



Department for
Business, Energy
& Industrial Strategy

Department for Business,
Energy & Industrial Strategy

1 Victoria Street
London
SW1H 0ET

Vattenfall Wind Power Limited
1 Tudor Street
London E4Y 0AH

T: +44 (0)20 7215 5000
E: beiseip@beis.gov.uk
W: www.gov.uk

Our Ref: EN010084

1 June 2020

Dear Sir or Madam,

PLANNING ACT 2008

APPLICATION FOR THE THANET EXTENSION OFFSHORE WIND FARM DEVELOPMENT CONSENT ORDER

1. Introduction

1.1 I am directed by the Secretary of State for Business, Energy and Industrial Strategy (“the Secretary of State”) to advise you that consideration has been given to:

- (a) the report dated 11 September 2019 of the Examining Authority (“the ExA”), that consisted of a panel of three examining Inspectors, Rynd Smith, Stephen Bradley and Jessica Powis, into the application (“the Application”) dated 26 June 2018 by Vattenfall Wind Power Limited (“the Applicant”) for a Development Consent Order (“the Order”) under section 37 of the Planning Act 2008 for the Thanet Extension Offshore Wind Farm (“the Development”); and
- (b) representations received by the Secretary of State after the close of the Examination to his consultation of 21 November 2019.

1.2 The examination of the Application began on 11 December 2018 and was completed on 11 June 2019. The examination was conducted on the basis of written evidence submitted to the ExA, nine issue specific hearings, two compulsory acquisition hearings, an open floor hearing, five unaccompanied site inspections and two accompanied site inspections. The Secretary of State also conducted a post-examination consultation on 21 November 2019 to obtain further information on matters that were not concluded at the close of examination so these could be considered fully by the Secretary of State before his decision on the application was made.

1.3 The Secretary of State notes that fifty-nine Relevant Representations (“RRs”) were made and have been considered fully by the ExA [RR-001-RR-059]. Those making the representations were able to become involved in the examination as Interested Parties (“IPs”). The Government of France made a written submission after the deadline for the submission of RRs requesting to become involved in the examination in respect to transboundary impacts of the proposed development on Natura 2000 sites outside of the UK. The ExA agreed that they could participate in the examination as an Other Person (“OP”). All RRs have been fully considered by the ExA and the issues that they raise are considered in Chapters 5 to 8 of their report. Written representations, responses to questions and oral submissions made during the examination were also taken into account by the ExA to formulate its recommendation to the Secretary of State.

1.4 The Order, as applied for, sought development consent under the Planning Act 2008 for an offshore wind generating station of up to 340 Megawatts (“MW”), formed as an extension to the existing operational Thanet Offshore Wind Farm in waters adjacent to the entrance to the Thames estuary in Kent, connecting to the shore at Pegwell Bay (“the Development”). During the course of the examination, the Applicant introduced a Structures Exclusion Zone (“SEZ”) to reduce the area of the sea where infrastructure could be located, and suggested that a pilot transfer simulation study could be undertaken (post-consent) to validate risk controls (transferring pilots between vessels is one of the key areas of navigational risk).

1.5 Published alongside this letter on the Planning Inspectorate’s website¹ is a copy of the ExA’s Report of Findings and Conclusions and Recommendation to the Secretary of State (“the ExA’s Report”). The ExA’s findings and conclusions are set out in Chapters 5-9 of the ExA’s Report, and the ExA’s summary of conclusions and recommendation is at Chapter 12.

2. Summary of the ExA’s Report and Recommendation

2.1 The ExA assessed and tested a range of issues during the examination, which are set out in the ExA’s report under the following broad headings:

- Introduction (Chapter 1);
- The Proposal and the site (Chapter 2);
- Legal and Policy Context: including the Planning Act 2008 and relevant National Policy Statements (NPS); Marine and Coastal Access Act 2009; European Law and related UK Regulations, Maritime and Related Law and Practice, Statutory drafting sources, transboundary effects, The National Planning Policy Framework, Local Impact Reports (“LIRs”); the local Development Plan; (Chapter 3);
- The main planning framework under which issues arising from the application and during examination were addressed (Chapter 4)
- Findings and Conclusions in relation to the Planning Issues Part A: Primary Issues, (Chapter 5);
- Findings and Conclusions in relation to the Planning Issues Part B: Contingent Issues (Chapter 6);

¹ <https://infrastructure.planninginspectorate.gov.uk/projects/south-east/thanet-extension-offshore-wind-farm/>

- Findings and Conclusions in relation to Habitats Regulations Assessment (European Sites within the UK) (Chapter 7);
- Findings and Conclusions in relation to Natura 2000 Sites in Other EEA States (Chapter 8);
- Conclusion on the case for Development Consent (Chapter 9);
- Conclusion on Compulsory Acquisition and Related Matters (Chapter 10); and
- Draft Development Consent Order and Related matters (Chapter 11).

2.2 The ExA recommends that the Secretary of State should withhold consent for the proposed Development for the reasons set out in their report.

3. Summary of the Secretary of State's Decision

3.1 Section 104(3) of the Planning Act 2008 requires the Secretary of State to decide the application in accordance with any relevant National Policy Statement ("NPS"). **The Secretary of State has carefully considered the ExA's Report and all other material considerations and has decided, in accordance with section 104(3), to refuse development consent.**

3.2 This letter is the statement of reasons for the Secretary of State's decision for the purposes of section 116(1)(b) of the Planning Act 2008 and the decision notice for the purposes of regulation 30 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 ("the 2017 EIA Regulations").

3.3 Section 104(2) requires the Secretary of State, in deciding an application to have regard to any relevant national policy statement ("NPS"). Subsection (3) requires that the Secretary of State must decide the application in accordance with the relevant NPS except to the extent that one or more of subsections (4) to (8) applies.

3.4 Here the Secretary of State has had regard to the relevant NPS, EN-3 for Renewable Energy Infrastructure, that applies to offshore wind energy generating station development. The Secretary of State has also had regard to NPS Ports ("NPSP") that is the designated NPS that applies to the development of major ports infrastructure. Whilst this is not an application under NPSP, it has been considered under NPSP on the basis that the application affects major ports including some that are NSIP Ports and the prospective development of future Ports, most particularly in the Thames estuary.

3.5 The Secretary of State has had regard also to the Infrastructure Planning (Decisions) Regulations 2010 which applies to this application because the draft Order includes a deemed marine licence. Under these regulations, if development consent (and thus the deemed marine licence) were to be granted, regulation 3A would require the Secretary of State to have regard to the need to prevent interference with legitimate uses of the sea, which means in this case to address the reduction of navigation risk to the As Low As Reasonably Practicable ("ALARP") range.

3.6 The Secretary of State has made his decision on the basis that making the Order would not be in accordance with his obligations under the Planning Act 2008 in relation to the policies in NPS EN-3 relevant to shipping, maritime navigation risk and ports, nor under NPSP relevant to port development.

3.7 The Secretary of State notes that the ExA also considered at length the question of the planning balance under section 104(7) of the Planning Act 2008 i.e. whether the strategic benefits of the proposed Development would outweigh the negative effects and concluded that it was not so - the adverse impact of the proposed Development would outweigh its benefits.

4. Secretary of State's Consideration of the Application

4.1 The Secretary of State has considered the ExA's report and relevant representations received after the examination in response to his consultation. His consideration of these is set out in the following paragraphs.

4.2 The Secretary of State has had regard to the three Local Impact Reports ("LIRs") received from Kent County Council, Dover District Council and Thanet District Council, environmental information as defined in the 2017 EIA Regulations and to all other matters that are considered to be important and relevant to the Secretary of State's decision as required by section 104 of the Planning Act 2008. In making the decision, the Secretary of State has complied with all applicable legal duties and has not taken account of any matters which are not relevant to the decision.

4.3 The Secretary of State agrees with the conclusions and recommendations of the ExA's report, and the reasons for the Secretary of State's decision are those given by the ExA in support of the conclusions and recommendations in the report, some of those which are summarised below.

Marine Navigation, Shipping and Ports

4.4 The key policy to this application is paragraph 2.6.165 to EN-3 - that the Secretary of State should not consent applications which pose unacceptable risks to navigational safety after all possible mitigation measures have been considered. The conclusion of the ExA is that the Applicant failed to demonstrate sufficient mitigation of risks to safety of navigation to make them As Low As Reasonably Practicable ("ALARP").

4.5 The impact of the proposed development on marine navigation, shipping and ports was the principal issue generating most attention and contention from Interested Parties ("IPs") and Other Parties ("OPs") throughout the examination, these being primarily either bodies with statutory duties to deliver and maintain a safe and efficient maritime environment or port authorities and the operators of shipping and pilotage services. IP and OP concerns throughout the examination were focused on the effect of the proposed Development on navigational safety of shipping traffic in immediately adjacent waters to the proposed Development; the resilience of facilities and services (including ports and pilotage) accessed by that shipping traffic; and in this context, the degree to which the proposed Development was policy compliant.

Effects on sea room and safe navigation

4.6 As required by EN-3 paragraph 2.6.156 the Applicant undertook a Navigational Risk Assessment ("NRA"), carried out in accordance with Maritime and Coastguard Agency's ("MCA") Marine Guidance Note MGN543 and a further assessment added as an Addendum to the NRA ("The NRA Addendum") following the establishment of the SEZ. In reaching conclusions about navigation safety, the ExA placed considerable weight upon the body of expertise and experience of mariners active in

these waters. The ExA noted that the Applicant failed to comply with NPS EN-3 paragraph 2.6.153 that requires early stakeholder engagement to ensure that solutions are sought that allow offshore wind farms and navigation uses of the sea to successfully co-exist.

4.7 The Applicant argued that it had complied with Marine Spatial Planning guidelines for sufficient sea room for vessels passing in a straight line between the NE Spit Racon buoy and the extremity of the SEZ. However, the ExA found that assessment of safe sea space should take account of context including turning manoeuvres, visibility and geographic constraints, not rely on rule-based computation alone.

4.8 The Secretary of State notes that the Applicant failed to address to the ExA's satisfaction questions as to how much additional spatial allowance should be made for vessels turning around the NE Spit racon buoy as well as other vessels crossing in the sea area, being a fishing ground and a location passed by a high density of service craft. Because of the continuing contention between IPs about the sufficiency of safe sea room, with experts for the Applicant reaching different conclusions from those reached by the IPs in relation to subject matter reliant on the exercise of professional judgement, the ExA had to consider the reliability of expert witness evidence. It concluded that the evidence submitted revealed a lack of effective understanding between the Applicant's expert consultants and those of the regulators and other stakeholders, and that IPs and OPs presented a practical level of expertise and specific local knowledge and local operational experience that was not matched by that of the Applicant's experts.

4.9 Furthermore, the ExA noted that the Applicant did not commission any independent review of the NRA or the NRA Addendum with the exception of a 'Collision Assessment of Proposed Extension' Report submitted late in the examination that was undertaken by a new, independent consultant (Anatec) on the same SEZ study area applied to the NRA Addendum, using different inputs and modelling software to that used in the original NRA. However, as this was done too late to inform the NRA Addendum submitted to the ExA and also too late to be fully responded to by IPs and OPs, the ExA considered the weight that could be attributed to it as standalone evidence to be limited.

4.10 IPs and OPs vigorously contested the figure for traffic growth projection assumed by the Applicant as being substantially too low (particularly in relation to the frequency of larger vessels expected to use the relevant sea area) and as this figure drives the assessed likelihood of hazard occurrence on which the NRA and NRA Addendum are founded and is therefore crucial to the Applicant's case, so the evidence provided by the IPs and OPs undermined it.

4.11 The ExA considered the evidence of locally experienced mariner stakeholders to be more reliable than that of the Applicant's experts to conclude that safety for general navigation as well as manoeuvring to transfer pilots would be reduced critically in the sea area of complex pilotage and general navigation between the proposed SEZ limits and the fixed navigational marks of NE Spit Racon buoy and also to a lesser extent at the Elbow buoy off the North Foreland.

4.12 Furthermore the ExA put very substantial weight on the qualitative judgement of the MCA as statutory authority responsible for marine safety matters. The MCA's final position was that it did not agree with the embedded and additional risk control measures and was unable to accept ALARP has been reached. In summary the MCA's judgement was:

- Even with the introduction of the SEZ, the Applicant had failed to demonstrate convincingly through the NRA and NRA Addendum that the overall risk of safety of navigation due to the impact of the proposed development on safe sea room had been reduced to ALARP;
- Equally the Applicant has failed to demonstrate such that no further risk control or mitigation (over and above the SEZ) would be practicable and proportionate;
- The Applicant had not taken sufficient account of weighty opinion in the form of a general consensus from other expert bodies on these matters; and
- Therefore the MCA was not prepared to advise the decision-maker that the conclusions of the NRA were acceptable.

Effects on pilot transfer operations

4.13 As referred to above, the ExA gave weight to the evidence of the IPs – being comprised of locally experienced mariners - to be reliable in concluding that safety in manoeuvring to transfer pilots would be reduced critically in the sea area of complex pilotage and general navigation between the proposed SEZ limits and the fixed navigational marks of NE Spit Racon buoy and also to a lesser extent at the Elbow buoy off the North Foreland. A further important factor in considering the effects of the proposed Development, not assessed adequately in the NRA or the NRA Addendum, was the likely growth in demand for service at the NE Spit pilot boarding station (in particular growth in numbers of large vessels dipping down to NE Spit). The ExA judged that this potential specific growth in demand for inshore pilot transfer at NE Spit to be the material issue to future navigational safety and economic impact of the proposed Development, more significant than assessed overall baseline traffic growth for the study area as this is where the reduction in sea room becomes most significant.

4.14 The ExA had regard to likely effects of the proposed Development on pilot transfer operations that constitute an important part of the navigation activities in the sea area under consideration, primarily to the west and north-west of the proposed Development. The ExA found that the proposed Development would be likely to produce an obstruction to navigation in the space between the existing Thanet Offshore Wind Farm and the NE Spit Racon buoy and the east-west shipping route to and from the Princes Channel; and a consequent increased risk of danger to navigation or effects to the shipping industry. The ExA found that such obstruction would increase the likelihood of collision by reducing the time available for encounter resolution because of traffic compression in a reduced sea area, and therefore, would increase the risk attending navigation and pilot operations with consequent adverse impact to shipping in this confined sea space with complex patterns of use.

4.15 A Pilotage Study and Pilot Transfer Bridge Simulation were carried out as an important component input to the NRA, where the Applicant was required to demonstrate that the siting, design and risk control and mitigation of the proposed

Development reduces to ALARP any increase in navigational risk over the pre-development baseline. A further collision risks assessment was undertaken by the Applicant after the introduction of the SEZ, however this further assessment did not alter the views of key stakeholders or address their concerns on navigation risks.

4.16 The MCA concluded that the increased risk of danger to safety of navigation and pilot transfer operations would not be mitigated to ALARP by the Applicant's proposed risk controls and therefore MCA advised that it could not categorically state that "all" risks to shipping and navigation had been reduced to ALARP as this concept also has a commercial element involved for the Applicant. The ExA agreed with the conclusion of MCA that the Applicant has not demonstrated satisfactorily that increased risk to the safety of navigation and pilot transfer operations in the sea space to the west and north-west of the proposed Development would be mitigated or controlled to ALARP and discounted the findings of the Pilot Transfer Bridge Simulation for anything other than testing feasibility of pilot operations in 'normal', non-adverse operating conditions.

Effects on shipping routes

4.17 The ExA found that the Applicant has made a convincing case that the sea area in the 5nm immediately around the Thanet Offshore Wind Farm used as shipping routes, does not contain 'recognised sea lanes' in the intended sense of the International Maritime Organisation ("IMO") definitions, and the routes do not give unique access to a lifeline port, therefore the routes cannot be regarded as 'essential'. However the ExA noted that to comply with EN-3 the decision-maker 'should have regard to the extent and nature of any obstruction of or danger to navigation which (without amounting to interference with the use of such sea lanes) is likely to be caused by the development'. EN-3 paragraph 2.6.162 requires that where a proposed development is likely to affect major commercial navigation routes for instance in causing appreciably longer transit times, the decision maker should give these adverse effects substantial weight in its decision making.

4.18 The ExA gave substantial weight to the advice from MCA and found that whilst there is no recognised sea lane in the immediate 5nm vicinity of the proposed Development, the routes passing the Thanet Offshore Wind Farm through the sea areas immediately surrounding it are strategically important to international shipping due to time saving when approaching the Thames from the south and in adverse Metocean conditions. Therefore, whilst the proposed Development does not contain internationally recognised sea lanes, it would adversely affect 'major commercial navigation routes' including pilot transfer locations immediately to the west and the north.

4.19 The ExA concluded that the IPs presented convincing evidence that the proposed Development, even with the SEZ as proposed, would probably increase perception of navigational risk or danger by prudent mariners for pilot transfer and passage for vessels over 240m and this would consequently cause some ships masters to decide (at least in adverse Metocean conditions) to not take the short 'inshore route' to the Thames to the west of the Thanet Offshore Wind Farm but instead to divert around the east and north of the Thanet Offshore Wind Farm to dip down to transfer a pilot at the normal location at NE Spit, thereby having an adverse effect on the resilience of pilot operations and access to ports.

4.20 During examination it emerged that even without dip-down to transfer a pilot, the diversion around the east of the proposed Development would amount to about one hour extra steaming time at normal vessel speeds with associated commercial impacts. The ExA concluded that it is likely that enough ships masters would divert in enough circumstances so as to materially increase average voyage times and materially reduce the efficient accessibility of Thames ports - both of which would have adverse economic consequences.

Ports and Port Operations

4.21 The ExA considered on the balance of probability, the effect of the proposed Development (even with the SEZ) of additional risk to or displacement of pilot transfer operations would have an adverse effect on resilience to adverse weather and accidents and thereby may have consequential adverse effects on passage times, berthing operations, reputation and competitiveness of some London ports. It noted that in extreme conditions in which the pilot service for the Ports of London and Sheerness can only be delivered at NE Spit, there is a perceived risk to safe navigation and pilot transfer operations that could result in economic and reputational harm to port and pilot services through loss of resilience and delay or diversion of shipping to other ports and is therefore contrary to NPS Ports part 3.4.13, being an important and relevant consideration in this application and also contrary to Marine Policy Statement para 3.4.7.

4.22 The Port of Tilbury and London Gateway Port maintained that the 10% increase in traffic utilised for the purpose of the Collision Risk Assessment is insufficient to account for future traffic growth for the full period during which the proposed Development would be operational as it fails to recognise the area being in the vicinity of extensive new port development and changes in existing use, resulting in greater use of the shipping lanes relevant to the examination.

The ExA's conclusions on Marine Navigation, Shipping and Ports

4.23 Therefore, taking all relevant evidence and policies into account, the ExA found generally that the policy test in EN-3 paragraph 2.6.147 '*... wind farms should not be consented where they would pose unacceptable risks to navigational safety after mitigation measures have been adopted*', had not been met, and that as required by NPS EN-3 paragraph 2.6.168 the Secretary of State should have regard to the obstruction of navigation in the sea area containing relatively high traffic density and complex navigation patterns that would be created between the proposed Development and the NE Spit navigational mark despite the SEZ, and to a lesser extent between the proposed Development and the Elbow navigational mark. In both cases additional danger to navigation would result.

4.24 Furthermore the ExA considered NPS Ports para 3.4.13 to be both important and relevant to this application given it cites the need for resilience of ports to account for '*short term demand peaks, the impact of adverse weather conditions, accidents, deliberate disruptive acts and other operational difficulties without causing economic disruption through impediment to the flow of imports and exports*', and that despite the introduction of the SEZ, the Applicant has not minimised navigation safety; as a consequent effect there is a probability of negative effects to the efficiency and resilience of continuing port operations as well as further port development. This is further compounded by the additional risk to or displacement of pilot transfer

operations - which could have consequential adverse effects on passage times, berthing operations, reputation and competitiveness of some London ports.

4.25 In considering how these issues are weighted in the planning balance, the ExA concluded that a combination of adverse effects insufficiently mitigated and policy non-compliance make marine navigation, shipping and ports considerations a major net negative.

Habitats Regulations Assessment

4.26 Under regulation 63 of the Conservation of Habitats and Species Regulations 2017 (“the Habitats Regulations”), and Regulation 28 of the Conservation of Offshore Marine Habitats and Species Regulations 2017 the Secretary of State is required (as Competent Authority) to determine whether the proposed Development would be likely, either alone or in combination with other plans and projects, to have a significant effect on a Natura 2000 site. If likely significant effects cannot be ruled out, the Secretary of State must undertake an Appropriate Assessment (“AA”) addressing the implications for that site in view of its conservation objectives. This process is collectively known as a Habitats Regulations Assessment (“HRA”). In light of any such assessment, the Secretary of State may grant development consent only if it has been ascertained that the proposed Development will not, either on its own or in combination with other plans or projects, adversely affect the integrity (“AEoI”) of such a site unless there are no feasible alternatives or imperative reasons of overriding public interest apply.

4.27 The Secretary of State has given due consideration to the information and analysis presented, and concludes that Likely Significant Effects (“LSEs”) could not be excluded for the features of thirteen Natura 2000 sites.

4.28 The Secretary of State has carefully considered all the information presented within the Application and the representations made by all IPs in light of the conservation objectives for the thirteen Natura 2000 sites. The Applicant concluded that the proposed Development would have no AEoI of any of the sites considered, either alone or in-combination with other plans or projects. The recommendation of the ExA is that there are no AEoI of any of the thirteen European Sites as a result of the proposed Development either alone or in-combination with other plans or projects. The Applicant’s conclusion of no AEoI for seven of these thirteen sites was agreed by all IPs. These seven sites are:

- Alde-Ore Estuary Special Protection Area (“SPA”);
- Alde-Ore Estuary Ramsar;
- Farne Islands SPA;
- Foulness (Mid-Essex Coast Phase 5) SPA;
- Margate and Long Sands Special Area of Conservation (“SAC”);
- Northumberland Marine SPA; and
- St Abb’s Head to Fast Castle SPA.

In light of the fact that the Applicant’s conclusions of no AEoI were undisputed by all IPs and considering the recommendations of the ExA, the Secretary of State undertook a light touch assessment for these sites, concluding that AEoI could be excluded both alone and in-combination with other plans and projects.

4.29 The Applicant's conclusion of no AEol for six of the thirteen Natura 2000 sites was disputed by some IPs. The Secretary of State therefore made a full assessment of the potential for AEol at each of these sites in light of the site's conservation objectives. The Secretary of State's conclusions are listed below:

- **Outer Thames Estuary SPA:** The Secretary of State concludes that collision risk and barrier effects to little tern and common tern and disturbance and displacement effects on red-throated diver from the proposed Development alone and in-combination would not represent an AEol. The Secretary of State notes the methodological disputes between the Applicant and relevant IPs with regard to disturbance and displacement effects on red-throated diver as a result of the proposed Development in-combination with other plans and projects, and the final position of Natural England ("NE") that an overall AEol cannot in its view be ruled out. The ExA recommends that the contribution from the proposed Development whilst apparent is beneath any the threshold of significance and *de minimis* and such that there is no AEol. The Secretary of State concurs with this view, considering that the effect is *de minimis* and would not represent an AEol.
- **Flamborough and Filey Coast SPA:** The Secretary of State concludes that collision risk and barrier effects to gannet, kittiwake and the breeding bird assemblage as well as the effects of disturbance and displacement to guillemot, razorbill and the breeding bird assemblage from the proposed Development alone and in-combination would not represent an AEol. The Secretary of State notes methodological disputes between the Applicant and relevant IPs with regard to collision risk to gannet and kittiwake as a result of the proposed Development in-combination with other plans and projects, and the final position of NE that an overall AEol cannot in its view be ruled out. The ExA recommends that mortality effects as a result of collision risk to gannet and kittiwake from the proposed Development are *de minimis* and therefore unlikely to be a significant contributor to any conclusion of AEol. The Secretary of State concurs with this view, considering the effect is *de minimis* and would not represent an AEol.
- **Southern North Sea SAC:** The Secretary of State notes NE's advice that, in the absence of a seasonal piling restriction, the risk of AEol from underwater noise in-combination with other plans and projects on harbour porpoise cannot be ruled out. The ExA recommends that potential impacts on harbour porpoise would not have an AEol, subject to the mitigation secured in the Deemed Marine Licence ("DML") for a Site Integrity Plan ("SIP") and a Marine Mammal Mitigation Protocol ("MMMP"). The Secretary of State concurs and, whilst acknowledging NE's position, concludes that inclusion of a seasonal restriction is unnecessary and that sufficient provisions are made for this restriction if necessary with the approval of the final SIP under conditions within the DML. The Secretary of State concludes that there would be no AEol.
- **Thanet Coast and Sandwich Bay SPA and Thanet Coast and Sandwich Bay Ramsar:** The Secretary of State notes the concerns raised by IPs that there could be an AEol and the ExA's recommendation that mitigation secured

in the DML and the Order is sufficient to reduce impacts such that there would be no AEol. The Secretary of State concurs and considers that the mitigation secured in particular the Saltmarsh Mitigation, Reinstatement and Monitoring Plan ("SMRMP") is sufficient to conclude that AEol (alone and in-combination) can be excluded for both sites with either Landfall Option 1 or Landfall Option 3.

- **Thanet Coast SAC:** The ExA found that subject to mitigation secured in the DML and the Order, in particular the SEZ, there would be no AEol alone or in-combination on the chalk reef and sea cave interest features of the site from the effects of temporary habitat loss and disturbance, increased suspended sediment and deposition, accidental pollution, or physical processes. The Secretary of State concurs and considers there is no AEol.

4.30 The Secretary of State concludes that, subject to the mitigation secured in the DML and the Order, the effects of the proposed Development, either alone or in-combination with other plans and projects, on the features of the thirteen Natura 2000 sites identified, would not lead to an AEol of these sites.

Natura 2000 Sites in EEA States

4.31 Given the potential for the proposed Development to affect mobile features across a wide geographical area, it is important to consider the potential impacts on Natura 2000 sites in other European Economic Area ("EEA") States, known as "transboundary sites", in further detail. These do not fall within the scope of HRA but it is Government policy that the Secretary of State will apply the same assessment principles, alongside the HRA process. The ExA also considered the implications for these sites, in the context of looking at the wider Environmental Impact Assessment ("EIA") considerations.

4.32 The EIA transboundary screening process was undertaken by the Planning Inspectorate and a response was received from a number of EEA states including France, Netherlands and Denmark. The Government of France was the only state to provide a substantive response. Responses were also received from the Netherlands, who did not have any comments to make but expressed a wish to be kept informed 'on future developments' and Denmark, who expressly stated they did not wish to participate in the process. No formal response was received from Belgium or Germany to the Secretary of State's consultation letter of August 2018.

4.33 The Government of France raised matters in relation to Natura 2000 sites, specifically in regard to ornithology, marine mammals and the Marine Strategy Framework Directive ("MSFD"). The views of the Government of France were broadly that the Applicant had not provided a sufficiently in-depth study demonstrating impacts on birds and loss of habitat and the need to implement environmental measures to limit the impacts particularly on the Caps Gris Nez SPA and Banc des Flandres SPA, Litteral Seino-marin SPA and Estuaire de la Canche SPA. They also raised points regarding the 26km harbour porpoise screening distance. The Applicant separately considered these points in relation to their Natura 2000 sites and also in respect of the 26km screening threshold for harbour porpoise that they had adopted, arguing this approach was in line with JNCC advice and guidance set out in the conservation

objectives for the Southern North Sea SAC. The Government of France also made representations in respect of the adequacy of the in-combination assessment relating to the other French wind projects identified, including Courseulles-sur-Mer, Fecamp and Dieppe Le Treport.

4.34 The Applicant screened out the potential for LSE on ornithological interest features at Natura 2000 sites outside of the UK. The ExA is of the view that the Applicant has sufficiently demonstrated that significant ornithological transboundary effects are not likely. The ExA notes the concerns raised around the cumulative/in-combination assessments for offshore ornithological features and notes the Applicant's submissions that it was unable to access all relevant information on collision risk or other potential impacts predicted from French Offshore Wind Farms. They are however content that the Applicant's approach to the screening of ornithological effects on Natura 2000 sites in France is sufficiently robust. The ExA also had regard to the relatively low levels of collision mortality and disturbance and displacement effects predicted from the proposed Development. The Secretary of State concurs with the recommendations of the ExA and concludes that the potential for LSE on ornithological interest features at Natura 2000 sites outside of the UK can be screened out.

4.35 The Applicant identified LSE at eleven transboundary sites in France, the Netherlands and Belgium in relation to three marine mammal species (harbour porpoise, harbour seal, and grey seal). The Applicant concluded that AEoI could be ruled out at all eleven sites, both alone and in-combination with other plans and projects. The Secretary of State concurs with the recommendations of the ExA and concludes that provisions contained in the Order and DML, (Project Environmental Management Plan ("PEMP") and MMMP would mitigate against any significant environmental effects upon marine mammals both within and outside of UK waters and there is therefore no AEoI.

4.36 On the basis of the available evidence, the Secretary of State is content that in circumstances where it has found no LSE on any Natura 2000 sites outside the UK, there is equally no evidence basis that the proposed development would cause non-compliance with the MSFD outside the UK.

4.37 The Secretary of State concludes that the proposed Development, either alone or in-combination with other plans or projects, will not adversely affect the integrity of any transboundary Natura 2000 site outside of the UK.

5. Secretary of State's consultation

5.1 The Secretary of State issued a consultation letter on 21 November 2019 to obtain further information on matters that were not concluded at the close of examination so these could be considered fully by the Secretary of State before his decision on the application was made. Comments from the Applicant and interested parties were requested by 13 December 2019 on the following:

Marine Navigation, Shipping and Ports Infrastructure

- (a) **An updated Navigation Risk Assessment ("NRA"), including further collision risk assessment:** The further collision risk assessment, undertaken

by an independent consultant (Anatec) on behalf of the Applicant, had been submitted late in the examination, therefore the ExA was unable to subject it to oral examination or fully seek the views of interested and other parties. The Secretary of State sought views from Trinity House, MCA, UK Chamber of Shipping, London Pilots Council, Port of Tilbury, London Gateway Port, Port of Sheerness, London Medway Ports, Port of London Authority and Estuary Services Limited on the update.

- (b) **A further Pilot Transfer Bridge simulation report:** following the close of examination, the Applicant submitted a further Pilot Transfer Bridge simulation report to consider whether there is sufficient sea room in the vicinity of the proposed Development to enable marine navigation and pilotage to continue safely. The views from parties listed at (a) were invited to comment on the further report.

Agreement for Lease

- (c) **Agreement for Lease between the Applicant and The Crown Estate (“tCE”):** the maritime components of the Order land are held by and would be subject to a lease from tCE. At the end of examination, a lease had not been agreed to secure the property rights required to allow the Applicant to construct the offshore elements of the proposed development.

Draft Development Consent Order

- (d) **Draft Order:** The Secretary of State was aware that the Applicant submitted changes to the draft Order late in the examination and as a result, IPs and OPs were not afforded the opportunity to submit their views on the Applicant’s changes.

Compulsory Acquisition

- (e) **Compulsory Acquisition:** The Secretary of State was aware that during the examination a number of parties were in negotiation regarding an option agreement. These parties, namely: National Trust, National Grid, and RAMAC Holdings (Trading) Limited were requested to provide an update on whether agreement has been reached.

Fish Spawning

- (f) **Fish Spawning Grounds:** The Secretary of State was aware of the concerns raised by the MMO regarding the impact of construction noise on herring and sole spawning grounds and that an agreement between the Applicant and MMO had not been reached by the close of examination. The Secretary of State suggested a new condition to be inserted into the Order to address these outstanding issues and invited comments from the parties.

Saltmarsh Mitigation

- (g) **Saltmarsh Mitigation:** In order to secure the Saltmarsh Mitigation, Reinstatement and Monitoring Plan in the terrestrial environment, the Secretary of State was considering the inclusion of a new text in requirement 13, requesting comments from the applicant, Natural England and any IP or OP on the inclusion of the text.

Response to the Secretary of State's consultation

5.2 The Secretary of State has carefully considered the responses to the consultation (summarised below) in respect of marine navigation, shipping and ports infrastructure. In the light of the continuing concern from IPs on this issue and especially the MCA's advice that its concerns on navigation safety risk had not changed, he does not consider that the updated NRA including further collision risk assessment or the Further Pilot Transfer Bridge Simulation Report are sufficient for him to be able to conclude that the ExA's conclusions and recommendation on these matters are no longer valid. He therefore has decided to withhold consent for the proposed development. The consultation responses in respect of all other matters apart from marine navigation, shipping and ports infrastructure have not been further considered as the Secretary of State does not deem it necessary to give those matters further consideration in the context of this application:

(a) The updated NRA including further collision risk assessment ("CRA"):

- a. The MCA confirmed that its concerns on navigation safety risk have not changed, and overall there are still too many outstanding elements of the NRA not agreed for MCA to confirm that this assessment addresses and satisfactorily assuages their concerns.
- b. Some IPs including Trinity House and the UK Chamber of Shipping expressed continued concern that an increase in the risk of collision is not deemed to be "significant" within the Application, especially when it coincides with a reduction in sea room. They concluded that the Automatic Identification System ("AIS") data from September 2017 used in the Collision Risk Model report does not provide an accurate picture of traffic density experienced in these waters, and due to the lack of radar data provided a large number of recreational craft and fishing vessels are unaccounted for. They confirmed these vessels also have an impact on the density of traffic in the area and subsequently the additional risk of safety of navigation in the vicinity of the proposed Development.
- c. The Port of London Authority and Estuary Services Limited maintained their concerns and about the effects of the proposed Development and that they remained largely unaddressed by the Applicant. The Port of Tilbury London Limited and London Gateway Port Limited had been unable to refer the CRA to their technical navigation specialists, HR Wallingford, as their appointment ended at the close of examination. Had the CRA or second Pilot Bridge Simulation Report been produced during the course of the examination then they would have been able to provide an assessment and analysis.

(b) The Further Pilot Transfer Bridge Simulation Report:

- a. The MCA does not stipulate simulation exercises as part of its guidance, as it well recognised by the maritime industry generally, there are limitations to simulation studies to achieve a holistic qualitative assessment compared to the real environment. However, they acknowledge the need for additional assessments that should be adequately weighed and undertaken in order to address concerns raised by IPs. The MCA attended the simulation workshop as observer and witnessed multiple runs over three consecutive days of exercises. They observed that for most part of the exercises, main and affected IPs were absent so that the Applicant's simulation exercises were not subject to nuanced cross verification and validation by the directly affected parties involved in pilot transfers.
- b. The Port of London Authority and Estuary Services Limited confirmed that this statement reflects a number of concerns they had identified particularly that the day-to-day practices of Estuary Services Limited were not considered during the simulation. It was noted by MCA that the trials utilised experienced pilots, although from a different operational area.
- c. The UK Chamber of Shipping confirmed that it had welcomed the decision to use coxswains and pilots that were unfamiliar with the area as this provides a more realistic picture of the conditions on board many commercial vessels picking up pilots and transiting the area.
- d. MCA's concerns remain however, that there has been a failure to obtain IP agreement regarding the risks to pilots, along with the other NRA related aspects, including the list of embedded and additional risk control measures as detailed in MCA responses throughout the examination and the acceptability of the final risk scores as ALARP.
- e. The Port of London Authority and Estuary Services Limited confirmed this is a useful and accurate summary of the position and in summary confirmed concerns about the analysis of the impacts of the extension on shipping and navigation that remain and that the second Pilot Transfer Bridge Simulation report has not changed this position and the risk scores have not been reduced to ALARP. If consent were to be granted in their view it would pose an unacceptable risk to shipping and navigation in the area. The Port of Tilbury London Limited and London Gateway Port Limited confirmed their concerns regarding the impacts on shipping and navigation interests are sustained and the findings of the second Pilot Transfer Bridge Simulation report do not allay their concerns in this respect.

6. Secretary of State's conclusion

6.1 The Secretary of State, in deciding this application in accordance with section 104(3) of the Planning Act 2008 and having carefully considered the responses to his consultation on marine navigation, shipping and ports infrastructure issues, agrees with the recommendation of the ExA that approving this application would not be in

accordance with EN-3 policies relevant to shipping, navigation and ports because the proposed development does not reduce the increased navigational risk to ALARP.

6.2 The Secretary of State has therefore decided to accept the ExA's recommendation not to make the Order granting development consent. In light of his decision not to grant development consent for the reasons set out above, the Secretary of State notes that there were various other issues considered during the examination of the Application but does not consider it necessary to give these matters further consideration in the context of this decision.

7. General Considerations

Human Rights Act 1998

7.1 The ExA and the Secretary of State has had regard to the potential infringement of human rights by the proposed Development, in relation to the European Convention on Human Rights in the event that the application is granted. However, as the Secretary of State is not granting development consent he considers there is no conflict with the provisions of the Human Rights Act 1998.

Equality Act 2010

7.2 The ExA and the Secretary of State has had regard to the Equality Act 2010 that includes a public sector "general equality duty". This requires public authorities to have due regard in the exercise of their functions to the need to eliminate unlawful discrimination, harassment and victimisation and any other conduct prohibited under the Act; advance equality of opportunity between people who share a protected characteristic and those who do not; and foster good relations between people who share a protected characteristic and those who do not in respect of the following "protected characteristics": age; gender; gender reassignment; disability; marriage and civil partnerships²; pregnancy and maternity; religion and belief; and race. The Secretary of State does not consider that his decision to refuse consent would have significant differential impacts on any of the protected characteristics.

Natural Environment and Rural Communities Act 2006

7.3 The Secretary of State's duty in accordance with section 40(1) of the Natural Environment and Rural Communities Act 2006 has to have regard to the purpose of conserving biodiversity, and in particular to the United Nations Environmental Programme Convention on Biological Diversity of 1992, when exercising its functions.

7.4 The Secretary of State is satisfied that there has been due regard to conserving biodiversity and that the ExA's Report, together with the environmental impact analysis, considers biodiversity sufficiently to inform the Secretary of State's decision in this respect.

8. Challenge to decision

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

8.1 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.

9. Publicity for decision

9.1 The Secretary of State's decision on this Application is being publicised as required by section 116 of the Planning Act 2008 and regulation 31 of the 2017 EIA Regulations.

Yours faithfully

Gareth Leigh

GARETH LEIGH
Head of Energy Infrastructure Planning

LEGAL CHALLENGES RELATING TO APPLICATIONS FOR DEVELOPMENT CONSENT ORDERS

Under section 118 of the Planning Act 2008, a refusal to grant development consent, or anything else done or omitted to be done by the Secretary of State in relation to an application for 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 statement of reasons for the refusal is published. The decision documents are being published on the date of this letter on the Planning Inspectorate website at the following address:

<https://infrastructure.planninginspectorate.gov.uk/projects/south-east/thanet-extension-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)