

From: [Leigh Gareth \(Energy Development & Resilience\)](#)
To: [Francesca De Vita](#); [Thompson Alexander \(Energy Development & Resilience\)](#)
Cc: [Karma Leyland](#); [Craig Harwood](#); [Libretto Denise \(Energy Development & Resilience\)](#)
Subject: RE: Hornsea Project Three - EN10080
Attachments: [image001.png](#)
[image005.png](#)
[image006.png](#)

Dear Francesca

Thank you for email of 29 July 2020 regarding the Secretary of State's letter of 1 July 2020 in respect of the application for development consent for the Hornsea Project Three offshore wind farm.

In terms of the approach outlined in your email, and without prejudice to final decision on its acceptability which remains a matter for the Secretary of State, the planning team at BEIS have no in-principle objections to your proposal. You will understand that it is not possible to offer any more definitive opinion in the absence of the detailed Compensation Plan designed to offset the impact to the kittiwake feature of the Flamborough and Filey Coast SPA and thereby maintain the coherence of the network of SPAs designated, at least in part, for kittiwake.

We would therefore urge Orsted to work closely with Natural England, the Secretary of State's statutory advisor on nature conservation, on the measures to be contained in the Compensation Plan and look forward to receiving details of the Plan by 30 September 2020.

This email is without prejudice to the Secretary of State's decision whether or not to grant development consent for the Hornsea Project Offshore offshore wind farm, and nothing in this email is to be taken to imply what that decision might be or what final conclusions the Secretary of State may reach on any particular issue which is relevant to the determination of the application.

Best regards

Gareth



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From: Francesca De Vita <FRADV@orsted.co.uk>

Sent: 29 July 2020 17:57

To: Thompson, Alexander (Energy Development & Resilience) <Alexander.Thompson@beis.gov.uk>

Cc: Leigh, Gareth (Energy Development & Resilience) <Gareth.Leigh@beis.gov.uk>; Karma Leyland <KALEY@orsted.co.uk>; Craig Harwood <CRHAR@orsted.co.uk>

Subject: Hornsea Project Three - EN10080

Alexander

I am writing further to the Minded to Approve Letter dated 1 July 2020 wherein the Secretary of State ("SoS") confirmed that he is minded to grant consent for the Hornsea Project Three Offshore Wind Farm subject to the Applicant providing sufficient evidence that appropriate compensation measures have been secured. I am seeking broad alignment to the approach outlined below.

Introduction

The Applicant provided the SoS with a kittiwake compensation strategy as part of its submission dated 20th February 2020. That strategy identified mammalian predator eradication, at a location to be determined, as the proposed compensation option for adverse effects on kittiwake. It has been noted that there was no negative commentary from the SoS on the proposed DCO condition or the proposed timing of delivery of the compensation measures.

Instead the commentary from the SoS focused upon:

1. Lack of agreement "in principle" with SNCB's on the feasibility of the measure identified by the Applicant and "significant potential obstacles" to implementation.
2. Lack of an evidence base stating that "robust evidence" would be needed to be provided to demonstrate that kittiwakes benefit.
3. Lack of agreement or a pathway to agreements. The SoS noted that the strategy does not specify "an approach for securing agreements for land access"

Brief legal analysis on the meaning of "Secure" and the meaning of "Delivery".

The law requires the SoS to ensure that compensation measures are secured or to be confident that they can be secured at the point of authorising the relevant project. It does not state when those measures must be secured or that they must be secured before the related harm arises. There is an important distinction between securing the compensation measures and its subsequent delivery.

As you are aware the Habitats Directive 92/43/EEC, the Conservation of Offshore Marine Habitats and Species Regulations 2017 and the Conservation of Habitats and Species Regulations 2017 ("the Regulations") do not expand on what is meant by "secured". In light of this, the Applicant has had regard to relevant case law and specifically the case of *Humber Sea Terminals v Secretary of State for Transport [2006] Env.*

L. R 4. From this case the Applicant has drawn the following

1. It is not necessary for there to be a binding agreement in place for delivery of compensation before consent is issued.
2. The question is whether the SoS could rationally believe that he could fulfil his duty to secure compensation measures, or could he only rationally conclude that he would be unable to fulfil it.
3. The SoS has the power to issue the consent if he can rationally believe that the mechanism for delivery of compensation would be implemented. In that, the SoS is entitled to rely on the advice of Natural England.
4. The timing of the measures to be secured depends on the timing of the events which would detract from the coherence of the network (i.e. when the impact occurs)

The legal position on timing of delivery of compensation measures was confirmed by the SoS in relation to the *Able Marine Energy Park Order 2013*. Two key principles arising from this decision are: (i) it is accepted that the compensation does not need to be delivered before any development commences; and (ii) it countenances a time-lag where there is damage/harm to the European Site, with compensation only fully functioning later. Additional compensation is required to account for interim losses.

The Applicants proposed approach to providing the SoS with sufficient confidence that the compensation measures are secured or can be secured at the point of authorising the Hornsea Three Project Three Offshore Wind Farm.

Having regard to the following:

1. The Regulations
2. Principle guidance documents including Defra 2012 Guidance and EC 2018 Managing Natura 2000 sites ("the Guidance");
3. Planning Inspectorates Advice Note Ten;

4. Tyldesley and Chapman's Habitats Regulations Assessment (HRA) Handbook;
5. The SoS's commentary in the Minded to Approve Letter; and
6. The principles drawn from relevant case law and DCO decisions;

the Applicant sets out below the areas it proposes to address against each compensation measure it has identified. **The Applicant is seeking broad alignment to the approach set out below and assistance in identifying whether there are any other deliverables that the BEIS planning team would like the Applicant to address in order to make their recommendation.**

To be clear the Applicant is currently considering a number of compensation measures and may conclude that it is necessary to present a suite of compensation measures, rather than focus upon one measure. In order to provide the SoS with sufficient confidence that the compensation measures are secured or can be secured at the point of authorising Hornsea Project Three the Applicant has identified the areas below and added some brief commentary.

1. Agreement in principle with Natural England

It is the Applicant's primary objective to reach agreement in principle with Natural England on the feasibility of the compensation measure identified. Agreement in principle with Natural England and an evidence base would provide the SoS with a rational basis upon which to make his decision.

2. Evidence

The intention is to submit sufficient evidence to inform and agree compensatory measures using reasonable metrics on numbers of birds to realise 65 to 72 birds/year. Reference will be made to the criteria in the Guidance. The Guidance recognises that the feasibility of the identified compensation measure must be based on best scientific knowledge available. It must be recognised that there are uncertainties across all proposed compensation measures. The Applicant will carry out a robust evidence gathering process and through the implementation of the measure together with detailed monitoring, further evidence on effectiveness will be provided.

3. Timescale for Delivery

It has been noted that there was no negative commentary relating to the timescale for implementation of the compensation measure in the Minded to Approve letter dated 1 July 2020. In line with the previous submission the Applicant intends to submit a compensation plan setting out the timetable for implementation prior to installation of the turbines. The Applicant is aware that the intention should ideally be for the compensation to be operational at the time the damage occurs. Where that cannot be fully achieved, overcompensation is likely to be required for interim losses as expressed in the Abel decision.

4. Monitoring

The Applicant notes that the Guidance requires a detailed monitoring programme during implementation to ensure the effectiveness of the measure in the long term should be included. The monitoring could lead to modification of the measure. In addition the Applicant hopes to identify any delivery partners who may be in a position to assist with monitoring through the lifetime of the project. It is envisaged that the Applicant would secure adaptive monitoring for the lifetime of the project. The Applicant would submit a draft DCO condition precluding commencement of any works until proposals for monitoring and reporting on their effectiveness has been approved.

5. Land/Seabed and Compulsory Acquisition.

The Applicant will present a land acquisition strategy. Due to the time constraints the Applicant will not be in a position to provide agreements in principle with landowners in relation, for example, with onshore sites for nesting structures. The strategy will be clear on the steps to be taken to reach agreement and whether it is possible to rely upon compulsory acquisition powers. The Applicant is engaging with the Crown Estate in respect of offshore areas of seabed and will include a pathway to exclusivity should appropriate offshore sites be identified. The Applicant would submit a draft DCO condition precluding commencement of any works until proposals for the location of, for example, onshore nesting sites, had been approved. **The Applicant would appreciate specific guidance as to whether BEIS planning align with the Applicant's view that a pathway to agreements would be sufficient for a recommendation to be made to the SoS.**

6. Design/Construction

Where onshore sites are identified, surveys will need to be undertaken to inform FEED studies for any proposed structures. The Applicant will present a design and construction strategy that will include the surveys needed to inform the design and any construction methodologies. In the context of onshore and offshore nesting structures, the Applicant can identify existing structures and demonstrate how these can be adapted to accommodate Kittiwake. Where no structure exists, the Applicant may need to demonstrate proof of concept. It may be possible to provide an outline construction plan but the content would be high level and dependent upon the outcome of any surveys. The Applicant would submit a draft DCO condition precluding commencement of any works until details of design has been approved.

7. Delivery Mechanism

The Applicant will submit a proposed condition to include within a Schedule to the DCO to secure the identified compensation measures. It is recognised that additional consents will be needed to deliver the compensation. Once again the Applicant will submit a strategy outlining the necessary consents and the steps required to obtain those consents. The Applicant shall develop a consultation strategy in line with the requirements for any necessary consents.

8. Funding

The Applicant proposes to identify the estimated costs associated with each measure and demonstrate how each measure will be funded. It is envisaged that this document will be similar to the Funding Statement submitted in support of compulsory acquisition.

I would be grateful to receive confirmation that you are broadly aligned with the above approach. I would also be grateful for any additional points that you may wish to see addressed as part of the Applicant's submission.

If you would prefer to discuss then I can arrange a call at your earliest opportunity.

Thank you

Best regards

Francesca

Best regards,

Francesca De Vita

Lead Legal Counsel

Legal Offshore CE & UK

Group Support



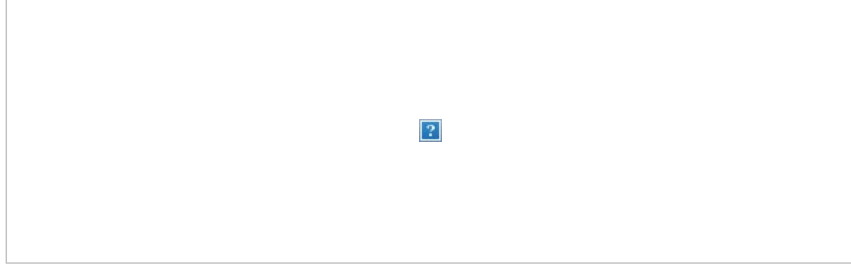
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