



Kerry Crowhurst,
Head of Planning,
Energy Infrastructure Planning Delivery Team, Energy Infrastructure Group,
Department for Energy Security and Net Zero, Department for Business and Trade
1 Victoria Street
London
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Date: 10 February 2023

Ref: EN010080

Dear Ms Crowhurst,

Development Consent Order for Hornsea Project Three Offshore Wind Farm (SI 2020/1656) (“the DCO”) – Application for a change to the DCO

We have a number of concerns with the process being undertaken for the Ørsted Hornsea Project Three (UK) Ltd (“**the Applicant**”) application for a non-material change (“**the Application**”) to the DCO. These concerns are summarised as follows:

We believe there is insufficient information provided currently for the Applicant to be able to demonstrate that the Application is unlikely to give rise to any materially new or materially different environmental effects from those considered in the kittiwake compensation plan (as set out under the DCO) and therefore it is not possible to say now that this is a non material change. (discussed further below)

Alongside this we believe the proposed amendments to the kittiwake compensation plan (specifically the reduced lead in time) would make a substantive difference to that compensation and there is a need for this impact to be substantively assessed as part of the Habitats Regulations Assessment requirements in order to fully comply with the Conservation of Habitats and Species Regulations 2017 (and Offshore equivalent Regulations (the “**Habitats Regulations**”)). (discussed further below)

In addition to the, in our view, insufficient information, the Secretary of State **Regulation 7(3)¹ Letter**, dated 21 December 2022, specifically requires the process for material changes to be undertaken and we do not believe the Applicant has fully complied with the publicity and time period requirements as follows:

3.1 Failure to comply with the Secretary of State’s requirements with regards to publicity

At paragraph 9 of the Regulation 7(3) Letter, the Secretary of State specified that the Application is to be publicised in line with the requirements of regulation 20 of the Change Regulations.

¹ The Infrastructure Planning (Changes to, and revocation of, Development Consent Order) Regulations 2011 (as amended) (“**the Change Regulations**”)

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However on 12 January 2023, the Applicant made a “Notice of Application to make a non-material change” to the DCO pursuant to regulation 6 of the 2011 Regulations (**“the Regulation 6 Notice”**). As far as we can see there has been no explanation provided as to why the Applicant is following the regulation 6 procedure not the regulation 20 procedure specified by the Secretary of State. Instead the Applicant (in its Application cover letter dated 12 January 2023) has said that the Application is made pursuant to section 153 and paragraph 2 of Schedule 6 of the Planning Act 2008. As you are aware this is the procedure used for non-material changes to Development Consent Orders. We believe that instead it should be made pursuant to paragraph 3 of Schedule 6 of the Planning Act 2008.

In taking this approach, the Applicant appears to have concluded that the Application is for a non-material change and has proceeded accordingly. However, the Secretary of State has not yet confirmed whether the Application is for a material or non-material change to the DCO, which is made clear in the final section of the 7(3) letter.

3.2 Failure to provide any statement about an updated Environmental Statement

By publicising the Application under regulation 6 of the 2011 Regulations (rather than under regulation 20) the Applicant has not included a statement (as required by regulation 20(2)(e) of the Change Regulations), as to whether the application involves Environmental Impact Assessment (“EIA”) development.

Although of course an Environmental Statement was submitted with the DCO Application, this Application is a ‘subsequent application’ for the purposes of the Infrastructure Planning (EIA) Regulations 2017 (the **“EIA Regulations”**).

Nor, as far as we are aware, has the Applicant requested an updated screening opinion from the Secretary of State in order to determine whether an updated Environmental Statement is required. Currently, in the information we have been provided with there is no information about EIA requirements.

3.3 The deadline for responses to the Secretary of State

As set out above we believe the Applicant has not complied with all requirements. However, even if the Applicant’s Regulation 6 Notice is in accordance with those regulation 6(2)(h), the Change Regulations, requirements, the deadline for the receipt of responses by the Secretary of State should be *‘not less than 28 days following the date when the notice was last published’* (emphasis added).

Given that the notice must run for two successive weeks in one or more local newspapers (in accordance with regulation 6(1)(a) of the Change Regulations), then the date of last publication should be the date after it has run for those two successive weeks. If the Regulation 6 Notice was published in a local newspaper on 12 January 2023 (and currently we have not been able to check the details of the publishing), two successive weeks would mean, at the earliest, the 26 January 2023. The deadline for receipt of responses to the Secretary of State should then be, at least 28 days after and therefore, the deadline given by the Applicant of 16 February 2023 cannot be correct.

Sufficiency of information accompanying the Application

Paragraph 10 of the Secretary of State’s Regulation 7(3) Letter states that:

‘... the Secretary of State’s written consent in this matter should not be taken as indicating approval for any aspects of the proposed changes to the 2020 Order [the DCO] which fall to him for consideration and determination, or whether the proposed changes will ultimately be regarded as material or not.’

We believe in order for the Secretary of State to make an informed decision he must have information about how the proposed changes to the DCO would be in compliance with the agreed kittiwake compensation plan. The DCO, Schedule 14, Part 1, paragraph 8 says:

'Any amendments to or variations of the approved KIMP [kittiwake implementation and monitoring plan] must be in accordance with the principles set out in the kittiwake compensation plan and may only be approved where it has been demonstrated to the satisfaction of the Secretary of State that it is unlikely to give rise to any materially new or materially different environmental effects from those considered in the kittiwake compensation plan.'

This consideration and determination by the Secretary of State and whether the change is material or non material is obviously critical and we are therefore concerned that the Applicant appears to be proceeding on the basis that its application is for a non-material change.

Proposed amendments to the kittiwake compensation plan under the DCO

To the extent that the proposed amendments to the compensatory measures under the DCO could have a substantive effect on the effectiveness of that compensation and therefore kittiwake, this needs to be substantively assessed as part of the Habitats Regulations Assessment procedures and to enable the Secretary of State, as the competent authority, to robustly determine whether the compensatory measures are effective and achievable - ecologically, legally and financially.

The Applicant is proposing to bring forward the impacts associated with the project by one and two years respectively. Potential impact on kittiwakes must be precisely identified and assessed as part of a revised Habitats Regulations Assessment in order to properly determine the nature (and adequacy) of the compensatory measures.

Request for Clarification

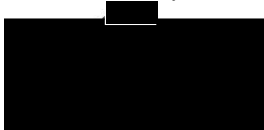
In light of the above we would be extremely grateful for answers to the following questions:

1. Has the Secretary of State received further communication from the Applicant regarding whether the notice of application should be made under regulation 6 rather than regulation 20 of the Change Regulations?
2. Has the Secretary of State confirmed, in response to that further communication, that the Applicant can comply with the provisions under regulation 6 of the Change Regulations and we would be grateful for the reasoning for this decision.
3. Whether, as we believe, additional information is required to enable a full and robust determination on whether the changes proposed in the Application will or will not
 - a. give rise to any materially new or materially different environmental effects to those considered in the kittiwake compensation plan;
 - b. the proposed changes are material or non-material; and
4. Finally whether the deadline for responses from stakeholders is correct.

Summary

Given our concerns raised above and pending the further clarification from the Secretary of State and the Applicant we respectfully request that the Secretary of State refrain from determining this Application and amending the DCO at this time.

Yours sincerely



Andrew Dodd,
Head of Casework,
The RSPB

cc: Eleni Antoniou, Ørsted Hornsea Project Three (UK) Limited