI document is one that enables consultees (both specialist and non-specialist) to understand the likely environmental effects of the Proposed Development and helps to inform their consultation responses on the Proposed Development during the pre-application stage".*

15. Advice Note 7 also stresses that:

> *"Applicants are not required to provide PEI when undertaking their formal consultation (although if they do so they must set out how it will be publicised and consulted on as part of this process). However, Applicants are encouraged to provide PEI to enable statutory consultees to understand the environmental effects of the development and to inform the consultation. Provision of PEI may assist in the identification of potential issues, enabling these to be addressed at an earlier stage in the pre-application consultation process."*

16. Given that the definition of "*preliminary environmental information"* is

information which is *"reasonably required ...to develop and informed view of the likely significant effects of the development"*, this advice needs to be treated with some caution. Where the information exists and can be consulted upon in the formal consultation, then in accordance with the well established principles for a lawful consultation, it should be. Consultees would otherwise be deprived of information which can be provided and is necessary to express an informed view.

17. However, whatever the flexibility inherent in PEIR as far as content is concerned, an Environmental Statement submitted to accompany a DCO application, must comply fully with the Infrastructure Regulations. Where at the application stage there remains a deficiency in the handling of reasonable alternatives, this can be raised with PINS at the point of submission or indeed subsequently and further information can be required (see Regulation 15(7) and (8)). In this context, PINS Advice Note 7 advises that:

> *"The Planning Inspectorate considers that a good ES is one that:*
> *...*
>
> - *explains the reasonable alternatives considered and the reasons for the chosen option taking into account the effects of the Proposed Development on the environment".*

The Project's Assessment

18. The objective of the requirement in terms of alternatives and reasons is to allow those consulted to form a view on the strength and robustness of the

need for the scheme (including its location and design). For this purpose, the main reasons why the scheme has been advanced and for rejecting any alternatives considered need to be at least “indicated”.

19. The Project decision making process here was initially summarised in Plate 4.1 of Chapter 4 of the PEIR, with the rest of the chapter fleshing out the reasoning to a greater or lesser extent, depending on the stage in that process.

20. At section 4.5, a number of ‘Project Commitments’ were set out. These were effectively strategic reasons for some of the decisions taken. They included the ruling out of 400kV towers to minimise the visual impact of the scheme, where practicable opting for the shortest cable route to minimise cost, impact and transmission losses and the avoidance of key sensitive features where possible.

21. As to the location of the windfarm itself, the PEIR set out the main reason for it. It lies within one of the Zones identified in Round 3 of the Offshore Energy Strategic Environmental Assessment as an area of opportunity for offshore windfarm projects (4.6.1 (22)) and in the Zonal Development Plan as an area with least environmental and technical constraint (4.6.2 (24), (29)). Sites within the zone were identified using a three step process involving detailed consideration of constraints, technical suitability and cost (4.6.2 (27)), although the differentiating factors were in fact limited to installation costs, energy production and operational offshore and transmission costs. Having regard to these factors, Norfolk Vanguard was the best performing site, with Norfolk Boreas the next best (4.6.2 (28).

22. The focus of the decision making process for the windfarm was on the Zone and it is clear why the location (in terms of its site) that element of the project was chosen. It performed better than any others assessed against the determining criteria.

23. The narrow scope for alternatives to the windfarm location which was explained, did not constrain the consideration of alternatives for the landfall. For this element (and in consequence the other landward elements of the Project), the scope for meaningful alternatives was greater. Alternatives requiring a cable landfall within an AONB, an SAC, SPA or Ramsar site, an SSSI or National Park were avoided (4.7 (33)), which left three options (4.7 (34)), which are described by reference to a plan (Figure 4.3) and assessed by reference to offshore and onshore constraints 4.7 (35) and (36)). Ranking is provided (Table 4.1).

24. However, what is not clear, because it is not explained, is how far the selection of the landfall was influenced (if at all) by the decision on the Grid connection point at Necton. The picture portrayed by the Womble Bond Dickinson letter, although this is not obviously consistent with the content of the PEIR (or the submitted Environmental Statement), is that the two ends of the Project were effectively fixed before the process of assessment commenced and on that basis, it is argued that their selection does not have to be explained.

25. The identification of the Necton Grid connection point was a joint process

between National Grid and the Applicant, leading to a grid connection agreement. That is in substance a commercial agreement between the two parties. As with the Cable Relay Station, National Grid's Horlock Rules were applied to the selection of the site for it.

26. The weakest part of the reasoning within Chapter 4 of the PEIR undoubtedly related to the selection of Necton as the location of the sub-station. Section 4.12 was directed at where, within a 3km radius of the existing sub-station an "extension" would most appropriately be located. It does not address the question "Why Necton?"

27. That is clearly a fundamental decision in relation to the Project as a whole. To the extent that this is covered at all, the PEIR effectively deferred to the process which led to the connection agreement (4.8). That deference accords with the assertion in Womble Bond Dickinson's letter.

28. Section 4.8 recites National Grid's statutory responsibility to deliver an economic and efficient design and asserts that the process allows for a variety of options to be appraised leading to the identification of a preferred option, but provides no description of the alternatives considered and no reason for selecting Necton over the others (assuming there were some).

29. Whilst the content of the submitted Environmental Statement has been amended and supplemented in the light of the consultation on the PEIR, its substance, in so far as is relevant to this advice, is little different. In Chapter 4, it illustrates the decision making process (Plate 4.1) and summarises the selection of the windfarm location (4.6) and landfall (4.7) in near identical, if

not identical, terms to the PEIR. As to the Grid Connection point location, it is now clear that alternatives *were* considered by National Grid and Vattenfall (44) and, perhaps in some recognition of the concern expressed on behalf of the Parish Council and residents, a largely new paragraph appears:

> *"48 A guidance note on the National Grid website explains how the assessment is carried out. The process looks to technical, commercial, regulatory, environmental, planning and deliverability aspects to identify the preferable connection for the consumer. The Electricity Act 1989 required National Grid when formulating proposals, to be efficient, co-ordinated and economical whilst also having regard to the environment. When the development being connected is offshore, the offshore aspects need to be considered in that evaluation too. The assessment process therefore looks to minimise the total capital and operational cost whilst taking into account other key considerations as outlined".*

30. However, all this paragraph does is to explain that there is a process (see National Grid's *The Connection and Infrastructure Options Note (CION) Process Guidance Note Issue 3*), what that process involves and that was undertaken in relation to this Project. However, the output of that process is not set out or summarised. This does not begin to *describe* the alternatives or to indicate why the preferred option was a substation at Necton, when compared with the alternatives. This amounts to a failure to comply with Regulation 14(2).

31. Leaving aside the law, the NSIP application process would be a strangely bizarre one, if a local community peculiarly affected by a large element of the proposed associated infrastructure was entitled to no explanation at all as to why they were expected to have to bear its various burdens.

32. The Womble Bond Dickinson claims that the Project has previously determined end points and which were treated as *"settled"* and effectively a choice which *"does not form part of the Project".* This is supported by the comment:

> *"This is the approach taken on every other offshore wind farm DCO application to date".*

33. Even if this latter point is correct, it is not a good one. The issue is not what other applicants may have done in the past but rather, what the Infrastructure Regulations require as a matter of law. The requirement is that they provide:

> *"a description of the reasonable alternatives studied by the applicant, which are relevant to the proposed development and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the development on the environment."*

34. The Project is defined here as including *"the Onshore Project Substation".* Any reasonable alternative to its proposed location which was considered is *"relevant to the proposed development"* and requires a description. It must also be clear why Necton was preferred over that alternative by reference to a comparison of environmental effects. It is not lawful for National Grid and the Applicant to agree between themselves by way of a connection agreement that this requirement of the Infrastructure Regulations should be excluded.

35. The fact that the two ends of a project may be influenced by the decisions of persons other than the Applicant, does not mean that they are not part of the Project or that alternatives considered in this bipartisan process of selection,

do not need to be explained in a subsequent Environmental Statement.

36. It seems to me that in advancing its argument, Womble Bond Dickinson is seeking to misuse the case law on reasonable alternatives in the context of Strategic Environmental Assessment and planning policy. In cases such as R(oao Friends of the Earth, England, Wales and Northern Ireland Ltd v Welsh Ministers [2016] Env LR 1, the Courts have held that what is or is not a reasonable alternative policy must be judged by reference to the objectives which the policy is intended to meet. If an alternative policy cannot meet the objective, it is not a reasonable one.

37. That approach is not relevant to NSIPs of the kind being promoted here. There is no national or other policy which fixes the two ends of this Project. Those are the product of a design process which has involved the consideration of alternatives. The relevant objective here is securing a grid connection at least cost to users and the environment. Even if Necton has proved to be the only reasonable option on this basis, there still needs to be some indication of why and a summary of the output of the National Grid's CION process is the minimum is required.

38. In reality, the connection agreement is little different to the Crown's process of identifying potential windfarm locations, which effectively determines the other end of the Project, or the decision on the landfall. As I have set out above, the PEIR and Environmental Statement explain the decisions at that end of the Project. The Applicant provides no good reason why the selection of the Substation location should be treated any differently.

39. My overall conclusion, therefore, is that there is a material weakness in the PEIR, which, is repeated in the Environmental Statement, and which amounts to a failure to comply with the Infrastructure Regulations.

40. I would advise the Parish Council and the Residents to write to PINS pointing out the deficiency and asking that no consideration of the application begins until further information addressing the issue has been provided and they have had an opportunity to consider its implications for the justification of the need.

SIMON BIRD QC
16 July 2018

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IN THE MATTER OF THE NORFOLK VANGAURD DCO APPLICATION

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Richard Buxton
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Your Ref:

Our Ref: EN010079

Date: 23 July 2018

By email

Dear Mr Buxton

Planning Act 2008

Application by Norfolk Vanguard Limited for an Order Granting Development Consent for the Norfolk Vanguard Offshore Wind Farm

Thank you for your email and attachments of 17 July 2018 to the Planning Inspectorate regarding the Norfolk Vanguard Offshore Wind Farm project.

We note your comments set out in your letter. The above application was submitted to the Planning Inspectorate on 26 June 2018. Beginning on the day after it was submitted the Planning Inspectorate (on behalf of the Secretary of State) has 28 calendar days to decide whether the application can be accepted for examination.

The Acceptance decision must therefore be taken on or before 24 July 2018. The decision will be published on the project webpage, here:

https://infrastructure.planninginspectorate.gov.uk/projects/eastern/norfolk-vanguard/

The Inspectorate will consider whether to accept the proposed Norfolk Vanguard Offshore Wind Farm application in accordance with the requirements of Section 55 of the Planning Act 2008. Should the application be accepted, you will be able to make a Relevant Representation at the appropriate time.

Yours sincerely

Tracey Williams

Tracey Williams
Case Manager

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