

REPORT

Boston Alternative Energy Facility

Note responding to RSPB concerns in relation to
Geographical Scope of Habitats Regulations
Assessment

Client: Alternative Use Boston Projects Ltd

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Technical Note

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Industry & Buildings**

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From: Alternative Use Boston Projects Limited
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1 Introduction

- 1.1.1 The Royal Society for the Protection of Birds (RSPB) raised concerns in their oral submissions on agenda item 4.d, recommending “that all relevant sites within the National Sites Network that could be affected by the delivery of the refuse derived fuel (RDF) be identified and included in the Habitats Regulations Assessment”¹. The Applicant confirmed that it would consider these concerns and confirm whether any further assessment work is required. This document is the Applicant’s response to the RSPB’s concerns.
- 1.1.2 The RSPB suggested in its submissions that the assessment for likely significant effects (LSEs) from the proposed development should include the routes taken by vessels transporting RDF to the Facility, to determine whether these journeys may impact Special Protection Areas (SPA) and Ramsar sites beyond those already considered in the Applicant’s Habitats Regulations Assessment (HRA)².
- 1.1.3 The Conservation of Habitats and Species Regulations 2017 (the Habitats Regulations), section 63, requires an appropriate assessment of the implications of a project to be carried out where a project is “likely to have a significant effect” on a protected site.
- 1.1.4 The European Commission notice “Managing Natura 2000 sites The Provisions of Article 6 of the ‘Habitats’ Directive 92/42/EEC”³ (the Guidance) provides guidance on the interpretation of the Habitats Directive underlying the Habitats Regulations. This Guidance sets out how screening for LSEs should be conducted in order to identify where an appropriate assessment is required.

¹ Royal Society for the Protection of Birds (RSPB) – Summary of Comments on Issue Specific Hearing 2 (ISH2): Environmental Matters – REP3-035, paragraph 3.14.

² Boston Alternative Energy Facility – EN010095 – 6.4.18 Environmental Statement - Appendix 17.1 - Habitats Regulations Assessment (APP-111)

³ C(2018) 7621, 21 November 2018

2 Geographical Scope

- 2.1.1 The Guidance provides, at section 4.2, that “as regards *geographical scope*, the provisions of Article 6(3) are not restricted to plans and projects that exclusively occur in or cover a protected site; they also target plans and projects situated outside the site but likely to have a significant effect on it regardless of their distance from the site in question” [original emphasis].
- 2.1.2 Case law on this point relates to the German and Irish implementation of the Habitats Directive into national legislation. The cases confirmed that projects located outside SPAs must nevertheless carry out an appropriate assessment where LSEs on a protected site are identified.
- 2.1.3 The Guidance does not specify that a project more than a certain distance away from an SPA may be excluded from an appropriate assessment. Instead, it is clear that where LSEs cannot be scientifically ruled out, an appropriate assessment should be conducted. The Guidance confirms that the safeguards in Article 6(3) are “triggered not by a **certainty** but by a **likelihood** of significant effects” [original emphasis].

3 Significant effects and the need for an objective assessment

- 3.1.1 The Guidance states that what constitutes a significant effect cannot be treated in an arbitrary way and must be considered objectively, having regard to the specific features and environmental conditions of the protected site. Conservation objectives as well as prior or baseline information can be highly important for identifying conservation sensitivities.
- 3.1.2 The Court of Justice of the European Union case of *Waddenzee* (C-127/02) held at paragraph 47 that “where such a plan or project has an effect on that site but is not likely to undermine its conservation objectives, it cannot be considered likely to have a significant effect on the site concerned”.
- 3.1.3 What constitutes significance will therefore vary “depending on factors such as magnitude of impact, type, extent, duration, intensity, timing, probability, cumulative effects and the vulnerability of the habitats and species concerned”.⁴ The Department for Environment, Food & Rural Affairs (Defra) Guidance “Habitats Regulations Assessments: protecting a European Site”⁵ states that in considering whether there is a risk or possibility of a likely significant effect this should be based on the evidence and that “[y]ou should only consider real, not hypothetical risk.”

⁴ Paragraph 4.5.2 of the Guidance

⁵ Published 24 February 2021

3.1.4 The Applicant has reviewed a number of HRAs for recent DCO decisions and port-related developments both in the United Kingdom and the European Union. Whilst the appropriate geographical scope for which protected areas are screened in depends on the particular development and the nature of the potential effects, it is readily apparent that a common-sense approach is taken in identifying protected sites that have a realistic risk of being subject to LSEs. The Applicant has found no examples where the entire potential transit routes for vessels or vehicles were considered in order to identify other SPAs to speculatively assess for LSEs outside of those in close proximity to the development. Including SPA or Ramsar sites at, or close to, the RDF origin ports would be contrary to the reviewed previous HRAs described above and would be inconsistent with Defra's guidance as it is a hypothetical risk only. As set out in the section below, it is the considered view of the Applicant's specialist ornithological advisors that significant effects are unlikely at these remote locations as the vessels will arrive from many different ports in the UK and the small magnitude and probability of change at these remote locations is unlikely to trigger LSE concerns.

4 Application to the Boston Alternative Energy Facility

4.1.1 The HRA considered which protected sites should be subject to screening for likely significant effects. The Applicant determined that effects on The Greater Wash SPA would be limited to those occurring due to an increase in vessel transit. Within the context of the existing vessel movements with The Greater Wash SPA, the Facility would cause only a minimal increase of vessel transits within existing navigation routes.⁶ In accordance with the Guidance, it was considered that the magnitude of the impact of the movements would be so minimal that there was no expectation of likely significant effect. The potential for harm was so low that the potential for LSEs could be dismissed on scientific grounds. RSPB accepted in its written representation that The Greater Wash SPA is already a heavily used area for navigation and impacts on this site area are unlikely.⁷

4.1.2 The HRA considered further the protected sites of The Wash SPA, The Wash and North Norfolk Coast SAC and The Wash Ramsar site when screening for LSEs. The location of the proposed development is within or near to these protected sites, with vessels travelling to and from the Facility necessarily traversing a route through The Wash and into The Haven on existing shipping routes.

4.1.3 The HRA screened for LSEs in the vicinity of the Facility and along the route that will be taken by vessels up to and including The Wash SPA. It noted that The Wash SPA covers an area of 622 square kilometres⁸. The screening for LSEs therefore covered the entire route that will be traversed by all vessels entering and leaving The Haven. It did not review potential routes that may be taken by vessels once outside of the route into and away from The Haven. The Applicant is satisfied that this was the correct approach for the following reasons:

- The Facility will accept RDF from across the UK from a number of ports with the specific departure locations being dictated by market conditions at the time of supply. As such, there is no certainty (and no way to derive certainty) of shipping routes that vessels will

⁶ Vessel movements relating to the Facility would amount to an increase of vessel transits of 0.75% - HRA, paragraph A17.3.3.

⁷ RSPB Written Representation, REP1-060, paragraph 3.2

⁸ HRA, *ibid*, paragraph A17.6.30

take before they reach the mouth of The Haven, or that they will take after departing The Haven and how many will take each route.

- The HRA identified that, within The Wash SPA, the shipping channel used to access The Haven was used by approximately 11,000 vessels annually.⁹ The increase in vessel numbers in respect of all vessels accessing the Facility was a small increase compared to the number already present within The Wash SPA. In view of the existing shipping activity within The Wash and the shipping channel, it was found that it was not anticipated that the increased shipping activity would result in an additional disturbance effect on the birds utilising this wider area¹⁰.
- Vessel movements will be from and to ports capable of loading RDF. These locations will, by their nature, have regular vessel movements and the vessels will be using established shipping routes.
- Vessels will not be travelling from the same port in the UK, with only a small number of vessels likely to use each potential loading port. This means that the factors to consider when screening for LSEs, including duration, intensity and timing, will be greatly reduced when compared to the vessel movements within The Haven within the Wash SPA. The ordinary shipping movements at each port will further reduce the magnitude of any potential impact of any vessels that use that port before travelling to the Facility.

4.1.4 As a result of these factors, there is no reasonable scientific basis to consider that the vessel movements associated with the Facility will have any impact beyond The Wash SPA, and certainly no quantifiable effect that must be considered and dismissed when screening for LSEs within the HRA.

4.1.5 The Applicant further notes that Natural England has not raised any issues with the protected sites included in the screening assessment.

5 Conclusion

5.1.1 The Applicant is satisfied that the HRA conducted has screened for LSEs within all relevant protected sites. The Applicant does not propose to undertake any further screening as a result of the RSPB's comments.

⁹ HRA, *ibid*, paragraph A17.6.30

¹⁰ HRA, *ibid*, paragraph A17.6.31