

# REPORT

## **Boston Alternative Energy Facility**

The Applicant's Responses to the Examining Authority's  
Commentary on the Draft Development Consent Order

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## 1 Introduction

- 1.1.1 This 'Applicant's Response to the Examining Authority's Commentary on the draft Development Consent Order Questions' document for the Boston Alternative Energy Facility (the Facility) supports the application for a Development Consent Order (DCO) (the DCO application) that has been made to the Planning Inspectorate under Section 37 of the Planning Act 2008 (the Act) by Alternative Use Boston Projects Limited (AUBP) (the Applicant).
- 1.1.2 This report sets out each of the Examining Authority's (ExA's) points within their commentary issued on 11th January 2022 (PD-011) along with the Applicant's response.

## 2 Responses to Commentary

### 2.1 Protective Provisions and Environmental Permits

#### Point 1 of the ExA's Commentary

2.1.1 ExA's Commentary Point 1: "The Environment Agency (EA) has repeatedly highlighted the risk of the Applicant not having sufficient time to obtain sufficient surety EPs will be granted by the close of the Examination and has repeatedly requested a delay in the Examination; at the Preliminary Meeting I did not agree to delay the Examination and highlighted to the Applicant the risk it was running of not obtaining agreement for the EPs. I also note that the Applicant is developing PPs where there is overlap with the matters contained in EPs, and potential EPs. I consider that it would assist the Examination if the Applicant produced a timetable detailing:

- Each of the EPs required;
- Each of the PPs to be contained in the dDCO; and
- The timetable for drafting and agreeing each of the above."

#### The Applicant's Response

##### *Environmental Permits (EPs)*

- 2.1.2 It was agreed with the EA during the pre-application meeting (October 2021) that a single, integrated Environmental Permit would be required for the Facility. Additionally, through subsequent correspondence with the EA, it was agreed that Permits covering waste and discharges to water would be required for the construction phase.
- 2.1.3 The Applicant has identified that the following permits will be required to construct and operate the Facility:

- CLAIRE Definition of Waste (DoW) Code of Practice (COP) for the re-use of site sourced material.
- Disposal for Recovery (DfR) Permit for the recovery of waste materials to raise site levels.
- Integrated Environmental Permit for the operation of the EfW, LWA and associated activities.
- An End of Waste Determination and Quality Protocol for the LWA plant end product.

2.1.4 Additionally, Permits may be required, during the construction phase, for:

- Discharges to surface or groundwater/ dewatering activities.
- Management of soil (waste) on site.

2.1.5 The following Waste Exemptions will also be required for the construction phase:

- U1 – use of waste in construction.
- D1 – depositing waste from dredging inland waters.
- T5 – screening and blending waste.

2.1.6 Permits required for the use of mobile plant will be the responsibility of the Operator of the equipment.

2.1.7 It is the Applicant's intention to submit construction phase Permit applications during 2022. The Determination period for DfR Permits can take up to four months.

2.1.8 The operational Permit application process is anticipated to take between 18 and 24 months following the completion of the Detailed Engineering Design phase. This includes:

- The Submission and Determination of an End of Waste Review.
- The Preparation of a Permit application.
- The Environment Agency 'duly-making' the Permit application, typically up to ten days.
- A 30 day consultation communication period starting the day the Regulator receives the duly-made application and which will remain open for 20 days.
- A 16 week determination period, unless otherwise agreed between the Applicant and the EA.

2.1.9 However, should the EA, under Part 1, Schedule 5 of the Environmental Permitting Regulations 2016 as amended, request further information from the Applicant, then the timeline for the application may be extended.

- 2.1.10 Applications for Waste Exemptions are completed via the EA's website and are typically granted within 24 hours following the receipt of an application.
- 2.1.11 Further discussion with the Environment Agency regarding permitting is scheduled for 25<sup>th</sup> January 2022 and the Examination will be informed of any update to the situation at Deadline 6.

### *Protective Provisions*

- 2.1.12 To clarify, the only protective provisions in the dDCO that are for the benefit of the EA relate to flood risk activities as set out in Part 4 of Schedule 8 to the dDCO. These are required as the Applicant has sought to disapply the need to obtain an environmental permit for flood risk activities under Article 40 of the dDCO. Neither the Applicant nor the EA is seeking to include PPs that relate to the EPs required (as listed above) and there is therefore no overlap between the PPs and the matters to be contained in those EPs.
- 2.1.13 As set out in response to the ExA's Second Written Question Q2.5.0.2 (document reference 9.57), discussions with the EA as to the drafting of the protective provisions relating to flood risk activities have progressed and the Applicant is hopeful that the protective provisions will be agreed by Deadline 6, with the amended text included in the version of the dDCO submitted at that Deadline.

## **2.2 Section 106 Agreements**

### **Point 2 of the ExA's Commentary**

- 2.2.1 ExA's Commentary Point 2: "I note that the Applicant has referred to reaching Section 106 agreements (s 106) with the EA and the local planning authorities. I remind the parties that the six month period for Examination is a strict one and that I must issue my recommendation report along with any draft s 106 agreements (where appropriate) three months after completion of the Examination. In order for any agreement to be considered by me in determining the application, they need to be agreed and signed by the parties. I consider that it would assist the Examination if the Applicant produced a timetable detailing:
- each of the s 106 obligations proposed;
  - date for submission of draft s 106 agreements to Examination; and
  - proposed date for submission of final agreed version."

## **The Applicant's Response**

2.2.2 The Applicant is currently in discussions with both Lincolnshire County Council (LCC) and Boston Borough Council (BBC) in relation to a single section 106 (s.106) agreement which both Councils would be party to, along with the Applicant and (if required) Alchemy Farms Limited, as the freeholder of the land included within the Order Limits (with the exception of land which is Crown Estate).

2.2.3 A summary of the obligations proposed in the s.106 agreement is provided below:

- To provide apprenticeships in connection with the Facility;
- To provide a local employment agreement;
- To provide a scheme of interpretation along the diverted public right of way;
- To provide a range of enhancements measures along the diverted public right of way;
- To use reasonable endeavours to incorporate battery storage infrastructure within or alongside the Facility;
- To use reasonable endeavours to consider the maximisation of carbon dioxide captured by the Facility and exported to local companies;
- To provide a number of Electric Vehicle charging points at the Facility;
- To undertake a range of Biodiversity Net Gain measures in the Boston area; and
- To use reasonable endeavours to explore opportunities to accept and treat local waste feedstock.

2.2.4 The Applicant intends to submit a draft of the s.106 agreement to the examination at Deadline 7, with the intention to submit a final agreed version before the end of the Examination. The Applicant and the Environment Agency are in discussions in relation to an agreement, though it should be noted this is not a s.106 agreement, but a legal agreement relating to the construction and maintenance of the new strategic flood defence structures along the river frontage. The Applicant has provided an update as to the status of the agreement in its responses to the Examining Authority's Second Written Questions (see Q2.5.0.3) (document reference 9.57).

## **2.3 'Without Prejudice' Derogation Case**

### **Point 3 of the ExA's Commentary**

2.3.1 ExA's Commentary Point 3: "Regarding the 'without prejudice' derogation case. Please explain how the compensation measures proposed will be secured in the DCO if the Secretary of State determines that there is an adverse effect on integrity?"

## The Applicant's Response

- 2.3.2 In the event the Secretary of State determines there is an adverse effect on integrity, the Applicant has prepared on a without prejudice basis a draft schedule that would be added to the DCO to secure the compensation measures. A draft of this schedule is attached as **Appendix 1** to this document.
- 2.3.3 It requires the establishment of an Ornithology Engagement Group and the approval by the Secretary of State of an ornithology compensation implementation and monitoring plan for the delivery of measures to compensate for the predicted disturbance to waterbirds. This must be based on the principles of ornithological compensation set out in the Without Prejudice Habitats Regulations Assessment Derogation Case: Compensation Measures (referred to in the Schedule as the ornithology compensation plan).
- 2.3.4 This a similar approach to that taken to secure compensation measures in the made Hornsea Three Offshore Wind Farm Order 2020, the made Norfolk Boreas Offshore Wind Farm Order 2021 and the draft East Anglia TWO Offshore Wind Farm Order and the drafting of the schedule is based on the schedules included in those Orders.
- 2.3.5 While it is the Applicant's position that the habitat at the Principal Application Site is not functionally linked to The Wash Special Protection Area (SPA), should the Secretary of State determine it is, the Applicant has included drafting in the schedule to account for this (shown in square brackets). In the event the Secretary of State agrees with the Applicant's position in this regard that text would need to be deleted.

## 2.4 Boston and Fosdyke Fishing Society

### Point 4 of the ExA's Commentary

- 2.4.1 ExA's Commentary Point 4: "I note the Applicant's request to delay the Issue Specific Hearing on navigation and fishing matters until February 2022, which I accepted. A Statement of Common Ground (SoCG) with the Boston and Fosdyke Fishing Society (BFFS) was submitted at Deadline 2, 11 November 2021 [REP2-005], but no update was submitted at Deadline 4. Given the absence of detail regarding progress with the issues identified as 'under discussion' in the SoCG, please can the Applicant update the Examination on the following as well as the proposed timetable for resolving outstanding issues:
- navigational issues resulting from increased shipping;
  - water quality and impacts on fisheries;
  - proposed mitigation; and



- proposals for securing any conditions and mitigations in the dDCO.”

### The Applicant's Response

- 2.4.2 Following the Deadline 2 submission, the Applicant submitted the Navigation Risk Assessment (NRA) (document reference 8.4, REP2-003) to BFFS by email on 15<sup>th</sup> November 2021. In addition, further details on the impacts of dredging (as raised in the SoCG with BFFS (document reference 8.9, REP2-005)) were provided at Deadline 3 in response to the Environment Agency's queries on estuarine processes (document reference 9.4, REP3-020). In response to BFFS's queries relating to water quality, the Applicant provided a response within the SoCG, which still stands.
- 2.4.3 The Navigational Management Plan (NMP) is secured by Condition 14 of the Deemed Marine Licence (DML) in Article 9 to the draft DCO (document reference 2.1(1), REP1-003). This is considered to provide sufficient mitigation on potential impacts on navigation. The NMP is to the substantially in accordance with the NRA.
- 2.4.4 On the 15<sup>th</sup> November 2021 the Applicant requested that a meeting should be set up with BFFS and their representatives during December to discuss the content and findings of the NRA and whether this and any other issues identified within the SoCG (document reference 8.9, REP2-005) as 'under discussion' could be agreed. However, BFFS responded on the 29<sup>th</sup> November 2021 stating that they have "misgivings about what is being proposed as mitigation and in particular, what is now articulated as part of [the] recently commissioned Navigation Risk Assessment". BFFS were concerned that the Applicant had failed to address their points on the timing of vessel movements and the effect of this on the fishermen. There is no reference to shipping/safety concerns in the latest correspondence but this is addressed in the NRA. The Applicant's view is that the mitigation measures set out in the NRA are proportionate, sufficient and robust.
- 2.4.5 On the 29<sup>th</sup> November 2021 BFFS also made clear that due to time, resource and cost required to review the NRA it would not be possible to meet before the Christmas break and would be in touch in the New Year. As of the 25<sup>th</sup> January 2022 no further written correspondence on this matter has been received from the BFFS or their representatives. The Applicant has continued to request updates from BFFS and phone calls have been made to their legal representatives.

- 2.4.6 As such there has been no progress on agreeing common ground with BFFS and the outstanding issues therefore remain as stated in the SoCG submitted at Deadline 2 (document reference 8.9, REP2-005). The Applicant awaits a formal response on the NRA, including details of any concern relating to the timing of vessel movements from BFFS. The Applicant understands that BFFS are undertaking the necessary work to respond in detail to the NRA, which the Applicant welcomes. However, the Applicant understands that results of their independently commissioned technical work will not be available until mid-February at the earliest.
- 2.4.7 The Applicant is also, therefore, not in a position to confirm a timetable for resolving these outstanding issues. Discussion with BFFS's legal representative has confirmed that a meeting with BFFS will be taking place as soon as practicable.

## Appendix 1

# Draft Ornithology Compensation Schedule



## SCHEDULE 11

Article [x]

### ORNITHOLOGY COMPENSATION MEASURES

#### PART 1

**1.** Measures to compensate for disturbance to waterbirds—(1) In this Schedule—

“OCIMP” means the ornithology compensation implementation and monitoring plan for the delivery of measures to compensate for the predicted disturbance to waterbirds from The Wash SPA [(and functionally linked habitat)] as a result of the authorised development.;

“OEG” means the Ornithology Engagement Group;

“ornithology compensation plan” means the document “Without Prejudice Habitats Regulations Assessment Derogation Case: Compensation Measures” certified by the Secretary of State as the ornithology compensation plan for the purposes of this Order under article 47 (certification of documents, etc.); and

“The Wash SPA” means the site designated as The Wash Special Protection Area.

**2.** The authorised development may not be commenced until a plan for the work of the OEG has been submitted to and approved by the Secretary of State. Such plan must include:

- (a) terms of reference of the OEG;
- (b) details of the membership of the OEG;
- (c) details of the schedule of meetings, timetable for preparation of the OCIMP and reporting and review periods; and
- (d) the dispute resolution mechanism.

**3.** Following consultation with the OEG, the OCIMP must be submitted to the Secretary of State for approval (in consultation with the relevant statutory nature conservation body). The OCIMP must be based on the principles for ornithological compensation set out in the ornithology compensation plan and include:

- (a) details of location(s) where compensation measures will be delivered and the suitability of the site(s) to deliver the measures (including why the location is appropriate ecologically and likely to support successful compensation);
- (b) details of landowner agreements demonstrating how the land will be bought or leased and assurances that the land management will deliver the ecology objectives of the OCIMP;
- (c) details of designs of the compensation measures and how risks from avian or mammalian predation and unauthorised human access will be mitigated;
- (d) an implementation timetable for delivery of the compensation measures that ensures all compensation measures are in place prior to the impact occurring (e.g. [for dredging and construction impacts to the habitat within Work No. 4 the measures will be in place prior to any dredging or construction works on the intertidal habitat and] for the compensation for disturbance at the mouth of The Haven the measures will be in place prior to operation of the authorised development);
- (e) details of the proposed ongoing monitoring and reporting on the effectiveness of the measures, including: survey methods; success criteria; adaptive management measures; timescales for the monitoring and monitoring reports to be delivered; and details of the factors used to trigger alternative compensation measures and/or adaptive management measures;
- (f) details of any adaptive management measures;
- (g) provision for annual reporting to the Secretary of State, to include details of the use of each site by waterbirds (split into species accounts) to identify barriers to success and

target the adaptive management measures. This would include the number of birds using the site; evidence of birds roosting, foraging and bathing around high tide periods and any evidence of continued disturbance from vessels..

- (h) details of the compensation site(s) maintenance schedule; and
- (i) minutes from all consultations with the OEG.

**4.** The undertaker must implement the measures as set out in the OCIMP approved by the Secretary of State, unless otherwise agreed in writing by the Secretary of State in consultation with the relevant statutory nature conservation body and no part of the authorised development may begin operation until the implementation of the measures set out in the OCIMP.

**5.** The undertaker must notify the Secretary of State of completion of implementation of the measures set out in the OCIMP.

**6.** Unless otherwise agreed in writing by the Secretary of State or unless the measures set out in the OCIMP have already been delivered, the undertaker must not commence construction of Work No.1 until it has first—

- (a) provided a reasonable estimate of the cost of delivery of the compensation measures; and
- (b) put in place either—
  - (i) a guarantee in respect of the reasonable estimate of costs associated with the delivery of the compensation measures; or
  - (ii) an alternative form of security for that purpose,

that has been approved by the Secretary of State.

**7.** The compensation measures delivered under this Part must not be decommissioned without the written approval of the Secretary of State, in consultation with the relevant statutory nature conservation body.

**8.**[Unless otherwise agreed in writing by the Secretary of State, the compensation measures in place for habitat affected by the construction and operation of Work No 4 must be maintained following the decommissioning of Work No. 4, unless the intertidal habitat is reinstated to an acceptable condition to enable waterbirds to return to use this area for roosting.]

**9.** The OCIMP approved under this Schedule includes any amendments that may subsequently be agreed in writing by the Secretary of State, in consultation with the relevant statutory nature conservation body. Any amendments to or variations of the approved OCIMP must be in accordance with the principles set out in the ornithology compensation plan and may only be approved where it has been demonstrated to the satisfaction of the Secretary of State that it is unlikely to give rise to any new or materially different environmental effects from those considered in the ornithology compensation plan.

**10.** In the event of any conflict or inconsistency between the terms of the waterbird compensation plan and the provisions of this Order, the provisions of this Order shall prevail.