



**Response to the Examining Authority's Third Written
Questions**

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

Submitted for Deadline 7

1 March 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	RSPB comments
3.1 Biodiversity, Ecology and Natural Environment (including Habitats Regulations Assessment (HRA))			
Q3.3.1.7	NE, RSPB, LWT	<p>In light of the additional information provided to the Examination to date on features of the designated sites that may be affected by the Proposed Development, please could NE, the RSPB and LWT specify the qualifying features of The Wash SPA, The Wash Ramsar site, The Wash SSSI, and The Wash and North Norfolk Coast SAC on which they consider there would be an adverse effect alone and those on which they consider that there would be an adverse effect in combination. Please identify the location at which those species may be affected, ie the application site, the mouth of The Haven or along The Haven. This could be presented in tabular form for ease.</p>	<p>We set out concerns for key species in our position summary at Deadline 5 (REP5-018). Tables setting out our species concerns for different sections of The Haven are submitted in Appendix 1 below. Whilst data are available to draw some conclusions in the upper reaches of The Haven and around the mouth of The Haven, there remain significant data gaps for the central section of The Haven and for the area of The Wash out to the Port of Boston anchorage area.</p> <p>Due to a number of colleagues being off sick since Deadline 5 and 6 submissions, we have not been able to progress a detailed review of all the relevant submissions. Whilst we continue to review the additional information on waterbird behaviour on The Haven (REP6-034), however, it is clear that the more surveys that are conducted the more interest is observed. For example, the observation of significant numbers of ruffs using The Haven in September 2021, as well as redshanks. The additional surveys only heighten concerns that The Haven is an important area for waterbirds associated with The Wash SPA and Ramsar site and that appropriate measures will need to be implemented to ensure adverse effects are avoided.</p>
Q3.3.1.29	The Applicant	<p>HRA process</p> <p>Where adverse effects cannot be ruled out, the HRA Regulations provide for the possibility of a derogation which allows plans or projects to be approved provided three tests are met:</p>	<p>We have noted the ExA's question and the reference to the position of the Norfolk Boreas ExA. We consider the current Application is in a similar position to that described by the Norfolk Boreas ExA i.e. there are not sufficiently detailed proposals for compensation in front of the examination.</p>

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		<p>1. There are no feasible alternative solutions to the plan or project which are less damaging;</p> <p>2. There are imperative reasons of overriding public interest (IROPI) for the plan or project to proceed; and</p> <p>3. Compensatory measures are secured to ensure that the overall coherence of the national site network is maintained.</p> <p>I would draw the attention of the Applicant to the recent Decision Letter in respect of the Norfolk Boreas Offshore Windfarm dated 10 December 2021; in particular paragraph 5.13 which states the following:</p> <p><i>“...the ExA could not recommend compensatory measures for the Secretary of State to consider because it did not have sufficiently detailed proposals for compensation. It therefore recommended that the Secretary of State should seek further information from the Applicant regarding alternative solutions or compensatory measures. The Secretary of State notes that the development consent process for nationally significant infrastructure projects is not designed for consultation on complex issues, such as HRA, to take place after the conclusion of the examination. he wishes to make it clear that, in order to maintain the efficient functioning of the development consenting regime, he may not always request post-examination representations on such matters, indeed it should be assumed that he will not do so, and he may therefore make decisions on such evidence as is in front of him following his receipt of the ExA’s Report.”</i></p> <p>The ExA notes that the information contained in REP6-025 contains limited detail on the proposed compensation package, identifies a reduced number of compensation site</p>	<p>We will await the Applicant’s response to Q3.3.1.29 before responding more fully.</p>

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		<p>options to that in the previous version of the document [REP2-013], and does not include a figure that depicts the location of the newly identified compensation site options. Please can the Applicant set out how the information provided to date satisfies the derogation tests and identify the location of the additional options. In so doing, to provide clear references from the Examination Library as to which documents address these matters.</p> <p>Natural England, the RSPB, The Lincolnshire Wildlife Trust and any other IPs are invited to comment.</p>	
Q3.3.1.31	NE and the RSPB	<p>Please could NE and the RSPB respond to the Applicant's view that the application site ('Area A') and adjacent area ('Area B') are not functionally linked to the SPA and Ramsar site, notwithstanding that it has been assumed for the purposes of the derogation case that they are functionally linked.</p>	<p>The RSPB continues to review the submissions made by the Applicant. In summary, we do not agree with the Applicant that the area adjacent the Application site is not functionally linked to The Wash SPA and Ramsar site.</p> <p>In our Written Representations (Section 6, pp.46-48; REP1-060) we identified the gaps in survey coverage and highlighted that all areas of The Haven could be used by features of The Wash SPA and Ramsar site. The Applicant's own surveys have identified that species which are features of The Wash SPA and Ramsar occur along The Haven and can occur in significant numbers; redshanks and ruffs are most notable, but the full importance of The Haven for waterbirds has not been assessed by the Applicant. We set out more detail on our concerns about the Applicant's approach to assessing the importance of The Haven to draw conclusions regarding the impact of vessel disturbance in our comments on the Ornithology Addendum (in particular, Section 2, REP4-026). As we stated in paragraph 2.59 of our comments on the Ornithology Addendum (p.19) the</p>

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			<p>Applicant’s approach (emphasis added) “...to the HRA fails to appreciate that the test of Likely Significant Effect must consider, on a precautionary basis, whether the project is likely to have a significant effect on the SPA, either alone or in combination with other plans or projects.” We have highlighted the need for this precautionary approach to be applied to the Application in both our Written Representations (REP1-060) and comments on the Ornithology Addendum (REP4-026) and this is especially the case when data deficiencies exist to draw conclusions (see Appendix 1 below). It is the applicant’s responsibility to prove “beyond reasonable scientific doubt” that there will be no adverse effect on the integrity of the qualifying features of the SPA/Ramsar site (or in this case no functional link to the SPA/Ramsar site). The concerns raised by the RSPB are based on legitimate scientific interpretation.</p> <p>We will provide greater detail at Deadline 8 (15 March 2022) on the Applicant’s updated Habitats Regulations Assessment.</p>
Q3.3.1.32	NE and the RSPB	Please could NE and the RSPB confirm whether they consider that the Ornithology Compensation Measures set out in Schedule 11 of the dDCO adequately secure the proposed compensation measures.	We refer you to our detailed comments on Schedule 11, as submitted at Deadline 7 (1 March 2022).
Q3.3.1.34	NE and the RSPB	In light of the Applicant’s references in REP6-025 to the proposed Habitat Mitigation Area (HMA) and statement that options for compensation will be required in the event that it was determined that there would be an AeOI, please could NE and the RSPB confirm whether they consider the HMA would constitute a mitigation or a compensation measure according to the Habitats Regulations, and provide their view of its effectiveness accordingly.	<p>As we set out in our concerns for key species in our submission at Deadline 5 (REP5-018), waterbirds that are features of The Wash SPA and Ramsar site have been recorded roosting at the Application site and foraging adjacent to the Application site. This is particularly the case with redshanks and ruffs which have been recorded in significant numbers.</p> <p>Redshanks, ruffs and other waterbirds will be displaced by the construction of the wharf and increased vessel movements</p>

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			<p>associated with the construction and operation of the facility. This would result in the loss of the existing redshank roosting area, and result in birds being disturbed and displaced from foraging habitat adjacent to the facility. The displacement will be due to the noise and visual impact of construction and operation of the wharf, as well as the presence of vessels being unloaded and loaded. Whilst waterbirds may habituate over time to port activities this is very dependent on species specific behaviours, as well as the site-based conditions surrounding the port. In the context of The Haven, this is a comparatively narrow channel compared to a wider estuary and therefore noise and visual disturbance have the potential to result in greater impacts, as birds will have more limited options available to move away from the disturbance source yet continue to forage in optimum areas adjacent to the Application site. The ability to mitigate impacts are limited due to the narrowness of The Haven and the limited opportunities that exist close to the Application site to address the impacts arising from construction and operational activities.</p> <p>The provision of an alternative roosting area for redshank, which may have benefits for other waterbirds during high tide, does have the potential to mitigate impacts arising from construction and operational activities provided there is no reasonable scientific doubt as to its effectiveness. However, the effectiveness of the roosting area will be dependent on:</p> <ol style="list-style-type: none"> 1. Being of a suitable scale to accommodate all birds displaced by the construction and operation of the wharf. We accept that the proposed relocation of the rock armour from the Application site does have the potential to create a roost area that could

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			<p>accommodate the birds that would be displaced. However, it is our understanding that the proposed alternative roost would be smaller than the current roost area, which will need to be addressed by the Applicant. We also highlight that the construction of the wharf will permanently remove a roost site and reduce the flexibility of birds using the upper reaches of The Haven to choose where they roost. It is unclear how this overall loss of roosting area has been factored into the Applicant's mitigation and compensation calculations.</p> <ol style="list-style-type: none"> <li data-bbox="1361 667 2069 1126">2. Provision of suitable shelter from prevailing wind and weather conditions to ensure birds are attracted to the alternative roost site. The alternative roost site would be on the same bank of The Haven as the roosting area that would be lost. It is possible that the alternative roost area would provide the right aspect to shelter birds from prevailing conditions. However, we note the queries by Natural England regarding the effect of proposed changes to bank heights and profiles within the alternative roost area (REP5-017). It is essential that the impact of such changes is understood to ensure the effectiveness of any proposed mitigation measures would be undermined. <li data-bbox="1361 1134 2069 1380">3. Avoidance of disturbance. It remains unclear if disturbance from the additional vessel movements, or indeed current vessel movements, would be at a level that birds would be able to tolerate when roosting. This is especially the case at night where no evidence has been gathered to understand numbers of birds using The Haven and their response to night-time disturbance

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			<p>events. Whilst management measures could be put in place to try and limit disturbance from people, dogs and predators from the land (but details on management and monitoring are still required from the Applicant on this matter), there will be no effective means to mitigate disturbance from vessels and other watercraft passing close to the roost site. This, therefore, remains a significant area of uncertainty regarding the effectiveness of an alternative roost in the location identified. The creation of an alternative roost close to the Application site and behind the seawall would provide more certainty about its effectiveness. We await further details from the Applicant to understand if alternative options have been explored to provide alternative roosting and foraging habitat close to the Application site.</p> <p>We note that during piling the area affected extends out to 450m, as identified by Natural England in their comments on the Outline Landscape Mitigation and Enhancement Strategy (OLEMS) at Deadline 5 (REP5-017). We already have concerns about the appropriateness of the proposed 250m works buffer and how this will be enforced during construction. The increased area affected further adds to the uncertainty regarding the effectiveness of this measure. Our concerns set out in paragraph 7.49 of our Written Representations (REP1-060) have not changed, as we have not seen evidence that this has been addressed by the Applicant.</p>

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			<p>4. Protection from overtopping by vessel wash, especially on high tides. The success of an alternative roost is also dependent on tidal wash/wave action and this depends on the height of the tide when ships will be passing. The higher the tide the further any wash created by vessels will extend onto and potentially over any roosting area. We are not aware that the applicant has provided any details to demonstrate that the tidal heights would be such that such events are unlikely.</p> <p>We consider the provision of alternative foraging habitat is also essential to address the direct loss of foraging area from construction and operation of the wharf area, as well as the additional area that is likely to be made unsuitable due to the activity around the wharf. The effectiveness of any additional foraging habitat will be dependent on:</p> <ol style="list-style-type: none"> 1. Being of a suitable scale to accommodate all birds displaced by the construction and operation of the wharf. It is not clear from the Applicant's submissions that sufficient foraging habitat could be created alongside the alternative roost to accommodate all redshanks, ruffs and other waterbirds that would be displaced by the construction and operation of the wharf. 2. Be of a suitable design to meet the foraging requirements of the species displaced. The creation of pools within the saltmarsh may provide alternative foraging for redshanks, subject to it being of a suitable scale and design to accommodate displaced birds. It is not certain that the foraging habitat, at the scale suggested, would

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			<p>meet the ecological and/or behavioural requirements of other waterbirds such as ruff. The ecological requirements will be based on suitable areas of bare mud with plenty of food. The behavioural requirements will include factors such as openness of habitat to scan for predators and maintain contact with other birds in a flock. Detailed design proposals are required to assess the suitability of any alternative foraging habitat for the different species.</p> <p>3. Avoidance of disturbance. It remains unclear if disturbance from the additional vessel movements, or indeed current vessel movements, would be at a level that birds would be able to tolerate when foraging. This is especially the case at night where no evidence has been gathered to understand numbers of birds using The Haven and their response to night-time disturbance events. Whilst management measures could be put in place to try and limit disturbance from people, dogs and predators from the land (more details on management and monitoring are still required from the Applicant on this matter), there will be no effective means to mitigate disturbance from vessels and other watercraft passing close to the foraging site. This, therefore, remains a significant area of uncertainty regarding the effectiveness of an alternative foraging area in the location identified. The creation of an alternative foraging area close to the Application site and behind the seawall would provide more certainty about its</p>

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			<p>effectiveness. We await further details from the Applicant to understand if alternative options have been explored to provide alternative roosting and foraging habitat close to the Application site.</p> <p>4. Replacement of a Priority Habitat. The creation of pools to create foraging habitat would result in the loss of saltmarsh. This is a priority habitat. Irrespective of the disagreements over the quality of the saltmarsh, as a priority habitat this should ideally be maintained, restored and enhanced. Where it would be lost then the habitat would have to be compensated.</p> <p>Whilst we accept that the alternative roost site could be considered a mitigation measure, this is dependent on enough evidence being presented to demonstrate that it would address the act to avoid the adverse impact from construction and operation of the Facility. For the reasons set out above, we remain unconvinced that sufficient evidence has been provided, at this time, to demonstrate the alternative roost would be effective beyond reasonable scientific doubt i.e. an adverse effect on the integrity of The Wash SPA/Ramsar site through the loss of this functionally-linked land cannot be ruled out. The alternative roost location would also not address the loss of foraging habitat for waterbirds given the uncertainties listed above. Therefore, there is also no evidence before the examination that the adverse effect on The Wash SPA/Ramsar site arising from the loss of functionally-linked foraging habitat can be ruled out beyond reasonable scientific doubt.</p>

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			<p>For measures to be accepted as mitigation in this context, the competent authority must be confident they will (rather than might) avoid harm to site integrity. In this context, this relies on having complete, precise and definitive information on the proposed mitigation measures.</p> <p>We, therefore, consider the lost roost and foraging habitat should more properly be considered as part of the compensation package set out in the Applicant's derogation case rather than as mitigation given the continued uncertainties regarding its effectiveness.</p> <p>Where there would be losses of priority habitat (of which coastal saltmarsh¹ and intertidal mudflats² are such habitats) due to the creation of the proposed alternative roost site (as set out in the Outline Landscape and Ecological Mitigation Strategy: REP3-008) these will need to be compensated.</p>

¹ See <https://data.jncc.gov.uk/data/6e4e3ed1-117d-423c-a57d-785c8855f28c/UKBAP-BAPHabitats-08-CoastSaltmarsh.pdf>

² See <https://data.jncc.gov.uk/data/6e4e3ed1-117d-423c-a57d-785c8855f28c/UKBAP-BAPHabitats-22-IntertidalMudflats.pdf>

Appendix 1: Tables setting out the RSPB’s position with respect to the impact of the Application on waterbird species in different sections of The Haven.

The following tables are provided in response to Q3.3.1.7 of the third round of Written Questions. This develops our position set out in the summary of our position of the Application and its impacts on features of The Wash SPA and Ramsar site at Deadline 5 (REP5-018).

Table A1: Definitions of the RSPB’s level of concern applied to each of the species recorded in the Applicant’s surveys or for species that are known to be present, particularly in areas not surveyed by the Applicant. This is replicated from the RSPB’s summary of our position (REP5-018).

RSPB level of concern	Definition
High	These are species recorded in significant numbers in the Applicant’s surveys and for which a conclusion of Adverse Effect on Integrity cannot be ruled out and will need to be fully assessed through the Habitats Regulations Assessment.
Moderate	These are species that have typically been recorded but in low numbers. Surveys have established The Haven is used by these species, with several having been observed to have experienced significant disturbance. Many of these species have restoration targets and increased levels of disturbance could undermine the ability to achieve these targets. A conclusion of Adverse Effect on Integrity cannot be ruled out and will need to be fully assessed through the Habitats Regulations Assessment.
Low	These are species that are present and, based on the currently available knowledge and understanding, are not of significant concern. However, they will still need to be considered as part of the Waterbird Assemblage feature.
Data deficient	These are features of The Wash SPA/Ramsar for which it is not possible to rule out a conclusion of no adverse effect on integrity given these species are known to occur in the area of the navigation channel, especially around the anchorage area, but no data is available to determine abundance, distribution and their behaviour to vessel movements in this area of The Wash.

Table A2: Summary of the RSPB’s level of concern for species recorded in surveys of the Application site. The levels of concern are defined in Table A1.

Level of concern			
High	Moderate	Low	Data deficient
Redshank	Shelduck	Cormorant	
Ruff	Oystercatcher	Mallard	
	Ringed plover	Grey plover	
	Lapwing	Dunlin	
	Turnstone	Bar-tailed godwit	
	Black-tailed godwit	Black-headed gull	
	Waterbird assemblage	Herring gull	
		Lesser black-backed gull	
		Great black-backed gull	

Table A3: Summary of the RSPB's level of concern for species that potential use The Haven from the Application site to the mouth of The Haven. The levels of concern are defined in Table A1 of Appendix 1, with our detailed reasons for categorising each species set out in Table A2. Species of highest concern are denoted by an * and include species that have been either recorded in significant numbers, are known to be sensitive to disturbance, have restoration targets or a combination of all these factors.

Level of concern			
High	Moderate	Low	Data deficient
			Cormorant
			Dark-bellied brent goose*
			Shelduck*
			Mallard
			Wigeon
			Oystercatcher*
			Avocet
			Ringed plover
			Grey plover
			Golden plover*
			Lapwing*
			Turnstone*
			Dunlin
			Redshank*
			Black-tailed godwit*
			Bar-tailed godwit
			Curlew*
			Ruff*
			Black-headed gull
			Herring gull
			Lesser black-backed gull
			Great black-backed gull
			Waterbird assemblage*

Table A4: Summary of the RSPB's level of concern for species recorded in surveys at the mouth of The Haven. The levels of concern are defined in Table A1.

Level of concern			
High	Moderate	Low	Data deficient
Dark-bellied brent goose	Wigeon	Cormorant	
Shelduck	Avocet	Mallard	
Oystercatcher	Ringed plover	Teal	
Golden plover	Curlew	Grey plover	
Lapwing	Ruff	Knot	
Turnstone		Dunlin	
Redshank		Bar-tailed godwit	
Black-tailed godwit		Whimbrel	
Waterbird assemblage		Black-headed gull	
		Herring gull	
		Lesser black-backed gull	
		Great black-backed gull	

Table A5: Summary of the RSPB's level of concern for species known to use the area between the mouth of The Haven and the Port of Boston anchorage area. The levels of concern are defined in Table A1. Species of highest concern are denoted by an * and include species that have been either recorded in significant numbers, are known to be sensitive to disturbance, have restoration targets or a combination of all these factors.

Level of concern			
High	Moderate	Low	Data deficient
			Red-throated diver*
			Cormorant
			Dark-bellied brent goose
			Shelduck
			Mallard
			Pintail*
			Wigeon
			Teal
			Eider*
			Common scoter*
			Goldeneye*
			Oystercatcher
			Avocet
			Ringed plover
			Grey plover
			Golden plover
			Lapwing
			Knot
			Turnstone
			Dunlin
			Redshank
			Black-tailed godwit
			Bar-tailed godwit
			Curlew
			Whimbrel
			Ruff
			Black-headed gull
			Herring gull
			Lesser black-backed gull
			Great black-backed gull
			Waterbird assemblage*