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The Wildlife Trust reference: 20022896

BY EMAIL

28 September 2020

Dear Frances

Impacts from cabling activities from Norfolk Boreas offshore wind farm on Haisborough, Hammond and Winterton SAC

1. Introduction

The Wildlife Trusts (TWT) is entering this representation to state that we cannot conclude no adverse effect from cabling activities on Haisborough, Hammond and Winterton SAC. We recognise that we have not engaged on the impacts of cabling from Norfolk Boreas, but due to our strong disagreement for the decision for Norfolk Vanguard and the minded to approve letter for Hornsea Three, TWT will now be engaging on all offshore wind farms which have an impact on benthic features within Marine Protected Areas from cabling activities.

Outlined below and within the appendices of this document are TWT views on cabling impacts to Haisborough, Hammond and Winterton SAC and our expectations for the Habitats Regulations Assessment (HRA) which will be undertaken before the Secretary of State can make a decision on this project.

2. HRA for cabling impacts on Haisborough, Hammond and Winterton SAC

The Secretary of State cannot draw a conclusion of no adverse effect on Haisborough, Hammond and Winterton SAC unless:

- a) The conservation objectives and recovery of the Site will not be hindered during the lifetime of the project from cabling activities, including cable protection
- b) Evidence is available to support that decommissioning of cable protection is possible
- c) Evidence is available to show that the site will recover following decommissioning of cable protection

We have provided detailed points in Appendix A on what must be included in the HRA when the Secretary of State makes his decision. This includes:

- The consideration of all available evidence, especially that provided by the Statutory Nature Conservation Body.

Patron

*HRH The Prince of Wales
KG, KT, GCB, OM, AK, CD,
QSO, PC*

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- The acceptance that cable protection is permanent for the lifetime of the project.
- An assessment against **all** conservation objectives for Haisborough, Hammond and Winterton SAC, not just extent.
- Recognition that the Site is in unfavourable condition¹. An assessment must be made on if cabling activities will cause further decline and impede recovery of the site during the lifetime of the project.
- Avoiding over-reliance on previous decisions: Experience in recent years shows a much larger degree of uncertainty with regards to recovery of habitats from cabling activities and increasing evidence is available on the negative impacts from cabling.
- The inclusion of commercial fishing in the in-combination assessment.

3. Compensation for Haisborough, Hammond and Winterton SAC

TWT suggests that further discussions are required on compensation for the SAC before a decision is made. All alternatives and compensations options have not yet been exhausted. Detailed comments can be found in Appendix B.

4. Pre-construction checks and balances

We recommend the inclusion of a condition on the face of the Development Consent Order or as a deemed marine licence condition to review the original findings of the HRA for Haisborough, Hammond and Winterton SAC before construction commences. This is for the following reasons:

- The project will be refined and therefore a check must be made to ensure the worst-case scenario assessed at the time of application still stands.
- New site condition information will be available. Many Marine Protected Areas are declining in condition, and this sort of information must be taken into account before project construction commences.
- There may be new in-combination impact factors which may need to be taken into account.

This approach will ensure that the appropriate monitoring, mitigation and compensation measures are in place to ensure that the conservation objectives for sites are met. We emphasise that this condition must not allow the deferring of the HRA conclusions, mitigation, monitoring and any derogation measures until the pre-construction phase.

5. TWT response to previous information provided

Responses to Examiner's questions/representations can be found in Appendix C on the following documents:

- TWT response to Request for Further Information dated 10th September 2020
- REP15-009: Natural England response to 5th questions
- REP14-067: Comments on Natural England's response to Deadline 14: Review of the Norfolk Vanguard and Hornsea Project Three decision in relation to the Boreas examination advice on HRA benthic considerations

¹ [As outlined in deadline 5: England's response to the Applicant's summary of Oral Representations at Issue Specific Hearing 4 - Agenda Item 6a\(i\)](#)

6. TWT representation for Hornsea Three offshore wind farm

As you may know, a letter² from Leigh Day was submitted on behalf of TWT to the Secretary of State for BEIS in response to the minded to approve letter for Hornsea Three. We suggest that the contents of this letter are considered when undertaking the HRA in relation to cabling impacts and the final decision for Norfolk Boreas.

Yours sincerely



Dr Lissa Batey
Head of Marine Conservation
The Wildlife Trusts

² [Letter submitted by Leigh Day on behalf of The Wildlife Trusts to the Secretary of State in response to the minded to approve letter for Hornsea Three offshore wind farm](#)

Appendix A: Habitats Regulations Considerations for cabling impacts on Haisborough, Hammond and Winterton SAC

1. Available evidence

Natural England has provided clear evidence across all recent offshore wind farm projects in relation to impacts on benthic SACs from cabling activities. As the English courts have explained on numerous occasions, it would require some cogent explanation if the decision-maker chose not to give considerable weight to the views of the appropriate nature conservation body: *R (Hart District Council) v Secretary of State for Communities and Local Government* [2008] EWHC 1204 (Admin) at [49] and *Mynnd y Gwnt Ltd v Secretary of State for Business Energy and Industrial Strategy* [2018] EWCA Civ 231).

It is important to recognise that there is now more evidence on likelihood of recovery than was available for earlier windfarm Development Consent Orders. In fact, there is now further evidence which demonstrates that full recovery is not certain. The following evidence must also be considered in decision making:

*Natural England Offshore wind cabling: ten years' experience and recommendations*³, dated July 2018. This report details Natural England's experience in advising on offshore windfarm development over the past 10 years. In particular, the report details that in Natural England's experience, cabling should no longer be considered a one-off activity as maintenance repair works, reburial and additional rock protection are often needed. The increase in offshore wind projects over recent years has also led to cable installation taking place in less robust areas of sediment where the prospect of recovery is less certain. This evidence makes it less likely that a conclusion of certainty can be drawn that cabling impacts will not result in an adverse impact.

*Natural England and JNCC advice on key sensitivities of habitats and Marine Protected Areas in English Waters to offshore wind farm cabling within Proposed Round 4 leasing areas*⁴

The impact of cabling operations on the unfavourable conservation status of the Benthic SACs has been noted by Natural England in its joint advice with JNCC. This information should be considered as part of the HRA:

"Haisborough, Hammond and Winterton SAC: This SAC is designated for sandbanks (including subtidal coarse sediment, subtidal sand) and subtidal biogenic reefs: Sabellaria spp.. All features of the SAC are currently in unfavourable condition. Subtidal sand is sensitive to all cabling pressures identified except changes in water flow. Subtidal coarse sediments are sensitive to all cabling pressures identified except changes in water flow and changes in suspended solids. Sabellaria reefs are sensitive to all cabling pressures except changes in water flow, changes in suspended solids, smothering and siltation rate changes (light) and physical change (to another seabed type).

The SAC is under pressure from historic and ongoing activities from offshore windfarm cables in the consenting system, further proposed offshore windfarm cables plus existing oil and gas pipelines and associated pipeline protection, aggregates extraction and fishing activities. Fishing activities are resulting in the implementation of management measures for the biogenic reef features (often located on mixed sediment in the sandbanks troughs) in the form of byelaws. We therefore advise that other activities should not hinder any management measures designed to restore site features. This includes direct and indirect impacts from the depositing of sandwave levelling sediment.

³ [Natural England Offshore wind cabling: ten years experience and recommendations](#)

⁴ <http://data.jncc.gov.uk/data/3c9f030c-5fa0-4ee4-9868-1debedb4b47f/NE-JNCC-advice-key-sensitivities-habitats-MPAs-offshore-windfarm-cabling.pdf>

Cabling activities in sandbank MPAs has been shown to be challenging due to impacts associated with cable installation such as sandwave clearance and use of hard substrate as cable protection. It may be possible to avoid an adverse effect from cabling through sandbank features of this SAC if sufficient evidence is provided that impacts are short-lived and the feature will recover. Consideration would need to be given as to how sufficient cable burial is achieved without the need for cable protection. Should sandwave clearance be necessary to achieve burial depth and avoid the use of cable protection then, as above, it would need to be demonstrated that impacts are short-lived, the feature can recover, and extracted material is retained in the system and can be deposited on material of the same grain size to avoid changes in habitat.”

This evidence increases the scientific doubt as to the recovery of habitats from cabling activities, which must be taken into account in the HRA.

It must also be taken into account that a lack of evidence exists on if cable protection can be decommissioned and if habitats will recover following decommissioning. If there is a lack of certainty that either decommissioning is not possible or that habitats will recover, then a conclusion of adverse effect must be drawn.

2. Temporary impacts

There is a lack of evidence to conclude that recovery of benthic SACs is possible after the decommissioning of cable protection. Even if decommissioning of cable protection is possible, the impact of habitat loss over the lifetime of the project cannot be considered temporary. Cable protection would cause a decline in site condition over the lifetime of the project and impede the recovery of the Site, which is already in unfavourable condition.

In *Commission v Spain (C-404/09)* the impact from mining operations over a period of 20 years was considered an adverse effect on integrity notwithstanding that it was accepted the habitat would fully recover on cessation of activities.

It is also important to consider that in some circumstances rock protection cannot be decommissioned, for example, at cable crossings. This is therefore a permanent impact and would cause a permanent loss of habitat, contrary to the conservation objectives for benthic SACs.

If a plan or project is likely to undermine the conservation objectives of the site, it must necessarily be considered likely to have a significant effect on integrity (Case C-127/02 “*Waddenzee*” at [36]). Development which further contributes to habitat loss necessarily delays the achievement of favourable conservation status. This must be taken into account in decision making.

3. Conservation advice and site condition

When the HRA is undertaken, the assessment must be made against the conservation objectives for the site and not just on the extent of impacts. The current unfavourable condition of Haisborough, Hammond and Winterton SAC must also be taken into account. As outlined in point 1, the best available evidence must be used when undertaking this assessment.

Regarding any assessment of impacts on extent, even if impacts are small, this does not mean impacts are *de-minimis*. Any further loss in extent for Sites which are in unfavourable condition may impede recovery and prolong an unfavourable conservation objective. This is not in line with the conservation objectives for the Site.

4. Previous decisions

Comparisons with the Dogger Bank Offshore Wind Farm decisions made in 2015 cannot be made. Experience since this decision has shown a much larger degree of uncertainty with regards to recovery of habitats from cabling activities and increasing evidence is available on the negative impacts from cabling (as outlined in point 1).

5. *Fishing must be included in in-combination assessments*

TWT position in a number of DCO applications for offshore wind farms has been that fishing is a plan or project for the purposes of article 6(3) of the Directive and therefore should be included in the assessment of in combination effects. We further note that BEIS has been undertaking a review of offshore wind farm consents in the Southern North Sea SAC in relation to noise impacts and fishing has been included as an in-combination effect in that assessment⁵. The Examining Authority for Hornsea 3 accepted in its report that fishing was a plan or project for the purposes of the Directive, although it ultimately concluded that the effects of current fishing had been considered in the baseline and therefore there was no need to consider the effects of future fishing in combination with the cable laying and rock protection. TWT disagrees with this analysis and considers it contrary to assurances given by Government.

On 3 September 2015, TWT issued a letter before claim to the Secretary of State for Energy and Climate Change, indicating that it intended to challenge the grant of a DCO for an Offshore Wind Farm known as “Teeside A and B”. The letter concerned the impact of cabling and rock protection on the Dogger Bank SCI (which at the time was awaiting formal designation as a SAC). Dogger Bank contains the same Annex 1 protected habitat as the Benthic SACs and was also in unfavourable condition at the time the Teeside A and B DCO was granted. TWT position, as set out in that letter, was that the regular grant of fishing licenses was a “plan or project” for the purposes of Article 6(3) and that any impacts of cabling operations from Teeside A and B windfarm should be considered in combination with the grant of future fishing licenses. These effects had not been assessed in the HRA accompanying the Teeside A and B windfarm and were conceptually different from treating the condition caused by fishing as part of the baseline for the assessment.

TWT issued proceedings but these were withdrawn following assurances given by the Secretary of State for Environment, Food and Rural Affairs in correspondence and in meetings between TWT and the Department for Environment, Food and Rural Affairs. In particular, TWT understood the outcome of those discussions to be that government would take steps to include fishing activities in the consideration of windfarm applications in the future. TWT position is that this approach is correct and is further supported by the recent *Dutch Nitrogen* cases (see C-293/17 and C-294/17). The reasoning of the CJEU in these cases is consistent with the points made in TWT’s letter to the Secretary of State dated September 2015.

TWT is concerned that additional human pressures on SACs that are already in unfavourable condition from windfarm development should not be introduced unless existing pressures such as fishing are reduced. TWT had understood that the Government accepted this and was taking steps to address commercial fishing while at the same time ensuring that due consideration would be given to treating fishing as a ‘plan or project’ in any future HRA, in line with Defra’s revised approach⁶ to fishing, so that a similar scenario that has occurred Dogger Bank does not happen again.

⁵ <https://www.gov.uk/government/consultations/southern-north-sea-review-of-consents-draft-habitats-regulations-assessment-hra>

⁶ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/345970/REVISED_APPROACH_Policy_and_Delivery.pdf

Appendix B: TWT comments on proposed compensation measures for cabling impacts on Haisborough, Hammond and Winterton SAC

1. Alternatives

TWT believe that safeguards provided for by the Habitats Directive, such as the consideration of viable alternatives, have not been exhausted. There are alternatives which TWT consider relevant and require further consideration:

1.1. No rock protection in Marine Protected Areas (MPAs)

TWT does not support the use of rock protection in MPAs. Rock protection causes the permanent loss of habitat, often in MPAs which are already in unfavourable condition. Based on the following evidence, TWT conclude that this alternative requires further exploration:

a) Lincs offshore wind farm

We are aware that offshore wind farms such as Lincs have cables which are exposed and have no rock protection. Further information is required as to why these offshore wind farms are able to have exposed cabled and management measures which have been put in place to ensure no damage to the cable.

b) Telecommunications cables

Although we appreciate telecommunication cables are smaller than offshore wind farm cables, as far as we are aware, no telecoms cables are protected by rock.

No cable protection within an MPA must be considered as a viable alternative and European Guidance states that this must be considered against the site's conservation objectives, integrity and contribution towards the overall coherence of the Natura 2000 network⁷. We suggest that this could be achieved by legally designating a safety/exclusion zone to all activities which have the potential to cause damage to cables. This would include anchoring from vessels, and fishing exclusion zones.

European Guidance states that compensation constitutes the last resort, when all other measures to avoid adverse effect have been considered⁸. By excluding cable protection from MPAs, compensation measures would not be required. Compensation in the marine environment is difficult to deliver. This further supports the need to fully explore no cable protection in MPAs to ensure no decline of the site, Natura 2000 and UK MPA network.

1.2. Summary of TWT position on alternatives

TWT has identified feasible alternatives which require further analysis against the MPA in question as outlined in European Commission guidance.

We encourage this applicant and all offshore wind farm developers, who have extensive resources and skilled engineers, to develop alternative solutions and invest in the gathering of data to give better certainty that there will be minimal impacts on the marine environment from offshore wind farm development. Developers cannot continue to deliver projects in the way which they have over the past 20 years if the UK network of MPAs is to be maintained.

⁷ Page 57. Commission notice "Managing Natura 2000 sites The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC" (2018)

⁸ Page 61. Commission notice "Managing Natura 2000 sites The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC" (2018)

2. Views on proposed compensation

2.1. Establish a new reef feature

TWT agree that this measure would not provide compensation for the impacts of cabling within HHW SAC as it does not meet both EU⁹ and Defra¹⁰ guidance on compensation measures. Associated with this there is a lack of uncertainty regarding the deliverability of this proposal which does not provide confidence that the compensatory measure will be sufficient.

2.2. Site extension or creation of comparable habitat

TWT does not support this as a compensatory measure for offshore wind farm projects for the following reasons:

- The process to extend or create new designated sites is lengthy and we question if there are statutory resources available to undertake this work.
- By extending or designating new sites, it allows for the chipping away and deterioration of existing sites. This is not acceptable as a mechanism, especially considering the scale of offshore wind farm development planned.
- Extending or creating new sites will create further problems in the future for offshore wind farm development, complicating the consenting process and further putting the UK MPA network at risk.

In conclusion, there is uncertainty on the delivery of site extension or creation as a compensatory mechanism which does not provide confidence required for the deliverability of this proposal.

2.3. Fisheries management – reduction of intrusive fishing methods

TWT considers fisheries management as a viable option which should be given further consideration. However, we do not support developers buying fisheries quotas as a mechanism to achieve this.

Fisheries management must be delivered at a strategic level to allow environmental head room to grant offshore wind farm development at a project level. The issue in delivering the scale of offshore wind in combination with other damaging human activities is to ensure that environmental capacity is not exceeded. One way to ensure this is to balance the number and types of damaging activities taking place within the marine environment.

We appreciate that many tools, regulatory mechanisms and policy will be required to achieve this, alongside spatial planning. We also recognise that we are in a time of transition on fisheries management which is associated with Brexit and the Fisheries Bill. It is also important to recognise that the Fisheries Bill may provide opportunities for how fisheries in UK waters beyond 12nm can be managed in the future.

We highlight that UK government has powers to manage fisheries within 12nm and mechanisms must be explored on how management can be achieved at a project level.

2.4. Removal of disused anthropogenic infrastructure and litter

TWT agrees with the applicant that this is not a feasible compensation proposal as it does not meet both EU and Defra guidance on compensation measures. We also suggest that decommissioning of

⁹ Commission notice "Managing Natura 2000 sites The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC" (2018)

¹⁰ 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 (2012). Defra

infrastructure is the responsibility of the owners of the asset and therefore cannot be considered compensation.

3. Conclusion

Sufficient time has not been provided to discuss and develop a compensation option for cabling impacts on Haisborough, Hammond and Winterton SAC. TWT recommends the establishment of a group to develop a compensation package which would be conditioned as part of the DCO and request to be part of this group.

Appendix C

1. TWT response to Request for Further Information dated 10th September 2020

R17.1.3 Cable Protection decommissioning after 30 years

“The Applicant and Natural England disagree over whether long term temporary impacts on benthic habitats caused by cable protection would recover to pre impacted states within the Haisborough, Hammond and Winterton Special Area of Conservation (SAC). Both parties have provided evidence for its case throughout the Examination. Both parties to confirm at Deadline 16, 28 September, whether this is their final position or if further discussions may lead to agreement being reached by Deadline 18, 12 October and the close of the Examination.”

It is TWTs position that impacts on benthic habitats caused by cabling impacts is a permanent impact and there is uncertainty that Haisborough, Hammond and Winterton SAC would recover to a pre-impacted state. Please refer to the covering letter and appendix A as part of this document for further information.

2. REP15-009: Natural England response to 5th questions

TWT agrees with the statement made by Natural England in their covering letter:

*“However, due to the lasting impacts over the lifetime of the project, uncertainty that habitats will recover to their pre impacted state and to a lesser extent the permanent impact of cable protection at cable crossings (for which cable protection has also been significantly reduced), **we cannot advise beyond reasonable scientific doubt that there will be no AEoI.**” (our emphasis).*

TWT agrees with the provisions as outlined in response to question 5.5.4.4. TWT request to be a consultee with regards to all documentation relating to cabling.

3. REP14-067: Comments on Natural England’s response to Deadline 14: Review of the Norfolk Vanguard and Hornsea Project Three decision in relation to the Boreas examination advice on HRA benthic considerations

3.1. Use of Site Integrity Plan (SIP) for cabling in Haisborough, Hammond and Winterton SAC

TWT agree that a SIP cannot be used to defer the Habitats Regulations decisions to post consent.

3.2. Recoverability and reversibility

TWT support Natural England’s comments that there is insufficient evidence and a lack of certainty that there will be no adverse effect beyond reasonable scientific doubt on Haisborough, Hammond and Winterton SAC from cabling activities.

3.3. Temporary vs permanent impacts

Further to Natural England’s comments on the temporary nature of cabling impacts, TWT argue that even if decommissioning is possible and if features can recover, cabling impacts should be considered permanent for the lifetime of the project. As Natural England state **“cable protection would have a lasting/permanent change to habitat form and function, and would therefore hinder the conservation objectives of the site”**.

TWT agrees with Natural England that the permanent impacts of cable protection at cable crossings which must remain in situ must be taken into account in the HRA for Norfolk Boreas and all future decisions.

3.4. Monitoring

TWT agree with Natural England that a revised condition in relation to decommissioning is required to monitor the cabling impacts during the lifetime of the project.

3.5. Reference to Dogger Bank decisions

TWT fully supports Natural England's comments with regards to taking into account the latest available evidence rather than unduly relying on past decisions which have shortcomings in the evidence base.

3.6. Small scale losses

TWT fully supports Natural England's three points in relation to small scale losses.