



**Comments on the Applicant's 'Without Prejudice'
Derogation Case
for the
Royal Society for the Protection of Birds**

**Submitted for Deadline 4
13 December 2021**

Planning Act 2008 (as amended)

In the matter of:

**Application by Alternative Use Boston Projects Limited for an
Order Granting Development Consent for the
Boston Alternative Energy Facility**

**Planning Inspectorate Ref: EN010095
Registration Identification Ref: 20028367**

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1. Introduction

- 1.1 In our Written representations (REP1-060), we set out our disappointment that a derogation case had not been developed pre-examination and the need for the Applicant to provide a derogation case (Section 9, pp.99-100). The need for this was based on the information available and our knowledge of the bird species affected, which meant that we could not conclude that it is not possible to rule out an adverse effect on the integrity of the SPA/Ramsar site (as well as the SSSI).
- 1.2 We therefore welcome the initial information provided by the Applicant, especially given our continued concerns with the Application due to the potential impacts on waterbirds using The Haven and its approaches out to the Port of Boston Anchorage area. However, we note that further work is ongoing to develop the derogation case. We therefore request clarity on when the Applicant considers its detailed derogation case will be available to review. When presented there must be sufficient time available within the examination for interested parties to scrutinise the detailed proposals and provide comments.
- 1.3 The RSPB has reviewed the three documents submitted at Deadline 2 that set out the Applicant's initial information on their derogation case. In summary:
- We are concerned that the Applicant's assessment of alternative sites is based only on alternative options for the proposed location on the edge of Boston. We consider more evidence is needed to ensure all alternative options that would meet the public need and have less environmental impact must be reviewed.
 - Given the narrow focus of the Applicant's assessment of alternative locations, we are not convinced that the Applicant has demonstrated that there are Imperative Reasons of Overriding Public Interest (IROPI) for the development at the location currently being considered.
 - We do not consider the Applicant's suggested Compensation Measures meet the criteria set out in our Written Representation (REP1-060).
- 1.5 We set out below our more detailed comments on each of the derogation case documents below.

2. The Applicant's 'without prejudice' derogation case – alternatives (REP2-011)

- 2.1 Having reviewed the Applicant's long list of alternatives, we welcome the information provided. However, we question whether the proposed list fully captures all potential alternative options.
- 2.2 We consider that the Applicant has taken a very narrow perspective on the project's location (as set out in Table 5-1, pp.21-24; REP2-011). We consider that the focus should be on the wider public need for any such development and minimising the environmental impact from such a development. This will necessarily mean that consideration be made of alternative locations nationally that could deliver the project objectives. A wider review of suitable national locations could enable such a proposed development to be constructed in an area

that “...is less damaging to the European site and does not have an adverse effect on the integrity of this or any other European site.”¹

- 2.2 In order to more fully consider the merits of the Applicant’s case, a more detailed evaluation of potential sites and solutions must be provided. This should set out a clear evaluation of why there are no other locations or solutions that could meet the Applicant’s objectives set out in Table 5-1, in particular objective 1:
1. To provide a sustainable and renewable form of energy recovery, to contribute towards meeting renewable targets and carbon emissions and is in line with the requirements of NPS EN-1 and EN-3 (DECC, 2011a; 2011b).
 2. To reduce the quantity of waste disposed to landfill.
 3. To reduce the quantity of waste exported abroad.
 4. To nurture and develop skills within Lincolnshire.
 5. To create employment opportunities within Lincolnshire.
 6. To minimise adverse impacts on the function and efficiency of strategic transport infrastructure
 7. To minimise carbon emissions associated with transportation
 8. To develop the Facility at a location that aligns with local planning policy.
 9. To minimise waste and apply the principles of waste hierarchy.
- 2.3 Whilst we note that objectives 4 and 5 make specific reference to Lincolnshire, we see no reason why the overarching topics they cover (local employment and skills) could not just as easily be considered more widely in terms of locations and solutions to contribute to renewable targets and reductions in carbon emissions. This does not mean that the Application site is not appropriate for development and employment, but that an appropriate level of scrutiny is needed to ensure that any such development is appropriate to the location and its environmental sensitivities, as is required under the Habitats Regulations.
- 2.4 We also note that this document makes reference to “Annex 1 redshank” (for example, paragraph 1.1.4, p.6 of document REP2-011). Whilst this species is a feature of The Wash SPA/Ramsar/SSSI (year-round) it is not a species listed on Annex 1 of the EU Birds Directive². Other species recorded using The Haven area such as bar-tailed godwit, common tern, golden plover, guillemot, little egret and ruff are Annex 1 species. We will seek to clarify our own position with respect to features of The Wash SPA/Ramsar/SSSI affected by the Application at Deadline 5 (25 January 2022), however, some revision of these documents will be needed by the Applicant to clarify the conservation status of species using The Haven and its approaches.
- 2.5 With respect to golden plover, we have highlighted in our initial comments on the Ornithology Addendum that the UK SPA Review 2001 site account³ lists this species as a feature of The Wash SPA (section 3(l), pp. 28-31; REP2-045). It is also an Annex 1 species and requires special protection throughout its range year-round. We note that this has not been recognised by the

¹ Department for Environment, Food and Rural Affairs (Defra) Guidance, Habitats regulations assessments: protecting a European site (2021) (Defra, 2021). [REDACTED]

² [REDACTED]

³ [REDACTED]

Applicant in paragraph 6.3.6 where it is simply listed as being part of the waterbird assemblage feature (p.26; REP2-011).

- 2.6 We consider the Applicant's information set out in Section 6 (pp.25-29) regarding the proposed development and its potential impact on The Wash SPA/Ramsar is taken from additional documents that we have already provided comments. Our comments set out in our Written Representations (REP1-060) and initial comments on the Ornithology Addendum (REP2-045) address our concerns with the Applicant's assessment, data gaps and the reasons why we consider an adverse effect on integrity of The Wash SPA/Ramsar cannot be ruled out beyond reasonable scientific doubt. We therefore will not repeat any comments we have already made.

3. The Applicant's 'without prejudice' derogation case – IROPI (REP2-012)

- 3.1 Given the RSPB's concerns with the Applicant's approach to alternative solutions, the RSPB has no comments, at this time, to make on the Imperative Reasons of Overriding Public Interest that have been presented by the Applicant.

4. The Applicant's 'without prejudice' derogation case – compensation (REP2-013)

- 4.1 The RSPB has set out its approach to assessing compensation proposals in section 10 of its main written submission (paragraphs 10.9-10.24 in REP1-060). Below, we summarise some of the key elements of that approach before setting out our initial comments on the applicant's compensation proposals.

- 4.2 These are necessarily initial comments, as it is the RSPB's view that there is still substantive work to be done to agree the nature and scale of predicted adverse effects on integrity. This additional work is critical to inform discussions on:

- What ecologically effective compensation for those impacts could comprise?
- What options should be considered to provide such compensation?
- The detailed consideration of possible locations and designs to implement ecologically effective compensation with a reasonable guarantee of success.

- 4.3 At Table 12 in REP1-060, we set out the criteria for designing compensatory measures:

Targeted – appropriate to the impact(s) predicted and refer to the structural and functional aspects of site integrity and habitats/species affected. Clear objectives and success criteria must be set out.

Effective – based on the best scientific knowledge alongside specific investigations for the location where the measures will be implemented. Measures where no reasonable guarantee of success should not be considered. The most effective option(s) with the greatest chance of success must be chosen.

Technical feasibility – design must follow scientific criteria and evaluation, taking into account the specific requirements of the ecological features to be reinstated.

Extent – directly related to the quantitative and the qualitative aspects inherent to the elements of integrity that are likely to be impaired, along with an estimated effectiveness of the measure(s). Ratios need to be used where they make ecological sense and will help secure a successful outcome by providing more of something. Simply multiplying capacity to address uncertainty is not appropriate, as it risks giving a false level of confidence.

Location – located in areas where option(s) will be most effective in maintaining the overall coherence of the National Site Network. Compensation measures should be as close to the area of impact as possible, while minimising the external pressures that may reduce the likelihood of success. Compensation measures proposed to benefit one SPA/SAC/Ramsar site feature must not result in damage to the integrity of any other SPA/SAC/Ramsar site and their features, or the integrity of any underpinning SSSI.

Timing - must provide continuity in the ecological processes essential to maintain the structure and functions that contribute to the National Site Network. Compensation measures should be fully functional (that is, secured, designed and created) before any damage occurs.

Long-term implementation – legal and financial security is required for the long-term implementation of option(s). These guarantees must be secured via an appropriate mechanism and in place prior to consent being granted. Robust financial guarantees are required to fund implementation, monitoring and any necessary remediation measures.

4.4 Following Table 12, we then set out the level of detail we consider is required to be before an examination in order to enable proper scrutiny of any compensation proposals (paragraph 10.18-10.24 of REP1-060). At this stage, we do not consider the applicant has provided the necessary detail to enable proper scrutiny of its “compensation measures”.

4.5 In Table 1 below, we have set out our initial comments on the outline compensation proposals provided by the Applicant in Table 3-1 of their ‘Without Prejudice’ Derogation Case – compensation document (REP2-013). At this stage, we do not consider these option(s) are fit for purpose and substantive work is required by the Applicant to develop appropriate compensation measures tailored to the ecological requirements of the SPA/Ramsar site features for which adverse effects cannot be ruled out. We note here Defra’s 2012 guidance (paragraph 35)⁴:

“If it is not possible to secure adequate compensatory measures, a derogation allowing the proposal to commence must not be granted.”

4.6 We consider this is in line with the EC (2018) guidance on the same issue.⁵

⁴ Defra (2012) 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.

⁵ EC (2018) Managing Natura 2000 sites – The provisions of Article 6 of the ‘Habitats’ Directive 92/43/EEC (21/11/18) C(2018) 7621 final.

Table 1: Copy of Table 3-1 (p.23) from the Applicant’s derogation case setting out the proposed compensation options that are being considered. Our comments on each option are set out alongside each option.

Option	Description	Location relative to SPA	Objective for compensation site	RSPB comments
1	Habitat management of areas within the prison boundary to encourage birds to use the area in line with the Prisons objectives.	North Sea Camp Prison Boston	To provide foraging and bathing habitat for SPA populations of Dark bellied Brent Geese and Black-Tailed Godwit. Also could provide potential roosting habitat for redshank, oystercatcher, lapwing and golden plover.	<p>The creation of a lagoon could provide an alternative location for dark-bellied brent geese to bathe. The provision of freshwater for bathing would be preferred by this species, but a saline lagoon would likely still be attractive to the species for bathing. A lagoon could work well for roosting redshanks and other species, providing it is large enough, undisturbed and likely has unvegetated or sparsely vegetated islands or very shallow water.</p> <p>However, dark-bellied brent geese are one of a few species that already make good use of the prison fields near The Haven mouth. They feed on the rye grass sward provided for sheep grazing on the fields owned by HMP North Sea Camp (based on direct observations from RSPB reserve staff). The creation of a lagoon on these fields could therefore result in foraging habitat <u>loss</u> for dark-bellied brent geese and could reduce their overall use of the site i.e. it could have an adverse effect on this functionally linked land to The Wash SPA/Ramsar site.</p> <p>The fields also offer potential feeding areas for black-tailed godwit, curlew, ruff and other species. The creation of a lagoon on these fields could therefore result in foraging habitat loss for black-tailed godwit, curlew, ruff and other waterbirds.</p> <p>The above highlights the importance on having clarity on the scale of ecological impacts, the number of birds that need to be accommodated and ensuring that a baseline ecological understanding of any proposed options is developed to determine whether a suggested site would be appropriate.</p> <p>In addition, it is important to understand whether management of the land as a lagoon for roosting would be “...in line with the prison’s objectives.” This information is needed to understand the viability of the</p>

Option	Description	Location relative to SPA	Objective for compensation site	RSPB comments
				<p>option and the scale of compensation that could be delivered, as the prison's objectives may make it difficult or impossible to deliver the required ecological objectives for the affected features of The Wash SPA/Ramsar. This issue will need to be evaluated before this option is pursued further.</p> <p>Whilst the principles being developed for this option could be appropriate, the Applicant must also explore options for other adjacent land that could deliver the same ecological requirements, but on sites that would not conflict with current waterbird activity.</p>
2	Habitat reinstatement of overgrown freshwater habitat within the Havenside LNR. Pools located around the monument are in need of clearing to open up the habitat.	Havenside LNR	To provide additional habitat for waders and wildfowl. The distance from the footpath would need to be maximised. As it is within the LNR it is expected that dogs would be kept on leads and therefore disturbance minimised.	<p>Whilst this option could deliver some small Biodiversity Net Gain by improving the quality of the wetland features within the Havenside LNR for aquatic plants and amphibians this is not going to deliver any meaningful habitat improvements for waders and wildfowl due to the very small size, high disturbance caused by proximity to walkers, dogs (whether on a lead or not) and presence of mature hedgerows.</p> <p>This highlights the need to have clarity on measures that constitute compensation separately from the measures that will deliver environmental net gains.</p> <p>We do not consider this a suitable compensation option based on our experience of habitat creation for waders and wildfowl.</p> <p>Again, this option further highlights the importance on having clarity on the scale of ecological impacts, the number of and type of birds that need to be accommodated and ensuring that a baseline ecological understanding of any proposed options is developed to determine whether a suggested site would be appropriate.</p>
3	Potential for habitat creation alongside The Haven on the north bank within the Havenside LNR.	Havenside LNR	As above	<p>The Havenside LNR appears to be unsuitable for the creation of additional wetland habitat for waterbirds due to:</p> <ul style="list-style-type: none"> • Its insufficient size; • It is too linear to allow appropriate habitat to be developed free from disturbance;

Option	Description	Location relative to SPA	Objective for compensation site	RSPB comments
				<ul style="list-style-type: none"> • Disturbance by walkers, dogs and other activities already occurs; and, • Mature hedgerows that affect sightlines for birds scanning for predators and will actively avoid such sites. <p>All these factors make any habitat created unlikely to be successful.</p> <p>We acknowledge that the largest block (of 4ha) is a broader, triangular shape rather than the thin linear patch of scrub/meadow regularly used by visitors. This has more potential, but is still unlikely to be large enough to support waders and wildfowl. It would also represent a loss of scrub in the area, which is an important habitat in its own right and is limited within The Haven area.</p> <p>Again, this option further highlights the importance on having clarity on the scale of ecological impacts, the number of birds that need to be accommodated and ensuring that a baseline ecological understanding of any proposed options is developed to determine whether a suggested site would be appropriate.</p>
4	<p>Provision of artificial wader roosting habitat within the SPA. This could potentially involve the placement of rocks alongside existing rocks that have been placed on the shallow intertidal area within the SPA or provision of floating roosting sites.</p>	<p>Within the SPA but far enough away from the vessel transit routes to ensure minimal or no disturbance.</p>	<p>To provide additional habitat, rocks would provide habitat particularly for black-tailed godwit, turnstone, oystercatcher and redshank.</p> <p>Although this option could meet the objectives for the birds within the SPA it would reduce the area of intertidal mudflat within The Wash and North Norfolk SAC which could compromise the</p>	<p>As identified by the Applicant, any proposed options within The Wash would impact on habitat and species features. Any such option would destroy existing SPA/SAC/Ramsar habitat and necessitate compensation as a result of this proposed option. Therefore, we do not consider this option to be compatible with the Habitats Regulations tests and the underlying purpose of those Regulations, as it would result in adverse impacts in its own right. We repeat our previous advice to the Applicant that this option should not be taken forward for this reason.</p> <p>Without prejudice to our fundamental position on this option, we are also concerned that the proposed option identifies black-tailed godwit as a species that could benefit from such measures. They are using the highest areas of mudflat adjacent to The Haven mouth rather than the rocks. This</p>

Option	Description	Location relative to SPA	Objective for compensation site	RSPB comments
			<p>conservation objectives for this site. This would need to be assessed in terms of the potential impacts on the designated sites.</p>	<p>option would therefore not be a suitable alternative option for roosting black-tailed godwits.</p> <p>Irrespective of the inappropriateness of the measures being proposed within The Wash SPA/Ramsar boundary, we do not consider novel approaches such as floating roosting sites to be appropriate, as their effectiveness is unknown and there would likely be navigational risks. They are inherently unproven and therefore should not be pursued.</p> <p>We do not agree that this option is viable and so it should not be progressed any further.</p>
5	<p>Potential for creation of shallow scrapes within agricultural fields although it is recognised that these would be further in from The Haven and may not be suitable.</p>	<p>Approximately 1km from The Haven.</p>	<p>Low potential to provide habitat as relatively distant from The Haven. Potential for habitat for redshank, lapwing and golden plover.</p>	<p>We agree with the Applicant's assessment that there is a low confidence that this option would be successful due to the distance from The Haven and the indication that agricultural operations would be continued. This is particularly the case for lapwings and golden plovers that will prefer larger areas. It is even less likely to be successful for redshanks which typically do not roost far from the intertidal habitat and would likely require islands surrounded by water, such as a lagoon with an island.</p> <p>We note that no specific locations for this option have been identified on Figure 3-1 of document REP2-013.</p> <p>It is not clear why fields closer to The Haven are not being considered as an option. If a suitably large area (consisting of several fields) were secured that could deliver lagoon creation and potentially foraging habitat this might be a more appropriate option. However, this would still require a suitable ecological baseline to be established and clear objectives set for the purpose of the proposed option.</p>
6	<p>Potential for measures to reduce predation risk</p>	<p>Fields alongside The Haven.</p>	<p>Could assist with reduction of predation risk.</p>	<p>We are concerned by this proposed option, as:</p> <ul style="list-style-type: none"> No specific areas have been identified for management.

Option	Description	Location relative to SPA	Objective for compensation site	RSPB comments
	to shorebirds. i.e. Vegetation management.			<ul style="list-style-type: none"> • No details on the type of vegetation management being proposed have been provided. • No detail has been provided on the predators that would be targeted by the activity. • No evidence is presented to demonstrate that predation risk is an issue for waterbirds using The Wash SPA/Ramsar/SSSI. • No evidence is provided to inform the potential ecological impact on other features of The Wash SPA/Ramsar/SSSI and The Wash & North Norfolk Coast SAC, as well as other priority species. <p>This option has been proposed but without any evidence, including from the Applicant’s surveys, that predation risk is currently a significant factor affecting waterbirds using the navigation channel from the application site to the Port of Boston anchorage area. There is also no evidence provided to indicate what predators the Applicant considers to be a problem along The Haven. Understanding whether the predator is, for example, domestic cats, birds of prey, foxes, otters, badgers, stoats or mink (not an exhaustive list), will identify any management measures that would be appropriate to address any problem that may exist. No such information has been provided by the Applicant.</p> <p>We do not consider that this option demonstrates an understanding of waterbird ecology along The Haven. Indeed, no connection is made by the Applicant to demonstrate that predation risk has any relevance to the key issues identified by the data collected by the Applicant that need to be addressed. Any proposed options must seek to reduce disturbance, displacement, and habitat and other ecological function loss associated with the Application. Whilst management of predation risk may be important when considering the location and design of new habitat, the relative importance of predation risk as a key pressure impacting on roosting and foraging waterbirds along The</p>

Option	Description	Location relative to SPA	Objective for compensation site	RSPB comments
				<p>Haven and its approaches must be set in the context of other activities that are causing disturbance. For example, how important is predation risk when compared to disturbance from vessel movements or recreational activities?</p> <p>The Applicant has also not clarified whether this option is proposed to provide benefits for breeding waterbirds, roosting waders, non-breeding wildfowl, or all of these categories. Breeding waterbirds occur away from the Haven and non-breeding waterbirds appear to utilise very specific locations, although there may be more areas of importance but no data are currently available to demonstrate this to be the case.</p> <p>Consequently, we are concerned that this option would not be appropriately targeted and would have little or no compensatory benefits for the qualifying features of The Wash SPA/Ramsar. We consider this option would be better considered as part of Biodiversity Net Gain measures, subject to addressing the criticisms set out above with regard its lack of clear benefit to any species or species group.</p>

5. Conclusions

- 5.1 Having reviewed the Applicant’s derogation case, we consider that it remains at a high-level and more detail is needed to demonstrate that conclusions of adverse effects on integrity of The Wash SPA/Ramsar can be adequately addressed.
- 5.2 We are concerned that at this stage the Applicant has provided an inadequate assessment of alternative options that would deliver public need whilst minimising the environmental impact for such a project. We have particularly noted the limited assessment of alternative locations that the Applicant has presented; this should not be limited to the Boston site only but include a wider UK assessment.
- 5.3 Having reviewed the Applicant’s submission on compensation, we consider the options proposed do not contain any detail on their location, scale or mechanism for delivery. Therefore, we are not yet in a position to understand if the ecological requirements of the species affected would be met by any of the proposed compensation options. They are not yet fit for purpose.

- 5.4 We also consider that there are additional options that could be appropriate to consider that the Applicant has not yet presented, such as consideration of more areas along The Haven that could be appropriate for habitat creation, subject to discussions with landowners. However, until the scale of displacement and habitat/ecological function loss is agreed this and any additional options to meet the species ecological requirements are uncertain at this time.
- 5.5 Given this and the high-level nature of the information provided by the applicant on their 6 options, the RSPB is unable to make a meaningful assessment as to how each of the proposed measures might meet the compensation requirements. The starting point for meaningful discussion and assessment of compensation options is reaching agreement on the nature and scale of the ecological impacts on SPA/Ramsar species.
- 5.6 However, we have provided some high-level commentary to inform the Examining Authority and reserve the right to return to this topic.