



Department for
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Alex Tresadern
Pinsent Masons LLP
30 Crown Place
London
EC2A 4ES

17 April 2023

Dear Mr Tresadern,

**PLANNING ACT 2008
PROPOSED NON-MATERIAL CHANGE TO HORNSEA THREE OFFSHORE WIND FARM
DEVELOPMENT CONSENT ORDER 2020 – S.I. 2020/1656**

1. I am directed by the Secretary of State for Energy Security and Net Zero (“the Secretary of State”) to advise you that consideration has been given to the Application (“the Application”) which was made by Orsted Hornsea Project Three (UK) Limited (“the Applicant”) on 12 January 2023 for changes which are not material to be made to the Hornsea Three Offshore Wind Farm Development Consent Order 2020 (“the Order”) under section 153 of, and Schedule 6 to, the Planning Act 2008. This letter is the notification of the Secretary of State’s decision in accordance with Regulation 8 of the Infrastructure Planning (Changes to, and Revocation of, Development Consent Orders) Regulations 2011 (as amended) (“the 2011 Regulations”).
2. The original application for development consent under the Planning Act 2008 was granted consent on 31 December 2020 and gave development consent for the construction and operation of an offshore wind farm above 100 Megawatts with associated offshore and onshore development in the North Sea and the County of Norfolk.
3. The Applicant is seeking consent for a change to paragraphs 3(c) and 4 of Part 1 of Schedule 14 to the Order. The Applicant seeks these changes to shorten the length of time which four planned artificial nesting structures for kittiwake (“ANS”) need to be in place before turbine operation. This will allow time for necessary rights for the construction of the ANS to be obtained without impacting the programme for the operation of Hornsea Three and its provision of renewable energy to the National Grid. Specifically, the Applicant seeks a reduction from four to three full kittiwake breeding seasons (defined as 1 March to 30 September of each year) in respect of two ANS prior to the operation of any turbine forming part of the authorised development. The Applicant also seeks a reduction from four to two full

kittiwake breeding seasons for the other two ANS prior to the operation of any turbine forming part of the authorised development.

Summary of the Secretary of State's decision

4. The Secretary of State has decided under paragraph 2(1) of Schedule 6 to the Planning Act 2008 to make non-material changes (“NMCs”) to the Order to authorise the changes as detailed in the Application. This letter is notification of the Secretary of State's decision in accordance with Regulation 8 of the 2011 Regulations.
5. The Secretary of State has given consideration to whether the Application is for a material or non-material change. In doing so, he has had regard to paragraph 2(2) of Schedule 6 to the Planning Act 2008 which requires the Secretary of State to consider the effect of the change on the Order as originally made.
6. There is no statutory definition of what constitutes a 'material' or 'non-material' amendment for the purposes of Schedule 6 to the Planning Act 2008 and Part 1 of the 2011 Regulations.
7. So far as decisions on whether a proposed change is material or non-material, guidance has been produced by the Department for Communities and Local Government (now the Department for Levelling Up, Housing and Communities (“DLUHC”)), the “Planning Act 2008: Guidance on Changes to Development Consent Orders” (December 2015) (“the Guidance”)¹, which makes the following points:
 - (a) given the range of infrastructure projects that are consented through the Planning Act 2008, and the variety of changes that could possibly be proposed for a single project, the Guidance cannot, and does not attempt to, prescribe whether any particular types of change would be material or non-material;
 - (b) however, there may be certain characteristics that indicate that a change to a consent is more likely to be treated as a material change. Four examples are given in the Guidance as a starting point for assessing the materiality of a proposed change, namely:
 - (1) whether an update would be required to the Environmental Statement (“ES”) (from that at the time the Order was made) to take account of new, or materially different, likely significant effects on the environment;
 - (2) whether there would be a need for a Habitats Regulations Assessment (“HRA”), or a need for a new or additional licence in respect of European Protected Species (“EPS”);
 - (3) whether the proposed change would entail compulsory acquisition of any land that was not authorised through the Order; and
 - (4) whether the proposed change would have a potential impact on local people and business (for example, in relation to visual amenity from changes to the size and height of buildings; impacts on the natural and historic environment; and impacts arising from additional traffic).
 - (c) although the above characteristics indicate that a change to a consent is more likely to be treated as a material change, these only form a starting point for assessing the

¹ <https://www.gov.uk/government/publications/changes-to-development-consent-orders>

materiality of a change. Each case must depend on thorough consideration of its own circumstances.

8. The Secretary of State has considered the change proposed by the Applicant against the four matters set out in (1), (2), (3) and (4) above:
 - (1) The Secretary of State notes that the information supplied supports the Applicant's conclusions that there are no new, or materially different, likely significant effects from those assessed in the ES. Considering the analysis supplied by the Applicant and responses to the consultation, the Secretary of State has concluded that no update is required to the ES as a result of the proposed amendments to the Order.
 - (2) In respect of the HRA, the Secretary of State has considered the nature and impact of the change proposed and is satisfied that there is no change to the conclusions of the HRA as a result of the proposed amendments and therefore a new HRA is not required. He is also satisfied that the proposed change does not bring about the need for a new or additional licence in respect of EPS as the amendments sought are not anticipated to give rise to any new or different effects from an ecological perspective than those assessed for the original application.
 - (3) In respect of compulsory acquisition, the Secretary of State notes that the proposed changes do not require any additional compulsory purchase of land.
 - (4) In respect of impacts on local people and businesses, the Secretary of State notes that no changes are anticipated by the Applicant to the impacts already assessed in the ES.
9. The Secretary of State therefore concludes that none of the specific indicators referred to in the guidance, or other relevant considerations, suggests that the changes considered in this letter is a material change.
10. Taking the information contained in the application and responses received from consultees into account, the Secretary of State is therefore satisfied that the changes considered in this letter are not material and should be dealt with under the procedures for NMCs.

Consultation and responses

11. In accordance with the requirements of Regulation 7 of the 2011 Regulations specified parties, such as the local planning authority, were notified by email on 12 January 2023.
12. The Applicant published a notice of the Application in accordance with Regulation 6 (publicising the application) of the 2011 Regulations (the "Regulation 6 notice") for two consecutive weeks in the local press (the Eastern Daily Press, the Norwich Evening News, the North Norfolk News and Lloyd's List) on 12 January 2023 and 19 January 2023 and made publicly available on the Planning Inspectorate's (PINS) website, such that there was an opportunity for anyone not notified to also submit representations to PINS. The Applicant also published the Regulation 6 notice in the Fishing News on 19 January 2023.
13. The Applicant submitted its Consultation and Publicity Report as required by Regulation 7A of the 2011 Regulations on 12 January 2023, which states that the Applicant has complied with all necessary steps set out in Regulations 6 and 7 of the 2011 Regulations in respect of stakeholder consultation and its public engagement approach. This was published on the PINS website on 03 March 2023 alongside a letter clarifying a typographical error which had

appeared in the letter from the Secretary of State regarding Regulation 7(3) of the 2011 Regulations on 21 December 2022 (“the Regulation 7(3) Letter”). A further two-week period for consultation responses was therefore given between 03 March 2023 and 17 March 2023 for responses to be received.

14. A total of 4 responses were received from specified Interested Parties including the Marine Management Organisation, Natural England and The Crown Estate who all did not raise any objections to the Application. The Royal Society for the Protection of Birds (“the RSPB”) responded and raised issues with the Application outlined below. No comments were received from Norfolk Wildlife Trust, The Wildlife Trusts, and The Norfolk Farming and Wildlife Advisory Group.

The Royal Society for the Protection of Birds

15. In its first response, the RSPB noted that the Applicant should have conducted its Application in accordance with Regulation 20 of the 2011 Regulations. This was because the Secretary of State’s Regulation 7(3) Letter included the typographical error stating that the Applicant was to follow Regulation 20 when publicising its application. Regulation 20 relates to material change applications. As highlighted in paragraph 13, the Secretary of State issued a letter clarifying that typographical error. The Application should have been, and was, conducted in accordance with Regulation 6 of the 2011 Regulations which relates to NMC applications. Subsequent misinterpretations of the Application by RSPB in this first response relate to reviewing the Application under Regulation 20 procedures instead of those outlined in Regulation 6.
16. The RSPB’s first response also stated that there was insufficient information provided by the Applicant to be able to demonstrate that the changes outlined in the Application are unlikely to give rise to any materially new or materially different environmental effects from those in the kittiwake compensation plan.
17. In its second response, the RSPB stated it was concerned that reducing the number of breeding seasons which the ANS must be in place prior to the development’s operation may give rise to materially new or materially different environmental effects. The RSPB considers that factors including lack of colonisation of the structures, Avian Influenza, risk of collisions and lower growth rate scenarios could all create external pressures on the kittiwake compensation plan, and that reducing the number of breeding seasons will unnecessarily add to this uncertainty. The RSPB suggested the Secretary of State could ask the Applicant to conduct meta-population analysis covering colonies across the wider SPA National Site Network to account and plan for wider uncertainty. Further, the RSPB asked about the efficacy of compensation if only three ANS were to be secured and all located in Suffolk.

Marine Management Organisation

18. The Marine Management Organisation had no objection on this application and wished to be informed of its outcome.

Natural England

19. Natural England concluded that the application will not significantly impair the effectiveness of the compensatory measures. Natural England also noted the importance of future monitoring to validate the application’s predictions, and the potential requirement to consider robust and timely adaptive management at as early a stage as possible should the kittiwake colonies be found to be underperforming.

The Crown Estate

20. The Crown Estate had no objection to the application.

The Secretary of State's consideration of the responses received

21. Noting the concerns raised by the RSPB, the Secretary of State considers that the Applicant has provided sufficient information during the consent process, and in applying to make this change, to demonstrate that reducing the length of time the ANS will be in place before the Development becomes operational will not give rise to any materially new or materially different environmental effects. The Secretary of State considers that the Applicant's Appendix 3: Growth Scenarios Report illustrates that the delay in the availability of one or more of the four ANS will have no consequence on the effectiveness of the proposed compensation measure with respect to the Flamborough and Filey Coast Special Protection Area kittiwake population (or wider North Sea population), or the coherence of the national site network for kittiwake. In coming to this conclusion, the Secretary of State considers that each of the four ANS will have sufficient capacity to fully compensate for the predicted impacts over the lifetime of the Project, and that the proposed change does not alter the original conclusions of the HRA.
22. The Secretary of State also notes that the Appendix 2: Environmental and HRA Report states that the Applicant has conducted a thorough site selection and careful design process for the ANS. Subsequently, there is a high likelihood of achieving more than the target of 404 nesting pairs per year cumulatively across the four ANS, as each ANS will have the capacity to support 467 nesting pairs. This provides a 4:1 compensation ratio in nest site provisioning. The level of overcompensation in this specific case gives the Secretary of State confidence that the required level of compensation can be delivered. The Secretary of State considers this would still be the case when fewer breeding seasons were completed prior to the operation of any turbine, as stated in the NMC application.
23. The Secretary of State notes the RSPB's concerns regarding external pressures, and he considers that, together with the level of compensation, the adaptive management and annual reporting as secured in Schedule 14, Part 1, Paragraphs 3 (d, e, f) and 6 provide an appropriate mechanism to account for such pressures and ensure that the compensation measures will be effective. The Secretary of State notes that the adaptive management and annual reporting concurs with Natural England's view that measures must be taken at as early stage as possible should the colonies be found to be underperforming. The Secretary of State does not consider that asking the Applicant to conduct meta-population analysis covering colonies across the wider SPA National Site Network would add value to accounting and planning for wider uncertainty associated with the NMC.
24. The Secretary of State notes that since the response from the RSPB, the Applicant was granted planning permission² on 13 March 2023 for the fourth ANS to be built in the vicinity of Hartlepool, County Durham.

² Reference: APP/H0724/W/22/3309272 <https://acp.planninginspectorate.gov.uk/ViewCase.aspx?caseid=3309272>

Environmental Impact Assessment

25. The Secretary of State has considered whether the Application would give rise to any new significant or materially different effects when compared to the effects set out in the ES for the development authorised by the Order.
26. The Secretary of State is satisfied that the information provided by the Applicant is sufficient to allow him to make a determination on the Application.
27. The Secretary of State has considered all relevant information provided and the comments of consultees. The Secretary of State agrees with the Applicant's conclusions that there will not be any new or materially different likely significant effects when compared to the effects set out in the ES for the development authorised by the Order and as such considers that there is no requirement to update the ES.
28. As there are no new significant environmental impacts as a result of the proposed change, the Secretary of State does not consider that there is any need for consultation on likely significant transboundary effects in accordance with Regulation 32 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017.

Habitats

29. The Secretary of State has considered the relevant and important policies in respect of the United Kingdom's obligations as set out in the Conservation of Habitats and Species Regulations 2017 ("the Habitats Regulations"). The Habitats Regulations require the Secretary of State to consider whether the Development would be likely, either alone or in combination with other plans and projects, to have a significant effect on a protected site, as defined in the Habitats Regulations. If likely significant effects cannot be ruled out, then an Appropriate Assessment must be undertaken by the Secretary of State, pursuant to Regulation 63(1) of the Habitats Regulations, to address potential adverse effects on site integrity. The Secretary of State may only agree to the Application if he has ascertained that it will not adversely affect the integrity of the protected sites within the National Site Network.
30. The Secretary of State has considered the information submitted in the Application and the comments of consultees and is satisfied that the proposed changes do not alter the conclusions set out in the Applicant's ES and the Secretary of State's HRA for the Order, and therefore a new HRA is not required.

General Considerations

Equality Act 2010

31. The Equality Act 2010 includes a public sector equality duty. This requires a public authority, in the exercise of its functions, to have due regard to the need to (a) eliminate unlawful discrimination, harassment and victimisation and any other conduct prohibited by or under the Act; (b) advance equality of opportunity between persons who share a relevant protected characteristic (e.g. age; sex and sexual orientation; gender reassignment; disability; marriage and civil partnership;³ pregnancy and maternity; religion or belief; and race) and

³ In respect of the first statutory objective (eliminating unlawful discrimination etc.) only.

persons who do not share it; and (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

32. The Secretary of State has had due regard to the need to achieve the statutory objectives referred to in section 149 of the Equality Act 2010 and is satisfied that there is no evidence that granting the changes considered in this letter will affect adversely the achievement of those objectives.

Human Rights Act 1998

33. The Secretary of State has considered the potential for the proposed changes to the Development to infringe upon human rights in relation to the European Convention on Human Rights. The Secretary of State considers that the grant of the changes considered in this letter would not violate any human rights as enacted into UK law by the Human Rights Act 1998.

Natural Environment and Rural Communities Act 2006

34. The Secretary of State, in accordance with the duty in section 40(1) of the Natural Environment and Rural Communities Act 2006, must have regard to the purpose of conserving biodiversity, and in particular to the United Nations Environmental Programme Convention on Biological Diversity of 1992, when granting development consent. The Secretary of State is of the view that the Application considers biodiversity sufficiently to accord with this duty.

Secretary of State's conclusions and decision

35. The Secretary of State has considered the ongoing need for the Development and considers that the project continues to conform with the policy objectives outlined in the Overarching National Policy Statement for Energy (EN-1) and the National Policy Statement for Renewable Energy (EN-3). The need for the Development remains as set out in the Secretary of State's letter of 31 December 2020.
36. The Secretary of State is satisfied that the Applicant's information demonstrates that the proposed changes will not result in changes to the impact conclusions of the Hornsea Three Offshore Wind Farm Development ES.
37. The Secretary of State has considered the nature of the proposed changes, noting that the proposed changes to the Development would not result in any further environmental impacts and will remain within the parameters consented by the Order.
38. For the reasons given in this letter, the Secretary of State considers that there is a compelling case for authorising the proposed changes to paragraphs 3(c) and 4 of Part 1 of Schedule 14 to the Order. The Secretary of State is satisfied that the changes requested by the Applicant are not material changes to the Order and has decided under paragraph 2(1) of Schedule 6 to the Planning Act 2008 to make a NMC to the Order to authorise the changes detailed in the Application.

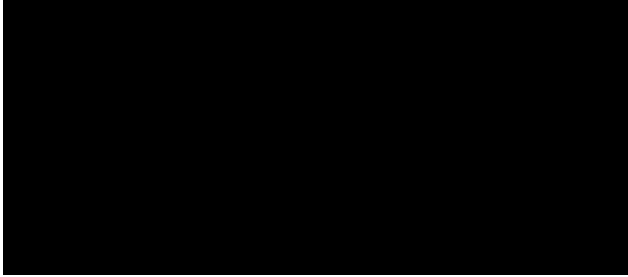
Challenge to decision

39. The circumstances in which the Secretary of State's decision may be challenged are set out in the note attached at the Annex to this letter.

Publicity for decision

40. The Secretary of State's decision on this Application is being notified as required by Regulation 8 of the 2011 Regulations.

Yours sincerely,



David Wagstaff OBE
Deputy Director, Energy Infrastructure Planning

ANNEX

LEGAL CHALLENGES RELATING TO APPLICATIONS FOR DEVELOPMENT CONSENT ORDERS

Under section 118 (5) of the Planning Act 2008, a decision under paragraph 2(1) of Schedule 6 to the Planning Act 2008 to make a change to an Order granting development consent can be challenged only by means of a claim for judicial review. A claim for judicial review must be made to the Planning Court during the period of 6 weeks beginning with the day after the day on which the Order is published. The Amendment Order as made is being published on the date of this letter on the Planning Inspectorate website at the following address:

<https://infrastructure.planninginspectorate.gov.uk/projects/eastern/hornsea-project-three-offshore-wind-farm/>

These notes are provided for guidance only. A person who thinks they may have grounds for challenging the decision to make the Order referred to in this letter is advised to seek legal advice before taking any action. If you require advice on the process for making any challenge you should contact the Administrative Court Office at the Royal Courts of Justice, Strand, London, WC2A 2LL (0207 947 6655)