Leigh Day

**BY EMAIL ONLY**

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Our Ref: TGY/CDY/00120709/3

Date: 19 August 2020

Secretary of State for Business, Energy and Industrial Strategy
1 Victoria Street
Westminster
London
SW1H 0ET

By email to: beiseip@beis.gov.uk

Dear Sirs,

**Re: Hornsea 3 Windfarm, letter dated 1 July 2020**

**Introduction**

1. We act for the Wildlife Trusts. The Wildlife Trusts ("TWT"), with more than 800,000 members, is the largest UK voluntary organisation dedicated to conserving the full range of the UK's habitats and species. TWT participated in the Examination of the cabling issues that are the subject of this letter.

2. We are writing to you in response to your letter dated 1 July 2020 ("the Letter"), indicating that you were minded to grant a development consent order for the Hornsea 3 Windfarm ("HO3") subject to receiving satisfactory details from the applicant about compensation measures in respect of the adverse impact on integrity to the kittiwake feature of the Flamborough and Filey SPA.

3. TWT has a number of serious concerns about your approach to the Habitats Regulations Assessment as set out in your Letter and the draft Habitats Regulations Assessment ("HRA") accompanying it. In particular, TWT is concerned that your conclusions on the absence of any adverse effect on integrity for two Special Areas of Conservation: The North Norfolk Sandbanks and Saturn Reef SAC and The Wash and North Norfolk Coast SAC ("the Benthic SACs") are fundamentally flawed, not in accordance with the evidence submitted during the course of the Examination, contrary to

established CJEU and domestic case law and contrary to assurances given to TWT about the Secretary of State's ("SoS") approach to considering future fishing activities in combination with the impact from offshore windfarm development.

4. In summary, as set out more fully below, your approach to the impact of offshore windfarm construction, operation and decommissioning is flawed and unlawful because it:

   4.1. Fails to give any, or any proper, consideration to the unfavourable condition of the SACs and the reasons why those SACs are in unfavourable condition.

   4.2. Applied the wrong test in considering whether evidence permits the SoS to conclude that there will be no adverse effect on integrity.

   4.3. Wrongly concludes that the effects from cabling operations, in particular cable protection (in this case provided by dumping rock on the sea bed), are temporary.

   4.4. Wrongly, and contrary to assurances given by Government, excludes fishing operations from the assessment of cumulative effects.

**The Development**

5. The application for a development consent order by Orsted Hornsea Project Three (UK) Ltd was accepted for Examination on 8 June 2018. The Development is an offshore wind farm above 100 Megawatts and up to 2.4 Gigawatts comprising a maximum of 231 wind turbines and associated infrastructure, including cabling. The construction, operation and decommissioning phases each involve habitat loss to the Benthic SACs, in particular loss and disturbance from sandwave clearance as part of cable laying and the installation and subsequent decommissioning of scour/cable protection.

6. Sandwave clearance is comparable to a capital dredge and involves the removal or reshaping of a sandbank sand wave to improve cable burial success.

7. Cable protection involves the placement of a hard substrate over a cable when burial to an optimal depth is not possible. In the case of Hornsea Three, the proposed cable protection is in the form of rock dumping.

**The SACs**

8. The Wash and North Norfolk Coast SAC and The North Norfolk Sandbanks and Saturn Reef SAC both contain Annex I habitats: sandbanks which are slightly covered by sea water all of the time. JNCC's latest view on the condition of both SACs is that the sandbank and reefs features are in unfavourable condition and should be restored to favourable condition (see ExA Report 17.5.103).

9. Both SACs have conservation objectives which seek to maintain or restore, among other things, the extent and distribution of qualifying natural habitats and the habitats of qualifying species; the structure and function (including typical species) of qualifying natural habitats and the supporting processes on which the qualifying natural habitats and the habitats of qualifying species rely.

10. The cabling route for HO3 runs through both SACs, including the Annex 1 habitats for which the Benthic SACs have been designated.

11. Cable installation will impact upon the subtidal sandbank features of both Benthic SACs. Cable burial methods will cause disturbance and temporary loss of this feature, which is assumed to recover (although evidence is lacking, as we explain further below). The introduction of cable protection within a subtidal sandbank, a sediment habitat, will cause the loss of this feature and change to the habitat type. As we explain further in this letter, these impacts are contrary to the conservation objectives for the Benthic SACs and, as a consequence, give rise to an adverse effect on integrity.

12. Subtidal sandbanks within North Norfolk Sandbanks and Saturn Reef SAC are the most extensive example of the offshore linear ridge sandbank type in UK waters and the outer banks are the best example of open sea, tidal sandbanks in a moderate current strength in UK waters. The subtidal sandbanks within The Wash and North Norfolk Coast SAC are one of the largest expanses of sublittoral sandbanks in the UK.[1]

[1] See https://sac.jncc.gov.uk/habitat/H1110/

13. Subtidal sandbanks are an important habitat in the UK seas, supporting diverse invertebrate communities that provide a food source for commercial fish species, amongst other species such as birds and marine mammals. On a project level, cable installation activities can cause a deterioration of sandbank condition due to the impacts as described above. However, offshore wind is likely to be a significant contributor in realising the UK's ambition to meet the net zero carbon target by 2050. Current predictions are that 75-100GW of offshore wind farm installation will be required to meet this target. Currently, only 10GW are installed. The cumulative effect at an ecosystem level from multiple cable installation projects on subtidal sandbanks could be disastrous. Therefore, project level decisions must be made based on sound evidence on the impact and recovery of subtidal sandbanks and the precautionary principle employed where the evidence is lacking.

**The Advice of Natural England on Adverse Effect on Integrity**

14. You will no doubt be aware that the views of the statutory nature conservation bodies in cases of Habitats Regulations Assessments are of paramount importance. As the English courts have explained on numerous occasions, it would require some cogent explanation if the decision-maker had chosen not to give considerable weight to the views of the appropriate nature conservation body (in this case Natural England and JNCC): *R (Hart District Council) v Secretary of State for Communities and Local Government [2008] EWHC 1204 (Admin)* at [49] and *Mynnd y Gwnt Ltd v Secretary of State for Business Energy and Industrial Strategy* [2018] EWCA Civ 231).

15. In the context of the Benthic SACs, Natural England's position in the Examination was as follows:

    15.1. It did not consider the information submitted in support of the application to be of sufficient quality and detail to enable a thorough assessment of the impacts on nature conservation issues.

    15.2. It had a fundamental concern with the standard of evidence provided. In particular, it was unclear if best evidence had been used throughout. In particular, NE referred to recent experience from offshore energy projects entering the pre-construction and construction phase which brought to light fundamental flaws in the consent documents and the

fact that the construction impacts for those projects have been significantly greater than those predicted (see 4.2 of Natural England's representation letter dated 20 July 2018).

15.3. NE had a further fundamental concern that the applicant had not assessed the impact of the three phases – construction, operation and maintenance, decommissioning – cumulatively over time.

15.4. As to sandwave clearance, NE said that there was little empirical evidence to support the assumption that clearance was of local spatial extent, short to medium term duration and high reversibility. NE noted that the evidence from the Race Bank project was unclear as to whether full recovery would occur. In respect of the North Norfolk Sandbanks and Saturn Reef SAC, NE noted that the conservation objective was "restore".

15.5. On the issue of cable protection, NE's view was that there was insufficient information available to assess the impact.

**The Examining Authority's Conclusions on Adverse Effect on Integrity**

16. The ExA's conclusions on benthic habitats issues were:

16.1. Sandwave clearance:

"*17.5.110 We acknowledge that evidence is lacking which demonstrates the complete recovery of these features. However, available evidence suggests that recovery starts to occur soon after clearance in most instances in this highly dynamic environment provided sufficient substrate remains after levelling*.

…

*17.5.112 In our view there is reasonable scientific doubt that smaller sandwaves may not recover where underlying sediments are exposed through a combination of post levelling erosion and the excavation of divergent substrata. In coming to this judgement, we are mindful that the deposition of material and other alterations to surface sediments are viewed by NE as most likely to lead to a persistent change to substrate which would not be suitable habitat for sandbank communities [REP7-066]. Whilst the extent of the potential impact is*

*unclear, NE advises that the extent of sandwave levelling is such that this cannot be considered de minimus*.

*17.5.113 Given the above, we conclude that the sandwave clearance associated with the Proposed Development would have an adverse effect on the integrity of this feature as an integrated system. This conclusion not only applies to the North Norfolk Sandbanks and Saturn Reef SAC but also the Wash and North Norfolk Coast SAC given the similarity of the underlying issues. We do not find that the measures in the Benthic Impacts Control Plan [REP10-027] provide sufficient confidence that these effects would be adequately mitigated in either site.* "

16.2. Rock protection and decommissioning:

"*17.5.128 The objectives for this site state, among other things, that the extent and distribution of this feature should be restored and that the entire site represents an integrated sandbank system that should be managed accordingly. It goes on to state that the installation and/ or removal of infrastructure may be having a continuing negative impact thus hindering recovery [REP4-050].*

*17.5.129. The conservation objectives also stress the importance of biological communities in ecological processes that include sediment processing, secondary production, habitat modification, supply of recruits, bioengineering and biodeposition. We note that they go on to state that the loss of characterising sandbank biological assemblages or sandbank sediments from an area of the feature would constitute loss of sandbank habitat and a reduction in overall feature extent [REP4-050].*

*17.5.130. Whilst we accept that the recovery of some ecological function arising from infaunal and epifaunal colonisation of rock berms may occur [REP1-138], this would not be an appropriate substitute for the loss of a designated feature or represent adequate mitigation for this loss. This is because it would have fundamentally different physical and ecological characteristics as previously noted.*

…

*17.5.135 Given the above, and considering all other matters raised, we conclude that the rock protection would permanently reduce the extent and distribution of the sandbank feature as well as its structure and function. This would add to the adverse effect on the integrity of this site that we have already identified from sandwave clearance. Together these effects would undermine the conservation objectives of this site, thus hindering the recovery of favourable conservation status.*"

17. The ExA further concluded that in respect of both Benthic SACs the cumulative effects of sandwave clearance and rock protection/decommissioning would undermine the conservation objectives of the site (ExA Report 17.5.135).

**Letter of 1 July 2020**

18. The SoS did not agree with the ExA or NE's assessment of the impact on the Benthic SACs. The brief reasoning is contained in paragraphs 7.20-7.21 of the Letter where it is stated that:

*"7.20 The Secretary of State's HRA differs from the ExA's conclusions on HRA in that he concludes the Development would not have an adverse effect on integrity on the relevant qualifying features of the North Norfolk Sandbanks and Saturn Reef SAC and the Wash and North Norfolk Coast SAC but he cannot rule out an adverse effect on the kittiwake qualifying feature of the Flamborough and Filey Coast SPA in-combination with other plans or projects.*

*7.21 In respect of the North Norfolk Sandbanks and Saturn Reef SAC and the Wash and North Norfolk Coast SAC, on the basis of the evidence that the area of the sites affected is relatively small and that affected features are able to recover in their entirety following the complete removal of all infrastructure and deposits associated with the Development, the Secretary of State concludes that there will be no adverse effect on the integrity of the Annex I 'sandbanks slightly covered by water at all times' features of those sites either alone or in-combination with other plans or projects.*"

19. The HRA further states[2], in summary:

19.1. A small area of each Benthic SAC would be affected: North Norfolk Sandbanks and Saturn Reef, only 0.26% of the SAC (9.3km$^2$) would be impacted (HRA 5.6.3.1) and the Wash and North Norfolk Coast and the Wash sandwave clearance would amount to just under 1km$^2$ (0.2%) of the SAC being impacted.

19.2. The monitoring at Race Bank showed that after five months either partial or full recovery had occurred at ten out of twelve monitoring locations comprising fourteen out of nineteen sandwaves.

19.3. There is uncertainty over the extent of the residual impact of laying cables, including whether some smaller sandwaves may fully recover. However:

"*the maximum area impacted by cable laying is 0.26% of the SAC and, based on the best available scientific evidence the majority, if not all, of which is predicted to recover. Consequently, the Secretary of State is satisfied that the potential for impacts on Annex I sandbank features from cable installation as a result of the Project alone would not represent an adverse effect upon the integrity*"

19.4. As to rock clearance and its impact on the sandwave feature, the SoS concluded that similar decisions had been made in respect of other wind farm projects and that those projects had been decided on the assumption that at the time of decommissioning, habitat would recover within a few months/years. He again relied on the Race Bank evidence.

19.5. The SoS concluded that there would be a long term but temporary impact and the site would recover over time. On this basis the SoS's overall conclusion was that there would be no adverse effect on integrity.

[2] See Sections 5.6 and 5.7

**TWT's Concerns with SoS's Conclusions**

20. As set out at the beginning of this letter, our clients have a number of serious concerns with the approach taken by the SoS on the impact on integrity of the Benthic SACs. These are set out in detail below.

Unfavourable Conservation Status

21. The Letter makes no reference to the unfavourable conservation status of the Benthic SACs. The Secretary of State does not appear to have considered the unfavourable status in his analysis of the impact of sandwave clearance and cable protection.

22. The reasons for the unfavourable status of both SACs include human pressures arising from existing offshore cabling**,** in particular the Race Bank Wind Farm which passes through The Wash and North Norfolk Coast SAC, and fishing activities. The proposal adds to these pressures and is inconsistent with the conservation objective of "restore".

23. While the unfavourable status is noted in the HRA, there is no analysis of the effect HO3 will have on achieving the conservation objectives for the Benthic SACs and the impact of delaying, or frustrating, the achievement of favourable conservation status through contributing to further habitat loss (whether temporary or permanent – see section on temporary effects). No reasons are given for disagreeing with the ExA or NE's conclusions that cabling operations are not consistent with the conservation objectives for the Benthic SACs.

24. If a plan or project is likely to undermine the conservation objectives of the site, it must necessarily be considered likely to have a significant effect on integrity (Case C-127/02 "*Waddenzee"* at [36]). Development which further contributes to habitat loss necessarily delays the achievement of favourable conservation status. TWT are at a loss to understand how the SoS could conclude that an adverse effect on integrity could be ruled out.

25. The impact of cabling operations on the unfavourable conservation status of the Benthic SACs has been noted by Natural England in its joint advice with JNCC dated September 2019[3]:

*"5.4 Region 4 The Wash*

*The Wash and North Norfolk Coast SAC:*

[3] https://hub.jncc.gov.uk/assets/3c9f030c-5fa0-4ee4-9868-1debedb4b47f

*This SAC encompasses the largest embayment in the UK designated for its saltmarsh features, coastal lagoons, large shallow inlets and bays, mudflats and sandflats and sandbanks, as well as harbour seals and otters. There are existing impacts on the SAC due to cable installation associated with offshore windfarms, with an additional offshore windfarm application currently in the consenting process which also proposes to cable through the SAC. Previous impacts to saltmarsh have resulted in a significant impact which has not recovered 6-7 years post-installation18. More recent cable installations have failed to reach optimum cable burial and required extra works with significant impacts including use of dredging, mass flow excavators and potentially cable protection. As some of the features and subfeatures of this SAC are considered to be in unfavourable condition, adding further pressure to the SAC with cable laying and associated cable protection would be likely to have a significant impact on the conservation objectives of the SAC and may impede restoration of the features."* (emphasis supplied)

*"North Norfolk Sandbanks and Saturn Reef SAC:*

*The sensitive features within this SAC are sandbanks (includes subtidal coarse sediment, subtidal mixed sediments and subtidal sand), and subtidal biogenic reefs: Sabellaria spinulosa. All designated features have a restore objective. Subtidal sand, subtidal coarse sediment and subtidal mixed sediments are sensitive to all cabling pressures identified. Sabellaria spinulosa reefs are sensitive to all pressures identified except changes in suspended solids. The site is under pressure from ongoing activities from a number of industries including aggregate extraction, fishing, telecommunication cables and a considerable amount of oil and gas extraction. Much of the oil and gas infrastructure is now being decommissioned. Cable laying, cable laying with associated protection and sandwave levelling are, in our view, incompatible with the achievement of the conservation objectives advised for the SAC and would impede restoration of the sandbanks which are slightly covered by seawater all the time."* (emphasis supplied)

Adverse Effect on Integrity

26. It is well-established that a plan or project cannot proceed (subject to article 6(4) Habitats Directive) if it is likely to have an adverse effect on the integrity of a protected site. An adverse effect on integrity must be ruled out beyond all

scientific doubt, using best available evidence (C-127/02 (the "*Waddenzee*" case).

27. The HRA agrees that scientific doubt remains as to whether the entirety of the affected areas within the Benthic SACs will recover from sandwave levelling and rock protection activities (see HRA 5.6.3.1). In light of that conclusion, we do not understand how the SoS went on to conclude in the Letter that the affected features are able to recover *"in their entirety*" and that there was no adverse effect on integrity (see Letter 7.21).

28. The reasons given for ruling out an adverse effect on integrity in the SoS's Letter and HRA appear to be that (a) the area affected is small and (b) the evidence submitted on sandwave recovery from monitoring at Race Bank shows recovery in the majority of areas over a short time is likely.

29. This reasoning is fundamentally flawed and unlawful:

    29.1. It is overly simplistic to conclude that an impact on a small area cannot give rise to an adverse effect on integrity. The question the SoS ought to have considered is whether the loss or disturbance has an impact on the conservation objectives of the site. We have seen no evidence of this analysis having been carried out by the SoS in the Letter or the HRA. For the reasons given above, if that analysis had been carried out, the inevitable conclusion would have been that there would be an adverse effect on integrity.

    29.2. Even if it is appropriate to consider only the size of the area affected, both NE and the ExA concluded that the effects on the Benthic SACs from sandwave clearance and rock protection were not *de minimis*. The SoS has provided no explanation as to why he disagrees with this analysis. It is clear from CJEU case law that impact on a small area can be sufficient to give rise to an adverse effect (see *Commission v Spain (the Alto Sil)* C-404/09 where an adverse effect on an area of 0.2% of habitat was not found to be *de minimis*).

    29.3. The SoS has placed significant reliance on the evidence submitted which purports to show some recovery of sandwaves at Race Bank following sandwave clearance. Again, the SoS has failed to give reasons why he disagrees with NE's advice that the Race Bank

evidence was inconclusive and could not necessarily be applied to HO3.

29.4. In the Letter, the SoS asserts inaccurately that the evidence from Race Bank demonstrates the sites will recover. The evidence itself does not show recovery in all locations and is insufficient to show full recovery[4]. In particular, the ExA concluded that while the evidence showed recovery for larger sandwaves, there was limited evidence of recovery for smaller sandwaves. Contrary to the SoS's conclusions in the HRA and Letter, the evidence does not demonstrate that the Annex 1 habitat is likely to fully recover. In fact, it demonstrates that recovery is uncertain and therefore an adverse effect on integrity cannot be ruled out.

29.5. The SoS has also wrongly applied the Race Bank evidence to the issue of rock protection. The Race Bank evidence does not address rock protection and was concerned with sandwave levelling only. Both the ExA and NE concluded that there was little evidence to demonstrate recovery from rock protection activities. The SoS's conclusion that sandwaves will recover following decommissioning is therefore fundamentally flawed and not supported by the evidence submitted to him. In fact, the only evidence submitted on decommissioning outlined the methodology but did not refer to the ecological impacts of the decommissioning or recovery. While the HRA states that these can be assessed at the time of decommissioning (see 3.4), this throws into light that it cannot be said with any certainty that decommissioning will be successful and/or will permit recovery of the protected habitat.

29.6. The SoS should also be aware of the NE document, submitted as part of the Examination, *Natural England Offshore wind cabling: ten years experience and recommendations*, dated July 2018[5] which details NE's experience in advising on offshore windfarm development over the past 10 years. In particular, the report details that in NE's experience, cabling should no longer be considered a one-off activity

[4] NE's advice was that sandwave levelling activities have only been proposed relatively recently and consequently there is limited evidence on how well this approach works, whether cables remain buried thus avoiding the need for additional cable protection, and very limited evidence on how quickly dredged areas recover.

[5] REP1-208 in the Examination

as maintenance repair works, reburial and additional rock protection are often needed. The increase in offshore wind projects over recent years has also led to cable installation taking place in less robust areas of sediment where the prospect of recovery is less certain. This document has not been referred to in the body of the ExA Report, the Letter or HRA. This evidence makes it less likely that (a) the small area referred to by the SoS is all that will be affected over the lifetime of the project and (b) that cabling is a once and for all activity which does not give rise to subsequent habitat loss and disturbances over time.[6]

29.7. We also draw your attention to Natural England's condition assessment for Inner Dowsing, Race Bank and North Ridge SAC[7] as evidence of the impact of offshore wind development on subtidal sandbanks. In particular, the assessment refers to the impact of construction and operation of the Race Bank offshore windfarm and casts reasonable scientific doubt on the prediction that sandwaves will recover. We draw your attention in particular to the following passages of the condition assessment:

"*The area of sandbank which is currently occupied by turbines for Race Bank offshore windfarm is known to be in unfavourable condition as it is not currently sediment.*"

"*Areas of feature within the wider array have been assessed as unfavourable to take account of scour prevention and operation and maintenance activities. 4,902.96 ha (16%) of the sandbank feature has been assessed as unfavourable-no change due to offshore windfarm infrastructure.*"

"*Natural England and JNCC considers that all scour protection within designated sites which interact with site feature will result in a lasting change to the habitat feature. Even if there is a commitment to remove infrastructure at the time of decommissioning, Natural England and JNCC consider the impacts are long lasting. Natural England and JNCC consider the following would need to occur before the favourable condition of the*

[6] The applicant has committed to produce a cable installation plan that covers the lifetime of the project, thus indicating that cable installation is unlikely to be a one off activity. This reflects both TWT and NE's experience of other Offshore Windfarm Projects where cables require replacement/repair.

[7] https://designatedsites.naturalengland.org.uk/MarineCondition/publicFeatures.aspx?SiteCode=UK0030370&SiteName=inner%20dows&countyCode=&responsiblePerson=&SeaArea=&IFCAArea=

*site is met for the pressures associated with existing Offshore Wind Farm installation and scour protection:*

- *That the impact is temporary and reversible; and/or*
- *That the scale of the remaining impact from the infrastructure is so small as to not hinder the conservation objectives for the site alone and cumulatively.*"

29.8. Further, in Marine License Application MLA/2018/00385 which is an application by Orsted for further cable protection within The Wash and North Norfolk SAC for cabling works for Race Bank Offshore Wind Farm, the MMO has concluded that there will be an adverse effect on integrity of the SAC from rock protection. The application is now paused. The expert opinion of three independent public bodies (NE, the Planning Inspectorate and the MMO) is that the development, or similar development, is likely to have an adverse effect on integrity of the Benthic SACs. We do not understand why the SoS felt able to reach a different view on the basis of the scientific evidence.

30. Contrary to the conclusions in the HRA, in light of the above, it is not the case that there is now more evidence on likelihood of recovery than was available for earlier windfarm DCOs. For these Wind Farms, the SoS gave consent based on the prediction that habitats would recover following decommissioning. In fact, there is now further evidence which demonstrates that full recovery is not certain. TWT is seriously concerned that the SoS appears to have placed weight on the need to act consistently with his earlier decisions, notwithstanding new evidence from the statutory nature conservation body which casts the accuracy of those decisions into doubt.

<u>Temporary Effects</u>

31. The SoS has wrongly concluded that the effects of rock protection will be temporary. The rock protection will be in place for the lifetime of the development (35 years). On any view, this is not an acceptable temporary loss of habitat, particularly in circumstances when the SACs are already in unfavourable condition and it has not been demonstrated that the sandwaves will fully recover upon decommissioning. In *Commission v Spain* the impact from mining operations over a period of 20 years was considered an adverse effect on integrity notwithstanding that it was accepted the habitat would fully recover on cessation of activities. In *Sweetman v An Board Pleanala* (C-258/11), the CJEU held that some strictly temporary loss which is capable of

being fully undone would not amount to an adverse effect on integrity. Neither of those conditions are met in this case, for the reasons given above.

32. Further, there is limited evidence which demonstrates that rock protection can be decommissioned without the operations required for decommissioning themselves having an adverse effect on integrity. During the Examination, NE's advice was that it was unable to agree that the applicant could demonstrate that decommissioning would be successful and would ensure that the seabed/site features are returned to their previous condition. In those circumstances, the SoS's conclusion that it was likely that any impacts on the Benthic SACs would be temporary has no basis in the evidence submitted.

**Fishing Operations**

33. TWT's position in a number of DCO applications for Offshore Wind Farms has been that fishing is a plan or project for the purposes of article 6(3) of the Directive and therefore should be included in the assessment of in combination effects. We further note that BEIS has been undertaking a review of offshore wind farm consents in the Southern North Sea SAC in relation to noise impacts and fishing has been included as an in-combination effect in that assessment.[8] The ExA accepted in its report that fishing was a plan or project for the purposes of the Directive, although it ultimately concluded that the effects of current fishing had been considered in the baseline and therefore there was no need to consider the effects of future fishing in combination with the cable laying and rock protection (ExA Report 17.5.178-182)[9]. TWT disagrees with this analysis and considers it contrary to assurances given by Government.

34. On 3 September 2015, TWT issued a letter before claim to the Secretary of State for Energy and Climate Change, indicating that it intended to challenge the grant of a DCO for an Offshore Wind Farm known as "Teeside A and B". The letter concerned the impact of cabling and rock protection on the Dogger Bank SCI (which at the time was awaiting formal designation as an SAC). Dogger Bank contains the same Annex 1 protected habitat as the Benthic SACs and was also in unfavourable condition at the time the Teeside A and B DCO was granted. TWT's position, as set out in that letter, was that the

[8] https://www.gov.uk/government/consultations/southern-north-sea-review-of-consents-draft-habitats-regulations-assessment-hra

[9] This conclusion was reached in respect of the potential impact on the Harbour Porpoise populations of the Southern North Sea SAC. The ExA Report does not mention the impact of fishing in respect of the Benthic SACs even though this was raised by TWT during the course of the Examination.

regular grant of fishing licenses was a “plan or project” for the purposes of Article 6(3) and that any impacts of cabling operations from Teeside A and B windfarm should be considered in combination with the grant of future fishing licenses. These effects had not been assessed in the HRA accompanying the Teeside A and B windfarm and were conceptually different from treating the condition caused by fishing as part of the baseline for the assessment.

35. TWT issued proceedings but these were withdrawn following assurances given by the Secretary of State for Environment, Food and Rural Affairs in correspondence and in meetings between TWT and the Department for Environment, Food and Rural Affairs. In particular, TWT understood the outcome of those discussions to be that government would take steps to include fishing activities in the consideration of windfarm applications in the future (Copies of the relevant correspondence are attached to this letter). TWT’s position is that this approach is correct and is further supported by the recent *Dutch Nitrogen* cases (see C-293/17 and C-294/17). The reasoning of the CJEU in these cases is consistent with the points made in TWT’s letter to the Secretary of State dated September 2015. No consideration of the impact of future fishing activities on the Benthic SACs has been included in the ExA Report, the HRA or the Letter for HO3.

36. TWT is concerned that additional human pressures on SACs that are already in unfavourable condition from windfarm development should not be introduced unless existing pressures such as fishing are reduced. TWT had understood that the Government accepted this and was taking steps to address commercial fishing while at the same time ensuring that due consideration would be given to treating fishing as a ‘plan or project’ in any future Habitats Regulations Assessment, in line with Defra’s revised approach to fishing, so that a similar scenario that has occurred Dogger Bank does not happen again. TWT is therefore extremely disappointed and concerned that the Letter has not considered in-combination effects from fishing and invites the SoS to re-visit this aspect of his analysis before he makes his final decision.

**Conclusion**

37. The deadline for the SoS’s final decision has been moved to 31 December 2020. TWT considers that there is ample time for the SoS to take on board the concerns raised in this letter and address them in an updated HRA and any final decision.

38. If, following a lawful approach to the appropriate assessment, the Secretary of State considers that there is an adverse effect on integrity of the Benthic SACs, there are a number of options to avoid an adverse effect, or alternatively to mitigate it. While it is a matter for the Applicant to make amendments to their proposals, the following are examples of measures which TWT considers may be appropriate:

    38.1. No cable protection within Benthic SACs and the implementation of a safety exclusion zone around cables to prevent damage to cables from fishing activity and anchoring.

    38.2. There are offshore windfarms currently in operation which do not use cable protection either on a temporary or permanent basis (Lincolnshire Offshore Wind Farm and, temporarily, Race Bank Offshore Wind Farm). HVDC cables could be used in place of HVAC cables, which reduces the number of cables required to bring energy onshore. Norfolk Vanguard Offshore Windfarm has committed to using this type of cable.

39. In order to provide time for a lawful and proper HRA to be carried out, we request a response to this letter by no later than **4 September 2020**.

Yours faithfully,

[redacted]

**Leigh Day**