



THE PLANNING ACT 2008

THE INFRASTRUCTURE PLANNING (EXAMINATION PROCEDURE)  
RULES 2010

NORFOLK BOREAS OFFSHORE WIND FARM

Planning Inspectorate Reference: EN010087

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**Natural England's Written Summary of Oral Representations made  
at Issue Specific Hearing 4 on offshore effects including the  
Draft Development Consent Order**

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30 January 2020

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## Oral Representations

### Application by Norfolk Boreas Limited for an Order Granting Development Consent for the Norfolk Boreas Offshore Windfarm Project

#### Issue Specific Hearing 4: Offshore effects including the draft Development Consent Order

Wednesday 22 January 2020

#### Attendees:

- The Applicant
- Natural England
- Marine Management Organisation (MMO)
- Historic England
- Eastern IFCA
- Maritime & Coastguard Agency

#### Requested Attendees Not Present:

- RSPB
- The Wildlife Trusts
- Whale and Dolphin Conservation

#### AGENDA

##### 1. Welcome, introductions and arrangements for the hearing

Although not mentioned until Agenda Point 3, it seems worth noting here the Panel's confirmation of the fact that (unless otherwise stated) everything under discussion relates to the Deadline 4 submission.

##### 2. Archaeological Written Scheme of Investigation

i. *To understand how micro-survey of potential archaeological assets at the offshore sites and landfall HDD prior to construction activities will be planned and executed.*

Discussion not relevant to Natural England.

ii. *To understand how delivery of embedded mitigation, e.g. AEZs, and actions to be taken would be secured in the post-consent offshore archaeological WSI.*

Discussion not relevant to Natural England.

##### 3. Shipping and Navigation

Discussion not relevant to Natural England.

##### 4. Fishing

Discussion not relevant to Natural England.

## 5. Marine Mammals

The Panel noted Natural England had made a late submission and while they had not reviewed the document, they said Natural England were at liberty to discuss. It should be noted that the late submissions were in relation to Benthic Habitats (09.01.2020) and the Benthic Site Integrity Plan (SIP) position statement (20.01.2020) and not in relation to marine mammals.

### a) Noise Monitoring

i. *To explore concerns regarding noise disturbance to cetaceans from foundation construction using various piling and non-piling techniques and the opportunities to minimise noise by foundation design.*

Natural England confirmed we were content with the updated license condition to include maximum hammer energies.

ii. *To understand whether the additional construction techniques including vibro-piling and 'blue hammer', proposed for Norfolk Vanguard, referenced in the Secretary of State letter, are appropriate to Norfolk Boreas.*

Natural England confirmed that we are aware of the Secretary of State's proposal (06.12.19) to include 'vibro piling' and 'blue hammer' within condition 14(1)(f) of Schedules 9 and 10, and condition 9(1)(f) of Schedules 11 of the Norfolk Vanguard DCO/DMLs as specific mitigation measures. However, Natural England's advice on that project is the same for Boreas namely that Natural England believes that vibro-piling and 'blue hammer' technologies were already captured by the original condition wording and additional wording could be unnecessarily restrictive if included.

iii. *To explore whether noise monitoring is necessary for more than just the first few piles of each foundation type.*

Natural England sought to clarify that agenda items at Points 3 and 4 differ:

i) Point 3 relates to monitoring subsea noise for the first four piles as a minimum requirement. But ideally, Natural England would also like to see monitoring of piles within high-resistance areas as these would represent the worst case impacts. However, we confirmed that we were not asking for a change to the wording of the condition.

ii) Natural England clarified that Point 4 is in relation to monitoring of marine mammals. For which Natural England requests that monitoring of marine mammals as proposed within the In Principle Monitoring Plan (IPMP) is secured by a DCO condition. We noted that other important factors, such as ornithology, had their monitoring specifically secured through condition.

As part of the condition relating to Marine Mammal Monitoring Natural England stated the need to validate the assessment. Natural England suggested that a strategic approach to monitoring is likely to be the best approach to achieve this, with some strategic projects coming online that the Applicant might be part of, such as the Offshore Renewables Joint Industry Programme (ORJIP). Therefore, the drafting of the condition should not exclude this and or any other monitoring and we confirmed that we were happy to work with the MMO and Applicant to ensure this by Deadline 5

iv. *To understand the need to monitor marine mammals themselves which has been raised by Natural England & TWT.*

Natural England confirmed that the proposed marine mammal monitoring during construction by TWT wasn't something Natural England would require as marine mammals are unlikely to be within the immediate vicinity during the construction phase.

v. *To identify whether there are any construction techniques, other than piling, under consideration that could result in noise impacts.*

Natural England confirmed we are content with the Applicant's assessment of other noisy activities and that we have no concerns about other noise creating activities as these would be covered within the Worst Case Scenario.

## **b) Mitigation**

i. *To understand the concerns regarding the appropriateness of JNCC 2010 guidelines and the effectiveness of in-situ methods for mitigation, including soft-starts, marine observers, passive acoustic monitoring, etc. To consider whether there are newer, proven, alternatives such as bubble curtains, which could be adopted.*

Natural England advised that the JNCC 2010 guidelines were "long in the tooth" and that we need more up to date guidelines. However, confirmed that the guidelines still provide a good baseline mitigation position upon which further required mitigation could be built.

For example, mitigation at 500 meters was not sufficient for larger projects; but the guidelines are a good foundation for the SIP etc.

## **c) In-Combination Effects**

i. *To fully understand the arguments regarding whether in-combination effects are likely to cause AEOL.*

Natural England wishes to clarify our position provided at ISH 4 in relation to potential Adverse Effect on Integrity (AEOL). Based on the SNCBs noise threshold guidance (20% of the Southern North Sea (SNS) seasonal area per day, 10% over the relevant season) and the information currently available to feed in to cumulative impact assessments, Natural England believe there will be a likely significant effect on the harbour porpoise feature of the SNS Special Area of Conservation (SAC). We also believe AEOL cannot be ruled out at this stage. The production of a SIP allows for the HRA to be revisited when more information is available regarding all the relevant plans and projects and the implementation of the most appropriate mitigation methods at that time to ensure there will be no AEOL.

ii. *To review positions between the Applicant, WDCS, Natural England and MMO regarding the appropriateness of using the SIP at consenting stage to address the in-combination effects from piling.*

Natural England confirmed agreement with the MMO that the only outstanding issue with the SNS SAC SIP was the lack of sight of the mechanism to ensure in combination impacts would be appropriately managed to ensure they remain within the site thresholds.

Natural England wishes however to further clarify the differences in our opinion between the SNS SIP and The HHW SIP. Within the SNS SIP there is agreement that mitigation can be achieved for the in combination effects through regulation of projects to ensure works do not overlap to breach the thresholds. Although, there is an outstanding question on the final mechanism for the regulation However, there is no agreement that the mitigation within the SIP for the Haisborough Hammond and Winterton (HHW) SAC can ensure no AEOL. Therefore, a SIP is appropriate in the case of the SNS SIP but not the HHW SIP.

## **d) Water Quality**

*i. To understand the potential in-combination effects of changes to water quality on harbour porpoise.*

Natural England confirmed that we had met with the Applicant and MMO and were in agreement that water quality impacts were not an issue for marine mammals for the Boreas project. The effects are agreed to be negligible and have advised similar to Norfolk Vanguard Ltd. in response to the Secretary of States Letter dated 6<sup>th</sup> December 2019.

Natural England also clarified that it was with reference to harbour porpoise in the 'Southern' North Sea SAC, rather than the 'South' North Sea SAC.

## **6. Benthic Ecology**

### **a) Haisborough, Hammond and Winterton SAC**

*i. To understand the implications to Norfolk Boreas of the Secretary of State letter to Norfolk Vanguard regarding specific mitigation solutions that would address the potential effects of cable protection on the SAC features. This will also investigate the implications of the possibility that micro-siting may not be possible.*

Natural England referred to Natural England's January 20<sup>th</sup>, 2020 *Position Statement Regarding the Proposed Site Integrity Plan for Haisborough, Hammond and Winterton Special Area of Conservation* (attached as Appendix 1)

In summary, Natural England explained that the Applicant wants to effectively defer consideration of critical ecological issues until after the making of a DCO. It was explained that Natural England is able to accept the Applicant's SIP proposal in relation to marine mammals in the SNS SAC because the uncertainties that remain to be resolved in that situation are inherently resolvable by careful timetabling, whereas the uncertainties in the cable corridor through the HHW SAC are of a very different nature.

Natural England has four main reasons for disagreeing with the Applicant:

Firstly, in terms of Project Management, this is an inefficient way of dealing with a difficult problem. The job of assessing whether a methodology exists to allow harm to be avoided is complex – considering cable laying methods, the location of reef and micrositing possibilities, and all of this in a situation where there is little or no experience of this being successfully done. This assessment must be rigorous enough to allow the decision-maker to be certain of the results. We already have a rigorous procedure for looking at difficult and important things, and we are in it now. It does not seem sensible to have to reinvent the procedural wheel in a few years' time.

One of the goals of the 2008 Planning Act was to try to front-load the difficult work and to prevent inquiries from dragging on for years and years. The March 2017 guidance on NSIPs and Housing, on its front page, refers to a front-loaded process and there will be many other sources that repeat this.

Secondly, without wishing to be confrontational, it has to be pointed out that the Site Integrity Plan concept in this instance proceeds on the basis of a false premise. If we look at its paragraph no. 1 we see that the concept is predicated on the view that it is going to be possible to ensure no adverse effect on the SAC by adjusting the methods used within the redline cable corridor. But we cannot yet be sure of this because we haven't got the information we need about the presence of reef, we don't know what methods will be used

and we don't know the actual line that the cable will take. So, we cannot logically conclude that a way through this can be found which will not adversely affect the SAC. This outcome is mentioned in the SIP, but only glancingly and without exploring what would be involved if this were to be the case. And Natural England believes that we need to explore this now.

Thirdly, if adverse effect cannot be avoided, we need to start looking at the derogations route – Article 6.4 of the Habitats Directive and Reg 36 of the 2017 Regulations – as soon as possible, in order to avert further delay at a later stage.

If *Sabellaria* reef turns out to be inconveniently located in relation to the proposed cable route, it is entirely possible that the only feasible and economic cable route will harm some of it to the extent of adversely affecting the integrity of the SAC.

It is premature to debate exactly how much harm is needed in order to amount to an AEol, because until we know how much harm is an issue the question is academic. And Natural England's Appendix 2.6 to its Relevant Representations is an advice note on this subject [REP1-057].

The issue is not pre-judged by Natural England, but if it turns out that there will be an adverse effect on the SAC it will be necessary to consider alternatives, imperative reasons of overriding public interest, and compensatory measures. If we find ourselves contemplating those matters a couple of years down the line, then we can be perfectly certain that at that point we will realise that it would have been better to address those issues now.

To briefly look at that trio of statutory steps:

#### *Alternatives*

A finding of adverse effect requires alternative solutions to be looked at. The Applicant must take its own advice on this, but domestic case law and guidance may be helpful to the Applicant, and it might conclude that only sensible and commercially feasible alternatives need to be considered. Natural England may provide advice on the environmental issues arising from any alternative solutions.

#### *Imperative reasons of overriding public interest*

Natural England does not give its views on this, but there is guidance available for the Applicant on this issue.

#### *Compensatory measures*

The third element of the derogations route is rather harder to pin down and to make work. There is essentially no domestic experience about how to compensate for harm to an offshore site. There is essentially no law on this, beyond the words of Regulation 36 of the 2017 Conservation of Offshore Marine Habitats and Species Regulations, but there is some guidance, both domestic and European, about the thinking involved.

Natural England feels that this might be more complicated than the alternatives and IROPI steps, or at least more time-consuming. It will involve the S of S, as it is him or her who is required by statute to secure measures of this sort. Hence Natural England thinks that it is in the Applicant's interests to try to get ahead of this earlier rather than later, in the existing process that is going to go up to the S of S anyway.

DEFRA's guidance, as well as European guidance, tells us that compensatory measures must be secured before consent is given for a proposal to proceed, and that the compensation should actually be in place before harm is caused. So there is potential for delay here.

European case law tells us, logically enough, that compensatory measures cannot be devised until the extent of the harm is understood, and the time needed to get to that point of understanding might be considerable.

The DEFRA guidance tells us that the SNCBs should help Applicants to identify suitable compensatory measures, and Natural England will be as helpful as it possibly can be, though it can't say that this will be quickly sorted out and it can't speak for the timescale that other bodies will work to, especially if the process is outside this examination.

Fourthly, there are issues of law, which have been deliberately left to the end of Natural England's submission because Natural England thinks that its position justifies itself in practical terms as much as in legal terms.

It is for the Secretary of State (SoS) to satisfy him or herself that the proposed pre-commencement conditions in the relevant DMLs are not legally flawed. Natural England is not going to stamp its foot about this, but its recent Position Statement suggests that any appropriate assessment of the DCO containing these DMLs risks unlawfulness because it is necessarily incomplete, and that the DML conditions themselves may be unreasonable because we cannot yet know whether the conditionality is capable of being satisfied.

This brings us round in a circle. Even if the SoS is satisfied that his or her appropriate assessment is going to be lawful, and that if it is lawful to use a Grampian condition of this sort - if it turns out, at a future date, that the Grampian condition cannot be met because a harm-free route cannot be found through the SAC the DML will need to be amended to allow us to take the derogations route.

Natural England's view is that the mechanism for amendment will, because it concerns a material issue, take us back to the SoS. And as has been said and written, isn't it prudent to bite this bullet now?

In relation to the ability to microsite around Annex I features Natural England stressed that both European case law and domestic law require certainty of the absence of AEoI . This is a very high bar. Even with further study and mitigation measures it may not be possible to be certain that the SAC will not suffer adverse effect.

Natural England wished to provide some clarifications concerning the SAC. Namely, that it is now considered that the whole site is made up of habitats that support designated feature, with no site fabric (except where there are old pipelines). That both reef and sandbanks are Annex 1 features. Natural England is equally concerned that the introduction of hard material will result in a lasting change to the sandbanks and *Sabellaria*. The Sweetman v Coillte Teoranta (C-323/17) case is also relevant to extent of loss. Please see Natural England's submission on small scale loss [REP1-057]. While we recognise that the area may be quite small-scale in relation to the whole SAC site, the amount of rock is still large and could impact ecological functioning and therefore needs to be considered in relation to the conservation objectives for the site. Natural England's view, therefore, is that impacts are not *de minimis*, there is a likely significant effect and requires an Appropriate Assessment.. Indeed, we cannot say there will be "no effects" because of our experience on other windfarm projects. There is a high probability that the conservation objectives will be hindered, and 5% of the cable corridor route will have a lasting effect. So even considering the mitigation proposed we cannot advise that no AEoI can be excluded.

Natural England said the purpose of the meeting on the 23<sup>rd</sup> January with the Applicant was to get a feel for each other's position and the legal issues. Natural England would be there in a helpful spirit and willing to discuss everything as the technical issues are substantial (although there's very little legal precedent to discuss).



In respect to the Oral Representations given by the Applicants specialist on 22<sup>nd</sup> January in relation to Agenda Item 6, Haisborough, Hammond and Winterton SAC. During the hearing Natural England did not have an opportunity to respond to representations from the Applicants specialist on some fundamental points raised in relation to understanding of the site features; the management and condition of the features; and feature response to pressures.

Therefore we will wait to see the Applicant's Deadline 4 Oral Representation on these points, but Natural England reserves to the right to reply through written representation at Deadline 5. In our response we would like to provide clarity to the Examining Authority on the following points, (but not exclusively)

- Changes in site management since the time of designation;
- Data collection since designation surveys and level of confidence in presence of Sabellaria spinulosa reef;
- The current favourable condition status of the site;
- The conservation objectives for the site; and
- Recoverability of features

Natural England clarified that we agreed the potential use of a SIP in Vanguard, but always said there was an AEoI that needs to be addressed. There was always doubt over whether the SIP was an appropriate mechanism and following discussion with MMO and legal representatives Natural England now have legal issues with the SIP, as discussed. Indeed, Natural England was never in a position, on Vanguard, where we said there was "no adverse effect".

Natural England confirmed that the purpose of the meeting on 23<sup>rd</sup> January 2020 was to consider the points raised in the SoSs Letter to Norfolk Vanguard Ltd (dated 6<sup>th</sup> January 2020) in relation to mitigation, alternatives, and compensation, where many of the points are also relevant to Boreas alone and in-combination. In terms of the Statement of Common Ground (SoCG), things move so quickly that it may be counter-productive to provide a further SoCG at this time, so will focus on finding a way through issues. Both parties intend to write up their response to the points raised and we will update our risks and issues log.

Natural England concluded that it would produce a round-up of its views on laying cable in the HHW SAC for Deadline 5.

ii. *To understand the strategy for disposal of sediments within the SAC, including the need for a condition specifying particle size, modelling of deposition and protection of Annex 1 reef.*

Natural England confirmed that the proposed disposal location is acceptable to Natural England and welcomed retention within the SAC sandbank system. The condition for Norfolk Vanguard required that particles should be 95% similar. However, as written, the condition partially compromises MMO regarding enforcement; but we're working on this and will discuss with MMO and the Applicant to hopefully have it resolved by Deadline 5 (February 26, 2020).

iii. *To understand how AEZs and A2 anomalies overlay on the Sabellaria Spinulosa reef features where the cable corridor transits the Haisborough, Hammond and Winterton SAC and how this may influence opportunities for micro-siting of the cable route and the possible minor amendments to Red Line Boundary or exclusions related to fishery byelaws.*

Natural England confirmed that the presence of AEZs and A2 features which will potentially require micro-siting will compound benthic concerns in relation to the ability to micro siting the cables and therefore increase the chances of AEoI.

iv. *To understand the regulators' views on whether O & M activities should be excluded from the SAC, and implications for the Applicant.*

Natural England agreed with the MMO that the O&M activities that would currently be permitted by the DCO/DML within the SAC pose a low risk and is content with O & M.

v. *To explore potential implications of a scenario where AEOI cannot be excluded with the Applicant, regulators and IPs including whether there are any feasible alternative solutions, any imperative reasons of overriding public interest for the project and any in-principle compensatory measures.*

Natural England agreed with the Applicant that the issue of *de minimis* should be addressed during examination. However, we reiterated that cable laying etc. can't be considered as having no effect therefore we advise that it is a likely significant effect on the site, so needs to go forward to the Appropriate Assessment stage where it may/may not be considered by the competent authority as AEol.

In response to the Examining Authorities concerns about the differing of opinions between Natural England and the Applicant, Natural England agreed and reaffirmed that the next day's meeting (23<sup>rd</sup> January 2020) was concerned with Vanguard and mitigation and compensation matters were likely to take up most of the day. The two parties were unlikely to reach a resolution tomorrow. The meeting would hopefully outline a plan of how they engage and address the issues. If further meetings were required then Natural England would be more than happy to participate.

## **7. Offshore Ornithology**

### **a) In-combination impacts of kittiwake, gannet and auks of Flamborough and Filey Coast SPA, black-backed gull of the Alde-Ore Estuary SPA**

i. *To understand the implications to Norfolk Boreas of the Secretary of State letters to Norfolk Vanguard and Hornsea 3 (for kittiwake) regarding additional requirements for further mitigation to lessen or avoid any adverse effects on the integrity of these sites, to include possible compensatory measures.*

The Panel was aware that Natural England had made a submission after Deadline 3 but prior to ISH they had not yet seen. Natural England noted we are still in the process of undertaking a review. Natural England was taking internal advice to ensure consistency across projects and will submit our full advice at Deadline 4.

Natural England considered the implications for the Haisborough, Hammond and Winterton SAC following the SoS letter to Vanguard. Natural England confirmed that we welcome mitigation as proposed by the Applicant. However, we recommend that the Applicant considers other options for raising draught heights by more than 5m – suggest presentation of a range options to reduce the Boreas contribution to in-combination totals by as much as is possible. The minimising of updates was welcome.

Natural England support the Applicant wanting to pull all the information together at one Deadline, after Vanguard. This has been part of the issue – alongside the figures for Hornsea 3. It's been agreed, therefore, that they provide figures with and without those for Hornsea 3. Advise Applicant to contact BEIS about Hornsea 3 holding up the process, as has implications for Boreas and EAN1 and 2.

Further to the Hearing, Natural England notes that if the updated Collision Risk Analysis is provided at Deadline 6 we will not be able to provide comment ahead of the scheduled Issue

Specific Hearing and will make best endeavours to provide a response by Deadline 7.

ii. *To consider the Applicant's comments that RSPB has misinterpreted the PVA results, and the implications of this.*

Following information provided by the Applicant regarding this, Natural England confirmed that our understanding is that the Applicant's interpretation of the counterfactual of final population size is correct – it indicates how much lower the impacted population will be compared to the projected un impacted population – so not relative to the current population size. Natural England noted that this is the approach we are taking to interpreting the counterfactuals for our advice on the Applicant's Deadline 2 updated offshore ornithology assessments that we will submit at Deadline 4.

iii. *To understand from Natural England what its view is regarding the Applicant's assessments provided at Deadline 2, and whether there is agreement on no AEoI for each SPA.*

Natural England noted that we provided interim advice on the updated assessments before this hearing and our full advice on these will be submitted at Deadline 4. Our review of the Applicant's updated assessments in terms of advice on conclusions is currently undergoing internal review to ensure consistency and will be submitted at Deadline 4.

When asked if we could give an indication of our advice, Natural England noted that in general we agree with the approach to the updated assessments undertaken by the Applicant, and it is likely that our advice will be similar to that reached at Vanguard.

We will likely be able to agree to no AEoI from Boreas alone for all species and site combinations including the features of the Flamborough and Filey Coast Special Protection Area (SPA) (kittiwake, gannet and auks) and lesser black-backed gulls of the Alde-Ore Estuary SPA.

With regard to the in-combination assessments we welcome that the Applicant has in the Deadline 2 assessment presented in-combination figures for all relevant projects and also figures for all projects excluding the Hornsea 3 and 4 projects. We note that due to Natural England's significant concerns regarding the incomplete baseline surveys for the Hornsea 3 project, and the associated level of uncertainty as regards the potential impacts of that project, Natural England will again not be in a position to advise that an AEoI for in-combination impacts can be ruled out for any relevant species or feature of an SPA when Hornsea 3 is included in the totals.

Additionally, the figures for Hornsea 4 come from the PEIR for that project. These figures and the methodologies to produce them are hence subject to ongoing discussions through the evidence plan process and therefore have an element of uncertainty associated with them and a likelihood of being subject to change. Therefore, the inevitable uncertainty around the Hornsea 4 figures along with our position regarding inclusion of Hornsea 3 in the in-combination assessments means that Natural England will not be in a position to advise that an AEoI for in-combination impacts can be ruled out for any relevant species or feature of an SPA when the Hornsea 3 and Hornsea 4 projects are included in the totals.

However, based on the figures presented in the Deadline 2 assessments, we will likely advise that we cannot rule out an AEoI for in-combination collision impacts to kittiwakes from the Flamborough and Filey Coast SPA and to lesser black-backed gulls from the Alde-Ore Estuary SPA, irrespective of whether the Hornsea 3 and 4 projects are included in the totals or not (which is the same as that advised during the Norfolk Vanguard examination). But it should be noted that these conclusions are subject to the current review and our final advice which will be provided at Deadline 4.

## **b) Collision Risk Modelling**

i. *To understand the need, or otherwise, for PVA for little gull of Greater Wash SPA.*

Natural England noted that we consider that a PVA model for little gull at the Greater Wash SPA would not be very informative given that we do not have any demographic parameters to use for little gull. Therefore, we do not think that a meaningful/useful PVA model could be undertaken on the basis of lack of data etc.

ii. *To understand whether a range-based approach to CRM for flight-height estimates is appropriate.*

Natural England confirmed that it supports a range-based approach

Following information provided by the Applicant regarding issues with the accuracy of the site-specific flight height data and use of Option 1 of the Band model, Natural England noted that we consider that given the issues with the site-specific flight height data and as the Applicant has taken into account in the updated assessments the range of predicted collision impacts apportioned to relevant designated sites, drawing not just from the mean/central predicted collision figures, but also the range of predicted figures resulting from the Applicant's analysis of the uncertainty/variability in the input data, the Applicant has done as much as they can.

However, there is clearly an issue with the collection of accurate evidence on site-specific flight heights of seabirds and this highlights the need to collect real evidence on actual collisions and also highlights the need for consideration of mitigation through raising turbine draught heights by as much as is possible.

Natural England confirmed that with regard to the stochastic collision risk model, the SNCBs are working through various questions related to collision risk modelling and use of the stochastic tool, noting the issues are complicated, and are working towards an update of the joint SNCB advice. In the meantime, our advice remains to use the Band model, as the best available tool, but to consider uncertainty and variability in the input data by varying each parameter in turn, as the Applicant has currently done. It is considered unlikely this will be resolved and that updated advice will be available in the timescales of the Norfolk Boreas examination.

iii. *To explore whether as-built or consented windfarms should be considered for in-combination effects.*

Natural England commented that early DMLs allowed for phased build. There is a legal question remaining as to if the built projects could legally extend to build to their permitted envelope. Moreover, as built is not assessed in the ES. You would hope developers wouldn't build to worst case scenario. Natural England has been raising the issue with Crown Estate and notes the need for a strategic approach to this issue. If conducted on a project by project basis this would lead to inconsistency across industry, when doing in combination and HRA. Therefore, this issue needs someone to take it on strategically on behalf of industry to establish one agreed approach. However we are aware that this won't be possible in time for the end of Boreas examination. Natural England said it may be possible for Applicant to consider three projects for the Boreas examination. However we need a strategic project to happen for the longer term.

Natural England also noted that the Race Bank assessment didn't use band model, and was based on Falkertz's model. Natural England added that it was also used for Dudgeon. This is why a strategic approach is needed.

Natural England added would make their best effort to work with Applicant on this throughout

examination.

Level of precaution in the assessment

*i) To consider the arguments relating to precaution and the conclusions drawn from applying density dependence, and the Applicant's conclusion of no AEOI even when applying precaution.*

Natural England confirmed that our advice regarding displacement impacts of red-throated divers (RTD) remains to consider a range of displacement rates up to 100% over a 4km buffer. We also confirmed that our advice regarding displacement impacts of auks remained that a range of displacement rates of 30-70% displacement across a 2km buffer should be considered. Our justification for this advice was detailed in Appendix 1 of our Relevant Representations [RR-099]. Additionally as definitive mortality rates for seabirds (including RTDs and auks), are unknown we advise a range of figures for mortality rates of between 1% and 10% are considered for assessments. We acknowledged that the Applicant's preferred rates for displacement and mortality for auks falls within our recommended range and our advice will be based on consideration of the predicted impacts across this range – we will not just focus solely on the predicted impacts for the upper rates within the range.

Natural England also confirmed that our advice remains that the two impacts of collision and displacement should be summed for gannet and noted that this is the recommendation set out in the SNCBs interim advice on displacement. We acknowledged that this approach will incorporate a degree of precaution. Full details of the reasoning for this advice will be set out in our Deadline 4 response to the Applicant's Deadline 2 updated offshore ornithological assessments. However, Natural England noted that the Applicant has undertaken assessment of gannet collisions plus displacement for both Environmental Impact Assessment (EIA) and Habitat Regulations Assessment (HRA) for the project alone and cumulatively/in-combination in their Deadline 2 updated assessments.

With regard to the Applicant's comments on the various aspects of precaution in assessments that the Applicant has highlighted in the updated assessments, Natural England's position regarding this has been set out in our response submitted ahead of this hearing and previously at Deadline 9 of the Norfolk Vanguard examination. Whilst each uncertainty compounds the overall uncertainty, our comments regarding the combined aspect of precaution will be set out in our Deadline 4 response of advice on the Applicant's Deadline 2 updated offshore ornithological assessments. However, in summary there is variability and/or uncertainty in most of the aspects of the assessments, including:

- Assessments are based on 2 years of survey data and the distribution of birds in the marine environment appears to be highly variable between days, seasons, years and even time of day. It is likely that for example, 24 days of surveys over 2 years - approximately 3.3% of the total number of 720 days - do not fully capture the full extent of variation density/abundance of seabirds that can be present within the survey areas during the 2 year period, including low as well as high counts, let alone over the 30-year period of the lifespan of the project. It is therefore appropriate for assessments to present and consider values from both lower and upper 95% confidence limits.

- Empirical evidence is scarce or lacking in many areas of the assessments, including around empirical avoidance rates of birds at offshore sites (just one study from Thanet offshore wind farm) and mortality rates from displacement.

Therefore, in order to reflect such potential variability and uncertainty in assessments, it is appropriate to apply precaution and hence Natural England's advice to take a range based-approach to assessments.

However, Natural England again noted that the potential limitations in recording of site-specific data on seabird flight heights may have the potential to lead to underestimates of potential collisions and hence assessments may be lacking in precaution in this aspect. For

example, using the mean values of the input parameters, the Option 1 collision risk modelling outputs presented by the Applicant (i.e. using the site-specific flight height data) predict over 1,000 kittiwake collision per annum at an EIA scale, compared to 203 per annum for Option 2 (generic flight height data from Johnston et al. 2014). This again highlights the need to collect real evidence on actual collisions and also highlights the need for consideration of mitigation through raising turbine draught heights by as much as is possible.

## **8. Draft Development Consent Order**

i. *To consider the implications for the Norfolk Boreas DMLs of the proposed amendments put forward by the Secretary of State in its letter in relation to Norfolk Vanguard in paragraphs 30-33 inclusive [REP3-012].*

Discussion not relevant to Natural England.

## **Appendix 1**

### ***NATURAL ENGLAND'S POSITION STATEMENT REGARDING THE PROPOSED SITE INTEGRITY PLAN FOR THE HAISBOROUGH HAMMOND AND WINTERTON SPECIAL AREA OF CONSERVATION***



THE PLANNING ACT 2008

THE INFRASTRUCTURE PLANNING (EXAMINATION PROCEDURE) RULES 2010

Norfolk Boreas Offshore Wind Farm

**NATURAL ENGLAND'S POSITION STATEMENT  
REGARDING THE PROPOSED SITE INTEGRITY PLAN FOR THE  
HAISBOROUGH HAMMOND AND WINTERTON SPECIAL AREA OF CONSERVATION**

Planning Inspectorate Reference: EN010087

Dated 20<sup>th</sup> January 2020



## Introduction

1. Natural England ('NE') wishes to repeat and further explain its concerns about Norfolk Boreas Limited (the 'Applicant')'s proposed use of a pre-commencement ('Grampian') condition that would have the effect of deferring a full assessment of the impacts of its proposals on the Haisborough, Hammond and Winterton ('HHW') Special Area of Conservation ('SAC') until after the making of a DCO.
2. The crux of the issue is the Applicant's suggestion that cable installation across HHW should not commence until a future 'site integrity plan' ('SIP') establishes sufficient mitigation measures (including cable location) to allow it to be concluded that the works will not have an adverse effect on the integrity of the SAC, having regard to its conservation objectives. On the basis of information currently available there can be no knowing whether this conclusion can be reached.
3. If, on the basis of facts and proposals that are not yet available, it cannot be concluded that the cable works can be carried out in a benign way they can only be granted consent if, there being no alternative solutions, there are shown to be imperative reasons of overriding public interest (IROPI) for the project to go ahead and if measures are put in place to satisfactorily compensate for the harm to the SAC that will be caused. This latter requirement raises complex and novel issues that could take a long time to resolve. NE believes that it is best to bite this bullet now, in examination, rather than leave it to the future.
4. It is important for NE to stress that in taking this stance (which is consistent with its approach in other wind farm cases and with other industries) it is trying to prevent this difficult and (at the moment) essentially un-knowable issue from being pushed into the indefinite future, where (depending on the ultimate resolution of the question) there is a risk of project delay or even of electricity generating infrastructure being stranded without a viable cable route to landfall. Natural England is very appreciative of the Applicant's real desire to ensure that its proposals do not harm HHW and it is with reluctance that NE finds itself in disagreement with the Applicant on this point.
5. The correctness of NE's position can be expressed in both project management and in legal terms, but NE wishes to make it clear that, even if the law were not on its side, its stance is based on sound and helpful common sense and is the opposite of being nit-picking or overly-legalistic.

6. The same issue has recently been raised on behalf of the Secretary of State (S of S) in the Vanguard case (letter dated 6 December 2019, paragraph 6)<sup>1</sup>. It appears that the S of S shares NE's concerns that mitigation solutions do not yet, and might not, exist and feels that it is appropriate to tackle the issues of alternatives, IROPI and compensation within the examination.
7. This is a single-issue position statement and should not be taken as affecting or diminishing the status of NE's other representations. Detailed technical issues are outside the scope of this document but can be raised directly with appropriate officers of NE.

### **The Applicant's proposal**

8. Paragraphs 11 and 12 of the Applicant's 'Outline Norfolk Boreas Haisborough Hammond and Winterton Special Area of Conservation Site Integrity Plan version 2' (DCO Document 8.20) ('the outline SIP') explain that **(original emphasis)**:

11. Condition 9(1)(m) of Schedules 11 and 12 (The Transmission Deemed Marine Licences (DMLs)) of the Norfolk Boreas draft Development Consent Order (DCO) state:

*"The licensed activities, or any phase of those activities must not commence until a site integrity plan which accords with the principles set out in the outline Norfolk Boreas Haisborough, Hammond and Winterton Special Area of Conservation Site Integrity Plan has been submitted to the MMO and the MMO (in consultation with the relevant statutory nature conservation body) is satisfied that the plan provides such mitigation as is necessary to avoid adversely affecting the integrity (within the meaning of the 2017 Regulations) of a relevant site, to the extent that sandbanks and Sabellaria spinulosa reefs are a protected feature of that site."*

12. Due to the long lead in times for the development of offshore wind farms it is not possible to provide final detailed method statements for construction prior to consent, and as a result, the detail of any required mitigation also cannot be finalised prior to consent. Key outstanding areas of uncertainty that will be addressed post consent through the SIP include:

- **The precise extent and location of the Annex 1 reef feature.** Due to the ephemeral nature of *S. spinulosa* reef which has the potential to vary greatly. This will be informed by pre-construction surveys which must be undertaken no earlier than 12 months prior to cable installation;
- **The detailed installation methodology, cable crossings and requirement for any cable protection.** This will be informed by pre-construction surveys which must be undertaken no earlier than 12 months prior to cable installation; and

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<sup>1</sup> Though this letter appears to suggest that NE has agreed that the SIP approach is suitable; for clarity, this is not NE's position.

- **The design of cable and pipeline crossings.** These will be determined by crossings agreements with cable and pipeline owners or operators which will be progressed post consent.

9. If this condition came into law as part of a DCO it would mean that cable could not be lawfully laid across the SAC until the MMO, in consultation with NE, is 'satisfied' that the following things have been resolved in a way that will prevent cables and their associated works and features from harming the protected Annex 1 sandbank and reef features of the SAC:

- *Sabellaria spinulosa* reef has been clearly mapped in the relevant part of the SAC; and
- A technically viable minimum-impact cable route has been found; and
- Minimum-impact methods of laying and protecting cable have been established;
- Site preparation design works have been identified to reduce the impacts on the site.

10. What this fails to mention is that:

- The correct legal test is not '*satisfaction*' but '*certainty*', beyond reasonable scientific doubt<sup>2</sup>;
- *Sabellaria spinulosa* reef is hard to map and its precise location within the proposed corridor is not yet well understood, though the proposed corridor falls within a fisheries management area within which there is confidence that *Sabellaria spinulosa* has been observed to be present across data sets, and existing survey evidence reveals sediment types favourable for *Sabellaria spinulosa*;
- Fisheries management within the proposed corridor has, as one of its aims, the protection of *Sabellaria spinulosa* and its recovery from damage by fishing gear;
- Without knowledge of where the reef is, and where it might grow or recover, it cannot be known whether it is actually possible to navigate cable around it.

11. And above all, what this fails to mention is any possibility that these unknowns will be resolved in such a way as to allow the MMO, acting in its capacity as competent authority, to ascertain that they will prevent adverse effect on the integrity of the SAC. In the absence of the necessary information it is not logically possible to be sure, at this

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<sup>2</sup> See, for instance, *Waddenzee and Cooperatie Mobilisation for the Environment UA and others v College van gedeputeerde staten van Limburg and others*.

point in time, that harm can be avoided simply by tweaking the route and the methodologies.

12. As an aside (and without prejudice to NE's main position) if NE's position is not accepted it is submitted that the wording of the proposed condition could helpfully be amended to make clear that the condition may only be satisfied if the MMO (in consultation etc.) is able to '*... ascertain on the basis of an appropriate assessment that the plan provides such mitigation as is necessary to avoid an adverse effect on the integrity of the HHW SAC having regard to the conservation objectives for that site and within the meaning of the 2017 Regulations*'.

### **What if harm cannot be avoided?**

13. The Applicant recognises that it may not be possible to avoid harm by adjusting the route and methods involved. See, for instance, paragraph 77 of the outline SIP, where it is said that (emphasis added):

77. As shown in Plate 5.1, should there not be sufficient space to route cables around reef identified during the interim and pre-construction surveys the route which would result in the least temporary disturbance would be proposed. This route would then be subject to further assessment and a conclusion of no AEoI would have to be reached by the MMO in consultation with Natural England. If such a finding could not be reached, construction could not commence and the onus would be on Norfolk Boreas Limited to consider alternative solutions. For example, this could include: minor amendments to the redline boundary in discrete areas where the cable route interacted with reef to provide space for micrositing; or a variation to the Transmission DML Condition 9(1)(m) to allow a finding of AEoI should the project satisfy the HRA Assessment of Alternatives, Imperative Reasons of Overriding Public Interest (IROPI) and Compensatory Measures tests.

14. Based on the current state of knowledge, it cannot yet be known whether feasible alternative solutions might exist. Thus attention must inevitably turn to the provisions of Regulations 29 and 36 of the Conservation of Offshore Marine Habitats and Species Regulations 2017 ('the 2017 Regs') which provide that a plan or project which will harm an SAC can be allowed to go ahead if:

- There are no alternatives that are not harmful; and
- There are imperative reasons of overriding public interest ('IROPI') in favour of the plan or project; but

- *'The appropriate authority must secure that any necessary compensatory measures are taken to ensure that the overall coherence of Natura 2000 is protected.'*<sup>3</sup> and
- The appropriate authority is the Secretary of State.<sup>4</sup>

15. The Applicant rightly recognises that this position could be reached and says (in the red text boxes at Plate 5.1 of the outline SIP):

- *Construction cannot commence.*
- *Norfolk Boreas Limited must consider alternatives.*
- *If no alternatives can be identified that can be agreed with the MMO, in consultation with Natural England, Norfolk Boreas Limited would be required to consider a DCO variation or Marine Licence application.*

16. If the Applicant's proposed DCO/DML condition cannot be satisfied, then a further procedure will be needed to amend that condition to bring it into a form that can be complied with. NE's view at this point is that the correct procedure would be to apply for a DCO variation, rather than a marine licence. The Infrastructure Planning (Changes to, and Revocation of, Development Consent Orders) Regulations 2011 (as amended) ('the 2011 Regulations') provide different procedures for 'material' and 'non-material' changes to DCOs. Natural England believes that any suitable amendment to the proposed DCO/DML condition will be 'material' for these purposes and ought therefore to be made by the S of S pursuant to the 2011 Regulations, with the power for a further examination to be held.

17. As regards materiality, it is clear from Govt. guidance<sup>5</sup> that a change should be considered material if it would require an updated Environmental Statement or if it would invoke a need for a Habitats Regulations Assessment. In order to allow the Applicant to comply with the proposed condition it might (for instance) be necessary to adjust the red line boundary enclosing the proposed cable corridor within the SAC, inevitably requiring its own Habitats Regulations Assessment and requiring an update to the Environmental Statement. And in the event of a conclusion that adverse effect on the integrity of the SAC cannot be avoided (and that no alternative solutions and IROPI exist) the timing of the damaging works would need to be coordinated with the implementation of the necessary compensatory measures by way of a modified condition (and perhaps other measures involving third parties). The novelty of such a situation places such a

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<sup>3</sup> Reg. 36 (2) of the 2017 Regs.

<sup>4</sup> Reg. 36 (3)(d) of the 2017 Regs.

<sup>5</sup> Planning Act 2008: Guidance on Changes to Development Consent Orders. December 2015.

modification outside the scope of 'non-material' and its importance for the protection of the Natura 2000 network of sites reinforces this conclusion.

18. To put this another way, the DCO will be a statutory instrument and its amendment ought to be a highest-level matter. Furthermore, the necessary amendment to the condition might involve either a further appropriate assessment, or the granting of consent to harm the integrity of a SAC, which is a matter requiring judgements about IROPI (which lie better with the S of S) and the securing of compensatory measures (for which the appropriate authority is the S of S). This would bring us back to where we are at the moment, but some years down the line. It would be better to get to the bottom of this now.

### **What if mitigation measures can be devised?**

19. Even if the Applicant, at some time after the making of a DCO, is able to improve the state of knowledge about *Sabellaria spinulosa* in the cable corridor, and is able to develop methods for satisfactorily reducing impacts, the process of formally confirming whether the pre-commencement condition has been satisfied will have to be a rigorous one, involving an 'appropriate assessment' within the meaning of the 2017 Regulations and case law. Rolling this up with the making of the DCO would appear to yield economies of scale, as well as keep the decision within a formal procedural framework with access to diverse expertise and a single overarching decision-maker.

### **The Secretary of State's appropriate assessment**

20. It is, of course, for the S of S to make the final decision on the DCO. That element of the decision that concerns cables laid in the HHW SAC will have to be supported by an 'appropriate assessment' that allows him or her to ascertain that the DCO and its DMLs will not lead to an adverse effect on the integrity of the SAC, having regard to its conservation objectives. Where evidence is lacking at the point of decision it is open to the S of S, and entirely reasonable, to ask whether it is yet evidentially and logically possible to reach such a conclusion.
21. The leading domestic case on what constitutes an 'appropriate assessment' is *Champion*<sup>6</sup>, a judgment of the Supreme Court. It was observed (para 41 of the judgment) that

"Appropriate" is not a technical term. It indicates no more than that the assessment should be appropriate to the task in hand: that task being to satisfy the responsible authority that the project "will not adversely affect the integrity

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<sup>6</sup> R (on the application of Champion) v North Norfolk District Council and another [2015] UKSC 52.

of the site concerned” taking account of the matters set out in [Article 6.3 of the Habitats Directive]’. As the court itself indicated in *Waddenzee* the context implies a high standard of investigation.”

22. From this it is clear that while there may be an element of flexibility as to whether or not to accept as ‘appropriate’ an assessment that contains elements that have yet to fall into place there is no discretion to accept as ‘appropriate’ an assessment that does not allow a conclusion to be reached because important imponderables have yet to be resolved. The S of S is hardly to be criticised if, as appears to be the case in *Vanguard*, s/he wants to understand the situation rather better before making a judgement that requires certainty.

23. Further guidance on the nature and content of an appropriate assessment has been given in *Grace and Sweetman*<sup>7</sup> and in *Holohan*<sup>8</sup>:

[An appropriate assessment] may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of dispelling all reasonable scientific doubt as to the effects of the proposed works on the protected area concerned.’

And

‘Article 6.3 of [the Habitats Directive] must be interpreted as meaning that the competent authority is permitted to grant to a plan or project consent which leaves the developer free to determine subsequently certain parameters relating to the construction phase, such as the location of the construction compound and haul routes, only if that authority is certain that the development consent granted establishes conditions that are strict enough to guarantee that those parameters will not adversely affect the integrity of the site.’

24. In NE’s submission, the omission of the effects of cabling in the HHW SAC from the DCO/DML appropriate assessment is an obvious lacuna, not filled by the proposed pre-commencement condition because there can be, at the date of the DCO/DML appropriate assessment, no certainty that a subsequent appropriate assessment will reach a conclusion of no adverse effect on site integrity.

### **Grampian conditions**

25. Law, policy and guidance relating to pre-commencement conditions is as much applicable to cases arising under the Planning Act 2008 as under the Town and Country Planning Act 1990 (as amended).

26. Paragraph 55 of the National Planning Policy Framework (July 2018) states that:

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<sup>7</sup> *Grace and Sweetman v An Bord Pleanála* CJEU C-164/17.

<sup>8</sup> *Holohan and others v An Bord Pleanála* CJEU C-883/18.

55. *Planning conditions should be kept to a minimum and only imposed where they are necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects. Agreeing conditions early is beneficial to all parties involved in the process and can speed up decision making. Conditions that are required to be discharged before development commences should be avoided, unless there is a clear justification.*

27. These words derive from case law and common sense. Important to note are the requirements for preciseness, reasonableness and the presumption against pre-commencement conditions.

28. The *Grampian* case itself<sup>9</sup>, which established the potential lawfulness of pre-commencement conditions, added the caveat that they have to relate to ‘... *something which had at least reasonable prospects of being achieved ...*’ and makes clear that:

‘The test of whether such a condition is reasonable is strict; it amounts to whether there are at least reasonable prospects of the action in question being performed.’

29. In *Jones v S of S for Wales and Ogwr Borough Council*<sup>10</sup> Lord Justice Purchas said (emphasis added)

‘The final test, therefore, is whether the condition is a reasonable condition. That is a condition which a reasonable planning authority would impose. In my judgment, unless there is some evidence that there is a reasonable prospect that some crucial condition to the consent may be satisfied, then, to insist that that crucial condition should be satisfied must almost always be an unreasonable imposition of a condition.’

30. Natural England’s view is that since there is insufficient evidence to know whether the pre-condition of certainty of no adverse effect on the integrity of the SAC is capable of being fulfilled at all it is not possible to meet the strict test in *Grampian* because one cannot yet make a reasoned judgement of the prospect of fulfilment.

31. Natural England reserves the right to expand on this analysis should the question of the legality of the Applicant’s proposed pre-commencement condition come to the fore.

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<sup>9</sup> *Grampian Regional Council v City of Aberdeen District Council* (1984) 47 P&CR 633

<sup>10</sup> CA (Civ Div) (1991) 61 P&CR 238.



## **Compensatory measures**

32. It is not Natural England's role to design whatever measures may be needed to compensate for an adverse effect on the integrity of a designated site, but it is willing and able to consider any such proposals that the Applicant may make and very happy to discuss the relevant issues with the Applicant. Ultimately, Natural England's role in this is as consultee and advisor.
33. It is beyond the scope of this note to consider law and guidance relating to compensatory measures or refer to any potential proposals. However, it is relevant to note that Govt. guidance<sup>11</sup> indicates, reasonably, that a relationship of proportionality should exist between the amount of harm caused, and the amount of compensation provided. This provides a yet further reason to get to the bottom of whether harm is or is not going to be caused to HHW, because if harm is to be caused one will need to know how much harm before being able to put together measures to compensate for it, and to ensure that those measures are secured.

## **Natural England's history in relation to this matter**

34. Natural England has clearly expressed concerns about the use of a pre-commencement condition in both the Vanguard and Boreas cases. See for instance pages 20 – 22 and Appendix 2 of Natural England's Relevant Representations of 31<sup>st</sup> August 2019 (Boreas) [RR-099] and NE's Deadline 8 submission (Vanguard) [REP8 – 104].
35. The Applicant's document 'Consideration of the Purpose of the Haisborough Hammond and Winterton Special Area of Conservation Site Integrity Plan', Document reference: EA; AS; 10.D7.19 of May 2019, produced in relation to Vanguard, notes instances in which pre-commencement conditions of this exact sort have been incorporated into offshore windfarm DCOs. By inference it suggests that if NE accepted these conditions in those cases it ought to accept them in this case.
36. If that inference is intended, Natural England wishes to stress that its position is always pragmatic and evidence-based: if the evidence in one windfarm case allows it to understand the effect of the project on protected features it is not going to take an obdurate position and raise unhelpful issues of process and law. However, knowledge and understanding improve with time and Natural England will always be guided by the

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<sup>11</sup> Habitats and Wild Birds Directives: guidance on the application of article 6(4). Alternative solutions, imperative reasons of overriding public interest (IROPI) and compensatory measures. December 2012

best and most up-to-date information. The fact that NE takes the stance that it does in the Boreas and Vanguard cases, but not in others, shows (a) its improved understanding of ecological issues raised by wind farms and (b) how strongly NE feels about the difficulties of the Applicant's proposal. Looking at each of the cases mentioned in the Applicant's document (cited in the paragraph above):

37. Hornsea Project Two:

37.1. The SAC in question is the Southern North Sea SAC, and the protected features are marine mammals. The technical issues involved were fundamentally different from the situation at HHW. It is noteworthy that the condition in question is accompanied by a list of 6 potential mitigation measures, indicating the number of tools at the Applicant's disposal when designing future mitigation.

38. East Anglia Three:

38.1. Again, the SAC in question is the Southern North Sea SAC, and the protected features are marine mammals. It appears that the draft SIP already contained a number of potential mitigation measures and that NE took a reasonable and pragmatic approach toward accepting that they would work.

39. Norfolk Vanguard.

39.1. The same issues arise in relation to both Vanguard and Boreas, and NE's position has been consistent.

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Matthew Boyer  
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20<sup>th</sup> January 2020