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NORFOLK BOREAS OFFSHORE WIND FARM

Planning Inspectorate Reference: EN010087

Deadline 7

**NATURAL ENGLAND'S COMMENTS ON THE APPLICANT'S
HAISBOROUGH HAMMOND AND WINTERTON SAC
POSITION PAPER OF FEBRUARY 2020**

31st March 2020

NE.NB.D7.O7.HHWSAC Paper

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1 Introduction

Please find below Natural England's comments on the Applicant's document entitled "Norfolk Boreas Limited Haisborough Hammond and Winterton SAC Position Paper" dated February 2020, version 1, submitted by the Applicant at Deadline 5 [REP5 -057].

2 Summary

Natural England notes that the Applicant's Position Paper is provided in order to support the position that with the proposed mitigation measures it does not consider that its proposals will have an Adverse Effect on Integrity (AEoI) on the Haisborough Hammond and Winterton Special Area of Conservation (HHW SAC), as any residual impacts will be either *de minimis* or inconsequential to the nature conservation of the site.

The Applicant identifies what it believes to be over-precaution in Natural England's evidence and advice. Natural England acknowledges that it has taken a precautionary approach, as the law requires, and notes that the legal standard of proof requires certainty that the Applicants proposals will not have an AEoI on the HHW.

Whilst Natural England remains unable to rule out an AEoI beyond reasonable scientific doubt it is certainly acknowledged that the risk of an AEoI has been considerably lowered by the additional mitigation that has been committed to by the Applicant.

Natural England believes that there are inherent uncertainties in the deliverability of the measures proposed by the Applicant, including those proposed most recently, and agrees with the Applicant that the amount and location of Annex 1 *Sabellaria spinulosa* reef that may be encountered within the proposed cable corridor at the time of cable laying cannot be known now.

Natural England also wishes to stress that the future effects of measures to be taken to control fishing activities capable of harming Annex 1 *Sabellaria spinulosa* reef needs to be monitored and reviewed over time and allowed to be as effective as they can be. These are measures affecting another industry sector and their intended effect (and the understanding of their actual effects) should not be compromised, at least initially, by other anthropogenic impacts.

3 Detailed Comments

Para-graph	Comment
2	Natural England notes that the Applicant appears not to take into account, or wish to address, Natural England’s Position Statement regarding the proposed site integrity plan for the HHW SAC, dated 20 th January 2020 [REP4-041]. Natural England wishes to repeat the concerns and legal issues raised in that document.
3	Natural England accepts that SACs are not exclusion zones. However, SACs protect natural habitat types of international conservation interest and benefit from the highest levels of legal protection afforded to conservation sites. The concept of <i>de minimis</i> is not found in the relevant law or guidance and the correct approach is to consider the existence, or not, of adverse effects on the integrity of the site, rather than whether adverse effects are large or small. If it cannot be shown that the proposal will not have an adverse effect on site integrity it should only be allowed if the Article 6.4 derogations route (IROPI, alternatives, compensatory measures) is followed. Small adverse effects or uncertain effects on site integrity can be accommodated by the derogations route, as the scale of compensatory measures should relate to the scale of harm.
8	Please note that the conservation objectives that the Applicant quotes are the higher level objectives for the site, and therefore very briefly stated. More detail can be found in Natural England’s conservation advice package.
10, 14	<p>Please see Natural England’s relevant representation [RR-099] where concerns about the Envision assessment report are set out.</p> <p>It is important to note that all areas of natural <i>Sabellaria spinulosa</i> reef are protected equally. This ought to include areas where it is considered likely that new reef will form. It is in this way that the conservation objective “to restore” is pursued.</p> <p>Further, as Natural England has previously explained, the term “priority areas” has no place in this analysis. No area of reef is more important than any other. This term has arisen in the course of considerations of where the greatest potential for reef recovery exists and does not describe areas of reef that are of special importance.</p> <p>The fisheries management measures in question seek to protect <i>Sabellaria spinulosa</i> reef (both existing and future) from damage by trawled fishing gear. Natural England believes it inappropriate to allow activities that hinder the objectives of these management measures, at least until such time as the effectiveness (or not) of the measures has been monitored and determined.</p> <p>The latter point can be expressed in terms of conservation: it is not sensible to try to</p>

	<p>prevent harm (albeit of uncertain extent) with one hand while allowing harm (albeit limited) with the other. The same point can be expressed in administrative terms: if it is considered appropriate to affect the fishing industry it ought to be inappropriate to permit another industry to undermine any resulting benefit (albeit in a limited way). The purpose of the fisheries management measures is to improve reef condition and not to create headroom to allow small areas of reef to be harmed.</p>
13	<p>Our advice remains unchanged in relation to difficulties in the ability to microsite we set this out in RR-099 and Deadline 5 [REP5-078] and [REP5081].</p>
16	<p>Please note that there is a difference in the approach taken by the EIFCA and MMO/Defra for fisheries management. Natural England agrees that there is a higher level of precaution included in the beyond-6nm fisheries management that is not present within 6nm. However, it should be noted that due to BREXIT the areas to be managed beyond 6nm are likely to change with the EU Common Fisheries Policy (CFP) no longer applying to the UK. However, Natural England would advise that fisheries management areas will still be required beyond 6nm, especially in areas where <i>Sabellaria spinulosa</i> reef has been observed on a more regular basis. Therefore, Natural England's future advice is likely to be similar to that previously provided and could include new areas and/or involve a series of smaller areas including the more heavily fished area to the South East of the site.</p> <p>The Applicant identifies three areas of uncertainty in relation to Natural England's approach to the protection of <i>Sabellaria spinulosa</i> reef, and "areas to be managed as reef" (namely areas where it is appropriate to pursue the "restore" objective). In relation to each of these three topics, Natural England accepts that it has taken a precautionary approach, as the law requires it to. Natural England does not accept that multiple separate "layers" of precautionality necessarily equates to over-precautionality when combined into a single analysis. Each topic must be looked at on its own merits.</p> <p>Regarding the <u>extent and distribution of reef</u>: Natural England has taken a precautionary approach on the basis of the evidence to hand, which is no more than a snap-shot at one point in time, but it can do no more nor less than this. As mentioned, in order to have regard to the objective of restoring the site to favourable condition it is necessary to protect not only existing reef, but also areas where it is likely to return.</p> <p>Regarding the <u>spatial extent and impact of fishing</u>: it is acknowledged that there is a lack of information, and that current fishing activity may be low. However, <i>Sabellaria spinulosa</i> reef is known to attract other biodiversity, including species important to the fishing industry (this being one of the reasons why it is so highly protected), and fishing activity changes over time and space. Moreover, it should be noted that the level of fishing pressure is not necessarily a good measure of the extent of harm caused, since the first pass of a trawl over <i>Sabellaria spinulosa</i> reef does more harm than subsequent passes. Natural England feels that its precautionary approach to this topic, which is based on the best available evidence and which influences the size of the areas it feels should be protected, is entirely appropriate in view of the desired outcomes.</p>

	<p>Regarding the <u>recover objective</u>: as above, the current (not well understood) level of fishing activity is (in the absence of controls) no guide to future levels. It is known that <i>Sabellaria spinulosa</i> reef has been and can be impacted by anthropogenic activities that are occurring within the site, therefore it is probable that this habitat is being suppressed by those activities and that the “restore” objective is compromised by those activities.</p> <p>Natural England wishes to stress that the approach that it takes in this case is consistent with its approach in all other plans or projects affecting this SAC.</p>
17	<p>As set out in RR-099 Natural England is advising that fisheries management areas are required to exclude fisheries pressures to aid <i>Sabellaria spinulosa</i> reef recovery in particular areas and we need to be consistent across industries. Whilst it is recognised that the impacts are different in scale both spatially and temporarily between fisheries and cable installation; we advise that the competent authorities BEIS and EIFCA undertake an Appropriate Assessment to consider the impacts <u>in-combination</u>. This would allow consideration to be given to means of avoiding interactions in byelaw areas.</p> <p>Please see advice provided at Deadline 4 [REP4-041], where Natural England discussed recoverability after disturbance. Even if/where the conservation objective is to “maintain” rather than “restore” there would still need to be mitigation measures to fully avoid AEoI and Natural England does not accept that the areas of reef involved are <i>de minimis</i>. Yes, they are small when expressed as a percentage of site area and actual or potential areas of reef within the site, but HHW is a large site and any loss of protected habitat is a matter of significance. The expression “death by a thousand cuts” is sometimes used in the context of conservation and is relevant here. Natural England fully accepts that the Applicant’s proposals will not have a large (or medium sized) effect on the integrity of the HHW, but if they occur without compensatory measures they will amount to a cut.</p>
18	<p>With regards the potential to microsite export cables to avoid Reef, Natural England draws attention the words “If this is possible”.</p>
19, 20	<p>The fact that the fisheries management measures are not yet in place doesn’t remove the need to protect Annex I reef or hinder its recovery in those areas where it has been found to most regularly occur i.e. areas likely to be included in the fisheries management.</p> <p>The draft DCO allows a long window for construction and it cannot be said that both fisheries management measures will not be in place before the relevant works start. It cannot be said that, in the timescales realistically involved, <i>Sabellaria spinulosa</i> reef will not have formed to an extent that makes micrositing impossible.</p>
21, 22, 23	<p>As recognised by the Applicant, Natural England doesn’t believe that disturbance and recovery of Annex I reef following cable installation has been demonstrated. The evidence presented by <i>Peace et al.</i> related to the establishment of <i>Sabellaria spinulosa</i> reef on</p>

	<p>areas of disturbed ground, but not where it was previously.</p> <p>The Applicant asserts that, if the whole cable corridor were to be blocked by <i>Sabellaria spinulosa</i> reef, it would take the shortest possible line through that blockage. It is too soon to make this assertion, as ground conditions and other features that are still poorly understood and could prevent this. It is therefore too early to say that whatever route is found through the cable corridor will be essentially neutral in effect, because that route has not yet been mapped.</p> <p>And, as mentioned above, and in Natural England's Position Statement of 20th January 2020 [REP4-041], <i>de minimis</i> adverse effect on integrity is not a recognised concept. Any adverse effects on the integrity of the SAC, having regard to the conservation objectives for the SAC, should be dealt with via the Article 6.4 derogations route, even if small.</p>
24	The aggregates dredging industry seeks to avoid areas of Annex I reef, so the evidence base for the Applicant's assertion is not large. See also the comment on <i>Pearce et al</i> , above.
29.	Natural England repeats its views about the concept of <i>de minimis</i> [REP4-041],
32.	Natural England welcomes the reduction in the quantity of cable protection estimated to be required and appreciates the work and thinking that has gone into this. However, it is noted that the amount of cable protection that will actually be required can only be known once, or shortly before, cable laying starts.
34	Please see Natural England's position on impacts on <i>Sabellaria spinulosa</i> reef from the placement of rock armouring [RR-099].
37	<p>The fact that SACs are not exclusion-zones has been commented on above. Those comments are repeated here.</p> <p>HHW SAC is not in favourable condition – it has lost Annex I <i>Sabellaria spinulosa</i> reef from areas where, in a less damaged site, Natural England would expect to find it. Sites of this sort are subject to natural change, which includes recovery from damage. The Applicant's cable routing proposals are based on the current snap-shot data and (much as those proposals have been made in absolute good faith and in a very positive spirit) they may not hold good by the time the work starts. Natural England would find it helpful to see how the cable routing proposals were actually devised to take into account the presence of Annex I reef.</p> <p>In relation to possible areas where cable protection might be required, please see Natural England's deadline 4 and 5 responses [REP4-038, REP4-041, REP4-043, REP5-078, REP5-081] concerning the importance of areas in-between protected features for the</p>

	<p>functioning of those features.</p> <p>In relation to the <i>de minimus</i> assertion made at para. 37 d., please see Natural England's small-scale loss position RR-099.</p>
40 and Appendix 1	<p>The Applicant's new commitment to the use of no cable protection in the area "to be managed as <i>Sabellaria spinulosa</i> Annex I reef" further demonstrates the Applicant's helpful approach. However this commitment must necessarily be qualified by observing that until closer to the date of the work it cannot be known how much cable protection will actually be required for operational and safety reasons, and by noting that the agreement of the MMO to allow this commitment to be reduced will, as a matter of law, require a fresh Appropriate Assessment and the application of the law requiring certainty of no AEol.</p>
44	<p>Whilst Natural England agrees with the Applicant that <i>Sabellaria spinulosa</i> is a widespread species within the North Sea and that it is only when it forms a cohesive 'reef' structure does it become of conservation importance, we do not agree that <i>Sabellaria spinulosa</i> (even in potential reef form) is Annex I reef when located on artificial substrate. As set out in Natural England Relevant Representations [RR-099] the SNCBs consider the establishment of <i>Sabellaria spinulosa</i> reef on artificial substrate as not "counting" towards favourable condition of the feature and/or site. This is because it is not a replacement for Annex I <i>Sabellaria spinulosa</i> reef on natural site sediment as set out at the time of designation and within the conservation advice package for the site.</p>
46	<p>Natural England agrees that we can't currently determine if and when recovery has occurred. This will need to be reviewed over the following years, considering best available evidence.</p> <p>Natural England queries the assertion that, if <i>Sabellaria spinulosa</i> reef were to recover to the extent of making up 6% of the HHW SAC, it could be said to have exceeded the "restore" objective. In the absence of factors promoting unnaturally enhanced Annex I reef recovery all <i>Sabellaria spinulosa</i> reef recovery is to be welcomed as a natural phenomenon affecting a protected habitat.</p>
49, 50, 52	<p>Natural England repeats its previous comments in relation to an interim survey in 2020 to map the extent of <i>Sabellaria spinulosa</i>, AEol on Annex I Sandbanks, and cable protection [RR-099, REP1-057, REP3-023, REP4-038, REP4-041, REP5-081].</p>
58	<p>Please note that whilst Natural England recognises the commitment by the Applicant to reduce the impacts from sediment disposal, there is still a requirement to ensure that disposal is within areas of similar particle size.</p>
Section 6	<p>Natural England has concerns about (a) the practical suitability of the proposed Grampian condition and (b) the legality of the use of this condition. Please see Natural England's</p>

Position Statement dated 20th January 2020 [REP4-041]. These concerns remain and are repeated. It is for the Secretary of State to determine, on the basis of an Appropriate Assessment, whether the information provided by the Applicant actually supports the conclusion of no AEoI. In making this judgement the decision maker will have to bear in mind that the evidence to hand is essentially snap-shot and that things are likely to have changed during a realistic timescale.

The Applicant points out that the purpose of the Grampian condition is to “verify previous assessments”. Natural England responds to this by noting that there is a possibility that the condition’s mechanism will not verify previous assessments, because previous assessments may be superseded by events. There is not “every prospect that the Grampian condition can be discharged in the timescales ...” – because there is *some* prospect that it can’t.

It is not appropriate to equate the use of the SIP process in this case to its use in the SNS SAC, in relation to the disturbance of marine mammals. In that case Natural England is sure that if works etc are suitably timetabled and carried out in the right way there will be no AEoI. That certainty is based on confidence in existing technologies and mechanisms for ensuring sensitive timetabling. In this case the contingencies are greatly less knowable at this range.

The proposal to use a Cable Specification, Installation and Monitoring Plan (CSIMP), which has to be submitted to and approved by the MMO, does not cure the problems of uncertainty. For legal purposes a future CSIMP will represent a plan or project that will have to be subjected to Appropriate Assessment during the process of approval by the MMO. Depending on circumstances existing at the time of submission of a CSIMP to the MMO the Appropriate Assessment is capable of concluding that AEoI will be caused, exactly as with the SIP process.

To amplify this point: the proposed wording at para. 78 describes a process by which cable laying cannot commence until a plan for it has been submitted to and approved in writing by the MMO. This is a situation contemplated for by reg. 28 (1) of the Conservation of Offshore Habitats and Species Regulations 2017, which provides that “*Before deciding to undertake, or given any consent, permission or other authorisation for, a relevant plan or project, a competent authority must make an appropriate assessment of the implications of the plan or project for the [SAC] in view of that [SAC’s] conservation objectives*”. By reason of reg. 5 of the 2017 Regulations the MMO is plainly a (or the) competent authority in this situation and the subject matter of a CSIMP is plainly a “relevant plan or project” for the purposes of reg. 28 (2) as all three of reg. 28 (2) (a), (b) and (c) are fulfilled. It therefore follows that on receipt of a CSIMP, and before it can approve it, the MMO will have to carry out its own appropriate assessment of the Applicant’s plan for specifying, installing and monitoring cables within the HHW SAC. It cannot be said that these things have received appropriate assessment at the time of the making of the DCO, because at that time the necessary details had not been specified.

	<p>It may be that at the point of submission of a CSIMP it will indeed be possible to micro-site the cable in a manner that is neutral as to protected features, but the significant effect on the site cannot be ruled out, meaning that a full appropriate assessment will be unavoidable.</p> <p>If this mechanism for dealing with the uncertainties of future cable laying and protection is to be employed it is suggested that it be called a Cable Specification, Installation, <u>Mitigation</u> and Monitoring Plan, as mitigation measures will be a key part of it.</p>
Appendix 1	<p>Natural England notes that the contents of the Appendix 1 'Assessment of Additional Mitigation of HHW SAC' are the same as was submitted (28th February 2020) in response to the Secretary of State's request for further information letter for Norfolk Vanguard dated 6th December 2019.</p> <p>At the request of the Secretary of State all interested parties including Natural England are to provide our comments on the submitted documents by no later than 27th April 2020. Therefore, we are currently in the process of reviewing the documents and drafting our formal advice to Secretary of State. However, until that process has concluded we are unable to advise on whether or not that mitigation is sufficient for both projects. We will therefore provide our advice on Appendix 1 for Deadline 9 on 29th April 2020</p>
Appendix 2	<p>Natural England believes that the document submitted at REP5 – 058 as Appendix 2 is the joint recommendation for North Norfolk Sandbanks and Saturn Reef Special Area of Conservation (NNSSR SAC) and Haisborough Hammond and Winterton (HHW) SAC for fisheries proposals under the Common Fisheries Policies (CFP) beyond 6nm, which is a co-ordinated DEFRA document drafted by Natural England, Marine Management Organisation, Joint Nature Conservation Committee and DEFRA. However, with the current cover page and no attribution to the authors this could be misconstrued as a Norfolk Boreas Ltd. document.</p> <p>Please note that all information relevant to the Norfolk Boreas project in relation to the CFP proposals has been provided by Natural England's in our relevant representation [RR-099]</p>