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9 May 2024

Dear Mr Tresadern,

PLANNING ACT 2008

**PROPOSED NON-MATERIAL CHANGE TO HORNSEA THREE OFFSHORE WIND FARM ORDER
2020 – (S.I. 2023/459)**

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 4 January 2024 for changes which are not material to be made to the Hornsea Three Offshore Wind Farm Order 2020 (“the Order”) under section 153 of, and Schedule 6 to, the Planning Act 2008 (“PA2008”). 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 PA2008 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. The Order requires the Applicant to construct four artificial nesting structures (“ANS”) along the English east coast, as a compensation measure for the potential impacts of Hornsea Three on kittiwake of the Flamborough and Filey Coast Special Protection Area.
3. Paragraph 3(c) of Part 1 of Schedule 14 of the Order as originally granted in 2020 required four structures to be in place four full breeding seasons before the wind farm becomes operational. On 12 January 2023, the Applicant made an application for a non-material change (“NMC1”) to the Order to shorten the length of time the ANS need to be in place before operation, to allow time for necessary rights for the construction of the ANS to be obtained without impacting the programme for the operation of the wind farm and its provision of renewable energy to the National Grid. On 17 April 2023, the Secretary of State made the Hornsea Three Offshore Wind Farm (Amendment) Order 2023 (S.I. 2023 No. 459) (the “Amended Order”), granting NMC1 and reducing the time period the ANS needs to be in place before operation of the wind farm (for two of the ANS, the time period was reduced from four to three full kittiwake breeding

seasons, and for the other two ANS the time period was reduced from four to two full kittiwake breeding seasons).

4. The Applicant states that construction of three of the four ANS have already been implemented. The Application is seeking consent to remove the length of time the fourth ANS needs to be in place before operation and proposes that the Order states “and no final commissioning of the authorised development must take place until the fourth artificial nest structure has been implemented”. The Applicant considers that this non-material change is required to allow time for necessary rights for the construction of the fourth ANS to be obtained without impacting the programme for the operation of the wind farm and to meet the urgent need for decarbonisation and security of supply.

Summary of the Secretary of State’s decision

5. The Secretary of State has decided under paragraph 2(1) of Schedule 6 to PA2008 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.
6. The Secretary of State has given consideration to whether the Application is for a material or non-material change. In doing so, the Secretary of State has had regard to paragraph 2(2) of Schedule 6 to the PA2008 which requires the Secretary of State to consider the effect of the change on the Order as originally made.
7. There is no statutory definition of what constitutes a 'material' or 'non-material' amendment for the purposes of Schedule 6 to the PA2008 and Part 1 of the 2011 Regulations.
8. 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;

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

- (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 materiality of a change. Each case must depend on thorough consideration of its own circumstances.
9. 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:
- (a) 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.
 - (b) 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. She 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.
 - (c) In respect of compulsory acquisition, the Secretary of State notes that the proposed changes do not require any additional compulsory purchase of land.
 - (d) 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.
10. 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 constitute a material change.
11. 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

12. In accordance with the requirements of Regulation 7 of the 2011 Regulations, the Secretary of State agreed to a reduced consultee list. The parties consulted were: the Marine Management

Organisation, Natural England, the Royal Society for the Protection of Birds, the Crown Estate, the Joint Nature Conservation Committee, the Norfolk Wildlife Trust, the Wildlife Trusts, and the Norfolk Farming and Wildlife Advisory Group. The Applicant sent its Regulation 6 notice to consultees on 4 January 2024.

13. 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 (Eastern Daily Press, the Norwich Evening News, the North Norfolk News, Lloyd’s List, and the Fishing News) on 4 January 2024 and 11 January 2024 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 deadline for receipt of representations was 23:59 on 12 February 2024.
14. The Applicant submitted its Consultation and Publicity Report as required by Regulation 7A of the 2011 Regulations on 19 January 2024, 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 22 January 2024.
15. One consultation response was received in relation to this non-material change application. The response was from Natural England, which stated:

“Natural England have reviewed the documents provided and are content that appropriate evidence has been considered. We note that the a [sic] wide range of plausible scenarios are considered, and that the low productivity scenarios appear to be reasonably precautionary. We observe that in all scenarios a significant amount of time is required to achieve the required level of compensation, and a delay in installation is likely to lead to an equivalent delay in full compensation delivery.

Natural England are content with the proposed amendment in this specific instance. This is based on the fact that HOW3 are progressing four structures, in at least two English regions, each of which they predict will address their impacts. Importantly, three of the four ANS are now in place, each of which has sufficient space to support the number of nests calculated to be required. The provision of multiple ANS provides some comfort that any build up in mortality debt resulting from the reduction in the number of breeding seasons has the potential to be mitigated against by the high level of nest space provision. Furthermore, the installation of ANS in two regions is likely to provide resilience against any negative environmental influences that arise in one location, again mitigating against the accumulation of mortality debt.

Natural England therefore concludes that the non-material change will not significantly impair the effectiveness of the DCO in securing the compensatory measures, and concurs with the Applicant that it could facilitate the delivery of a site with high ecological suitability. We note the importance of future monitoring to validate the predictions put forward, and the potential requirement to consider robust and timely adaptive management at as early a stage as possible should the colonies be found to be underperforming. This will become particularly important should the NMC be approved.”

16. The Secretary of State has considered the representations received in response to the consultation and does not consider that any further information needs to be provided by the Applicant or that further consultation is necessary.

Environmental Impact Assessment

17. 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.
18. The Secretary of State is satisfied that the information provided by the Applicant is sufficient to allow her to make a determination on the Application.
19. 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.
20. 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.

The Habitats Regulations

21. The Secretary of State has considered the relevant requirements 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 any site within the national site network, known as "protected sites"). 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 (subject to Regulation 64) if he has ascertained that it will not adversely affect the integrity of a protected site.
22. 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. Having considered the information available to her including the Applicant's productivity scenarios, the Secretary of State agrees with the Applicant in accordance with the advice of NE, that the provision of multiple ANS, three of which are already constructed and capable in themselves of fully compensating for the predicted impact, means that the Application will not significantly impair the effectiveness of the compensatory measures.
23. The Secretary of State agrees with Natural England regarding the importance of future monitoring to validate the predictions put forward, and the need to consider robust and timely

adaptive management at as early a stage as possible. The Secretary of State is satisfied that future monitoring and adaptive management is provided for in Part 1 of Schedule 14 of the DCO.

Equality Act 2010

24. 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 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, sexual orientation, gender reassignment; disability; marriage and civil partnerships;² pregnancy and maternity; religion or belief; and race) and 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.
25. The Secretary of State has had due regard to the need to achieve the statutory objectives referred to in s149 of the Equality Act 2010 and is satisfied that there is no evidence that granting this Application will affect adversely the achievement of those objectives.

Human Rights Act 1998

26. The Secretary of State has considered the potential infringement of human rights in relation to the European Convention on Human Rights, by the amended development. The Secretary of State considers that the grant of development consent would not violate any human rights as enacted into UK law by the Human Rights Act 1998.

Natural Environment and Rural Communities Act 2006

27. The Secretary of State notes the “general biodiversity objective” to conserve and enhance biodiversity in England, section 40(A1) of the Natural Environment and Rural Communities Act 2006, and considers the application consistent with furthering that objective whilst having also had regard 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 biodiversity has been considered sufficiently in this application for an amendment to accord with this duty.

Secretary of State’s conclusions and decision

28. The Secretary of State has considered the ongoing need for the Development and the continuing demand for the UK to meet its energy and net zero objectives, and considers that the project continues to conform with the policy objectives outlined in the Overarching National Policy Statement (“NPS”) for Energy (NPS EN-1) and the NPS for Renewable Energy (NPS EN-3). The need for the Development remains as set out in the Secretary of State’s letter of 31 December 2020. The Secretary of State notes the revised draft energy NPSs were released on 22 November 2023 and designated in Parliament on 17 January 2024 (“the 2024 NPSs”).

² In respect of the first statutory objective (eliminating unlawful discrimination etc.) only.

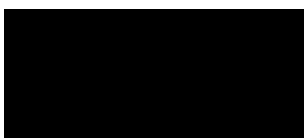
The Secretary of State does not consider that there is anything contained within the 2024 NPSs that would lead her to reach a different decision.

29. As such, for the reasons set out in the paragraphs above, the Secretary of State is satisfied that the Applicant's request is justified and demonstrates that the proposed changes will not result in changes to the impact conclusions of the ES that accompanied the original Hornsea Project Three application.
30. 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 additional environmental impacts or effects of different significance, and will remain within the parameters consented by the Order.
31. The Secretary of State notes that Natural England is content with the proposed amendment in this specific instance, and that it concludes that the non-material change will not significantly impair the effectiveness of the Order in securing the compensatory measures.
32. For the reasons given in this letter, the Secretary of State considers that there is a compelling case for authorising the proposed changes to **relevant parts** of 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

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

Yours sincerely,



John Wheadon

Head of Energy Infrastructure Planning Delivery

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://national-infrastructure-consenting.planninginspectorate.gov.uk/projects/EN010080>

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)