



**Comments on Responses to the Examining Authority's  
Second Written Questions**

**for the  
Royal Society for the Protection of Birds**

**Submitted for Deadline 6**

**8 February 2022**

**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**

Question number	Question addressed to	ExA question	Applicant's comments	RSPB comments
<b>1. General and Cross-topic questions</b>				
Q2.1.0.4	The Applicant	Regarding funding, please provide a response to the RSPB's comment concerning the ability to secure, deliver and maintain in perpetuity the appropriate mitigation and compensation measures to address any adverse effects on The Wash SPA/Ramsar [REP3-033].	<p>We note the comments made by the Royal Society for the Protection of Birds (RSPB) in Q1.0.4 of their Comments on Responses to the Examining Authority's First Written Questions (document reference 2.1(2), REP3-033) where they note that, <i>"funding has direct relevance of the ability of Applicant to secure, deliver and maintain in perpetuity the appropriate mitigation and compensation measures...."</i>.</p> <p>A number of locations are currently being considered for the provision of compensation measures (if required) by the Applicant that would, when taken as a whole, provide the required level of compensation. Consideration and budgetary provision has been made in relation to both purchase cost for any land requirements, and costs to deliver the required measures and to ensure such measures are maintained throughout the required lifetime of the Facility to the end of decommissioning. If the SoS determines the wharf site is a functionally linked habitat to the SPA, the measures to provide habitat for birds using the wharf site will be maintained following decommissioning of the wharf unless the intertidal habitat is reinstated to an acceptable condition to enable waterbirds to return to use this area for roosting.</p> <p>The Applicant's consultants have assisted the Applicant in identifying the costs that may be required to construct and maintain such</p>	<p>The Applicant indicates funding will be available to ensure habitat is <i>"...in place and available before the operational phase when the potential impacts that may require compensation would take effect"</i>. This is not acceptable for a number of reasons:</p> <ul style="list-style-type: none"> <li>• The first impacts will arise during the construction phase, not the operational stage. Therefore, relevant compensation measures must be in place and fully functional (see next point) before construction occurs.</li> <li>• Relevant policy and guidance (Defra and European Commission) makes clear that compensation measures should be fully functional before damage occurs in order to ensure the coherence of the National Site Network is protected. In practical terms this means sufficient time must have elapsed between establishment of the compensation measure(s) and becoming fully functional <u>before</u> damage occurs. This will vary dependent on the habitat type and local conditions e.g. for wet grassland it may take between 5-7 years to become functional and longer to become fully functional.</li> <li>• To establish this timeline, it is necessary to have sufficient detail on the specific package of compensation measures to determine if the chosen locations and ecological designs are capable of delivering the ecological functions required and how long it will take to reach the fully functioning stage at each location. Such detail has not been made available by the</li> </ul>

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			<p>compensation and the Applicant has made provision so that funding will be available at the required time to ensure the establishment and success of such measures. Notably, this includes ensuring that compensatory measures are in place and available before the operational phase when the potential impacts that may require compensation would take effect. No issues in relation of funding of any required compensation are therefore present from the Applicant's standpoint, and such costs are considered to be financially feasible.</p> <p>In relation to the mechanism to secure funds to deliver the compensation measures, the Applicant has explained in its submitted Funding Statement (document reference 3.2, APP-009) that funding for the capital cost of construction of the Proposed Development, will be secured following the grant of the DCO, and such funding will be sourced from a combination of commercial debt and additional equity. Once the funding has been secured a final investment decision will be taken to irrevocably commit the necessary funding for the project. Should funding be required for any habitat compensatory measures then those project costs will be taken into account in any final investment decision.</p> <p>As set out in The Applicant's Response to the Examining Authority's Commentary on the Draft DCO (document reference 9.58) also submitted at Deadline 5, the Applicant proposes to secure any compensation (if required) via a schedule to the</p>	<p>applicant to date. We note that this has been common practice on such compensation packages since the mid-2000s.</p> <ul style="list-style-type: none"> <li>• In the absence of this detail, it is almost impossible to assess the Applicant's statement that sufficient funding will be available to establish and maintain any compensation measures.</li> <li>• In relation to this, we consider it necessary for the relevant security mechanism to protect the long-term funding to be set out now so that it is available for scrutiny during the examination, not at some post-consent stage</li> </ul> <p>We are also concerned by the suggestion that compensation habitat would not be maintained following decommissioning of the facility. We note there is no firm commitment whether the facility will be decommissioned. We note this statement has been included in the draft Schedule 11 of the DCO. We will respond further to this issue at Deadline 7 after we have reviewed the updated DCO (due to be submitted at Deadline 6).</p>

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			DCO. A draft of that schedule is included as Appendix 1 to that document and requires the compensation measures to be in place prior to the operation of the development. If considered necessary the Applicant would be content to enter into an appropriate security mechanism around the time of the implementation of the compensatory measures (if any) to provide reassurance that the measures will be retained and maintained during the operation of the facility.	
Q2.1.0.8	The Applicant	Further to NE's request [REP4-023], please would the Applicant confirm what specific documents they will be submitting and when.	<p>The following ecology/ ornithology related documents are to be submitted at Deadline 6:</p> <ul style="list-style-type: none"> <li>• Bird survey data (Change in Waterbird Behaviour Report);</li> <li>Updated Outline Marine Mammal Mitigation Protocol;</li> <li>• A technical note outlining the process for managing the risk to ornithology from vessel management along with a Pilotage Statement which will provide further information on navigation matters;</li> <li>• An updated Compensation Measures document (document reference 9.30, REP2-013);</li> <li>• A technical note to address alternative locations and associated financial and technical considerations set out within the Assessment of Alternative Solutions (document reference 9.28, REP2-011); and</li> <li>• Responses to any unanswered marine ecology and ornithology related comments. The Applicant will endeavour to inform Natural England (NE) of any changes to the above and details of the documents to be submitted at subsequent deadlines.</li> </ul>	We welcome the update on the additional submissions that will be made by the Applicant at Deadline 6. We will endeavour to review and respond to as much of the information as appropriate at Deadline 7 (15 March).

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<b>3. Environmental Statement (ES)</b>				
Q2.3.0.5	The Applicant	Please would the Applicant provide an update on the potential need for scour protection to be used for the Proposed Development, and associated assessments? In addition, please address the RSPB's comments [REP3-033].	<p>The Applicant maintains their position from their Comments on Examining Authority's First Written Questions (document reference 9.24, REP2-008) which stated that scour protection would not be the preferred solution but that detailed design may identify the requirement for such protection. Until detailed design has been progressed it is not therefore possible to confirm if scour protection will or will not be required. However as stated in REP2-008, a key design principle will be the minimisation of habitat loss.</p> <p>The RSPB commented in REP3-033 that to understand the impacts on habitat loss a worst-case scenario including scour protection would seem appropriate. Given that scour protection may be required the Applicant agrees with this view.</p> <p>The assessment of habitat loss with the incorporation of scour protection is set out in the Outline Landscape and Ecology Mitigation Strategy (OLEMS) (document reference 7.4(1), REP3-007). Paragraph A1.7.1 states that, "<i>Within the Principal Application Site there is approximately 1.54 ha of mudflat and 1 ha of saltmarsh which would be lost due to the direct loss within the footprint of the wharf and the dredge footprint, potential loss due to scour protection (which is a worst-case scenario) and some potential loss which could occur as a result of hydrodynamic changes following dredging.</i>"</p>	We note that Natural England has provided detailed comments on the extent of saltmarsh that would be affected by the Application (REP5-017), notably comments on paragraphs A1.7.1-A1.7.9 of the OLEMS. We support Natural England's position and consider additional work is needed to identify measures to compensate for losses of both saltmarsh and mudflat.

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			<p>Paragraph A1.7.3 states that the area of saltmarsh to be lost in the Principal Application Area is a narrow strip (approximately 15m wide) of higher marsh with very limited zonation. The saltmarsh that may be lost is characterised as being of poor quality. The loss of saltmarsh resulting from the worst-case scenario including scour protection equates to less than 0.02% of the saltmarsh resource within Lincolnshire. In recognition that any loss of saltmarsh habitat is not desirable however small an area, the Applicant has undertaken a search for potential areas for habitat creation/restoration. This search has identified that there are no realistic opportunities for the creation of new inter-tidal habitat and therefore, debris clearance and restoration of existing saltmarsh is more appropriate.</p>	
Q2.3.0.19	The Applicant MMO	Please update the Examination regarding agreement with the IPs regarding a maximum vessel speed.	<p>Agreement has not yet been reached with the IPs regarding a maximum vessel speed limit. However, further evidence and justification was provided at Deadline 4 on the use of the 6 knot vessel speed limit in response to the Marine Management Organisation (MMO) and Natural England's queries regarding Marine Mammals and Fish (document reference 9.49, REP4- 014).</p> <p>The Port of Boston relies on the Convention on the International Regulations for Preventing Collisions at Sea, 1972 (COLREGS) safe speed, and in the case of large shipping, safe speed is set by the onboard pilot and is based on the prevailing circumstances, conditions and proximity of other vessels. The vessels associated with the Facility would therefore conform to current practice in The Haven.</p>	This statement by the Applicant shows that there is no ability to adjust vessel speeds. This further supports the inability of the Applicant to apply mitigation measures to the speed of vessels, thus reinforcing the need for compensation measures to address impacts that cannot be mitigated.

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			Discussions with the Port of Boston have identified that they would not agree to a speed limit within The Haven that compromised vessel safety and the existing situation with regard to safe speed needs to be maintained to ensure vessel safety.	
<b>3.1 Biodiversity, Ecology and Natural Environment (including Habitats Regulations Assessment (HRA))</b>				
Q2.3.1.21	The Applicant, NE, RSPB, LWT	Please can the Applicant and IPs provide an update on progress with the respective SoCGs, particularly in relation to HRA matters, and indicate when draft SoCGs will be submitted.	The Applicant is liaising with NE, RSPB and Lincolnshire Wildlife Trust (LWT) with the aim of submitting draft SoCGs at Deadline 6.	We provided our latest comments on the draft SoCG and a list of key issues that should form the focus of the SoCG to the Applicant on 7 February 2022. Our understanding is that the Applicant now aims to submit a draft SoCG at Deadline 7 and we will continue to review further iterations.
Q2.3.1.24	The Applicant	Please can the Applicant indicate whether it intends to submit an updated HRA derogation case to address the concerns of NE, the RSPB and LWT and if so, when it is likely to be submitted.	<p>The without prejudice HRA derogation case is currently being updated with the Applicant intending to submit the following at Deadline 6 (8th February 2022):</p> <ul style="list-style-type: none"> <li>- An updated Compensation Measures document (document reference 9.30, REP2-013); and</li> <li>- A technical note to provide further clarity on financial and technical considerations set out within the Assessment of Alternative Solutions (document reference 9.28, REP2-011).</li> </ul> <p>These documents will address the concerns of RSPB, NE and LWT as far as possible as well as providing further information which may be of use for these Interested Parties and the ExA.</p>	We welcome an updated derogation case from the Applicant and will review and provide comments, as appropriate, at Deadline 7 (15 March).
Q2.3.1.27	The Applicant	Please confirm whether winter bird surveys commenced in November	The Applicant confirms that winter bird surveys commenced in November 2021 with eight survey visits planned between December and March (i.e.,	Whilst additional information may be helpful, it is unclear when the new survey data will be provided. The final survey is due in March 2022. It

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		2021 and whether any further ornithological surveys are planned during the Examination, and if so when the results will be submitted.	an average of two per calendar month). These surveys aim to address comments made earlier in Examination concerning potential gaps in coverage or knowledge of the baseline scenario and will collect data relating to the intervening length of The Haven, connectivity between the SPA/Ramsar/SSSI and the Principal Application Site, and the precise locations of additional high tide roost sites. Results have been requested within a working week of the last survey visit.	<p>is not clear when in March the final survey will be conducted. Whilst results have been requested within a week of the final survey, there is no indication whether these additional data will have been analysed in any way. Deadline 7 (15 March) is only seven working days from Deadline 8 (24 March), with only two weeks until the close of the Examination at Deadline 9 (7 April). It is unclear what expectations there will be on interested parties to review and comment on these additional data at this late stage.</p> <p>It is also unclear what data will have been collected on disturbance to waterbirds along this route or what benefit could be gained from a one-off survey effort in the middle reaches of The Haven. This is important as no variation between years will be possible, the current winter has been relatively mild and a year-round survey over two years is the standard that is required.</p> <p>We note the Applicant has not sought to gather any additional evidence between the mouth of The Haven and the Port of Boston anchorage area.</p>
Q2.3.1.28	The Applicant	Please provide your proposed timeline for agreeing each of the main outstanding environmental and HRA issues with the environmental bodies.	<p><b>HRA/ Ornithology</b></p> <p>The Applicant maintains the position that there is no adverse effect on integrity (AEOI) and is challenging some points with the IPs (such as connectivity between habitat at the Principal Application Site and The Wash SPA).</p> <p>The position of the IPs is that AEOI cannot be shown beyond reasonable scientific doubt. The Applicant continues to submit information to the</p>	<p>The Applicant's response does not commit to Deadlines for responding to outstanding issues. At this stage in the Examination it is critical to understand how the Applicant intends to use the remaining time; this has not been addressed in the Applicant's response.</p> <p>We have set out a summary of our position at Deadline 5 (REP5-018) and this has not changed.</p>



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			<p>IPs in order to evidence its case. Additionally, the Applicant is progressing the without prejudice HRA derogation documents for the IPs to review and comment.</p> <p>As discussed in the response to question 2.1.0.8, the Applicant will submit further documentation at Deadline 6 as well as the draft SoCGs in order to narrow the outstanding issues.</p> <p>In order to help NE identify the Applicant's position on outstanding matters, the Applicant has provided an updated version of their Risk and Issues tracker back to NE on 12 January 2022.</p> <p><b>General environmental matters</b>  Good progress is being made with several IPs on various environmental matters which will be shown through updated SoCGs submitted at Deadline 6. Matters are being discussed through meetings planned with the following IPs:</p> <ul style="list-style-type: none"> <li>• Heritage stakeholders (Historic England, LCC and BBC) (meeting complete, 20 January 2022);</li> <li>• Black Sluice Drainage Board (24 January 2022);</li> <li>• Environment Agency (27 January 2022);</li> <li>• MMO (27 January 2022);</li> <li>• LCC (28 January 2022);</li> <li>• BBC (31 January 2022); and</li> <li>• Inland Waterways Association (w/c 31 January 2022).</li> </ul>	

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			A meeting with Boston and Fosdyke Fishing Society (BFFS) is being arranged. There is ongoing and positive discussion with the Port of Boston on a weekly basis.	
<b>10. Navigation/fishing issues</b>				
Q2.10.0.1	The Applicant	I note that the NMP could contain detailed information that could have implications for the HRA. Please advise when a draft of the NMP will be submitted to the Examination for IPs to review, as well as informing the ExA's Report on Implications for European Sites due for publication 22 February 2022.	<p>The Navigational Management Plan (NMP) is a post-consent document that will be produced once a principal contractor is selected for construction and the detailed design of the facility is progressed to a sufficient level to allow detailed planning of the NMP to be progressed. The 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).</p> <p>There is established precedent for a NMP within The Haven in relation to the Boston Barrier scheme. The plan is to be prepared in conjunction with the Port (who will approve it for use) and the Applicant has discussed with the Port (as the statutory body responsible for navigation in The Haven) the benefit of preparing an outline NMP at this stage in the project, noting that the Port has previous experience with the Boston Barrier NMP. Both the Applicant and the Port are of the view that an outline NMP would not at this stage contain sufficient detail to provide clarity on potential impacts from an HRA perspective.</p> <p>The Applicant therefore proposes the following:</p> <ul style="list-style-type: none"> <li>- a technical note is produced setting out an explanation of the process to be followed (and topics covered) in developing the NMP (and</li> </ul>	Whilst the Applicant refers to the precedent that has been set by the Boston Barrier project, we note that the evidence base has now moved on and highlighted the greater importance of The Haven to waterbirds than was previously known. As a consequence, sufficient detail of the Navigation Management Plan must be provided to enable it to be considered as part of the HRA process. We will review the Applicant's additional submissions at Deadline 6 and provide further comments, as appropriate, at Deadline 7.

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			<p>supporting NRA), including ongoing consultation with Interested Parties.</p> <ul style="list-style-type: none"> <li>- Information relevant to navigation and the management of vessels serving the Facility will also be included in a 'Pilotage Statement' which is being drawn up by the Port. This statement will contain further information (inter alia) on how the Port manages existing vessel traffic, and how it would manage the additional vessel traffic arising from the Facility.</li> <li>- NE will be invited to be a consultee on the NMP in relation to ecology matters (birds and marine mammals) and this will be secured within the DCO.</li> <li>-</li> </ul> <p>These items will be progressed in conjunction with the Port of Boston and will be submitted to the Examination at Deadline 6.</p>	
<b>15. Water Environment</b>				
Q2.15.0.1	The Applicant	<p>I note the following contained in the Applicant's response to Q1.15.01 [REP2-008]: 'The ongoing maintenance of the flood defences will be subject to an agreement with the EA. The Applicant is currently liaising with the EA as to the terms of this agreement.' Please would the parties update the Examination on progress with this agreement. In addition please also</p>	<p>Please refer to the response to Q2.5.0.3 in relation to the progress with the legal agreement with the Environment Agency.</p> <p>In relation to RSPB's comment regarding the compensation proposals and the need to consider the impacts on flood defences as any offsite compensation measures will be outside of the Order limits, they would not be captured by the disapplication of the environmental permitting process for flood risk activities under Article 40 of the draft DCO and the associated legal agreement being negotiated with the Environment Agency. If</p>	<p>With respect to compensatory habitat, future flood defence requirements should be considered when identifying compensation sites and developing site plans. Sufficient space will need to be left to ensure that the scale of any compensation habitat will not be reduced due to future flood defence needs.</p>

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		respond to the RSPB's comment regarding compensation proposals [REP3-033].	any offsite compensation measures trigger the need to obtain an environmental permit for a flood risk activity, the Applicant would apply for that permit and the impacts on flood defences would be assessed at that time.	