



**Response to comments on the Fifth Report on Outstanding
Submissions (REP9-033)**

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

Submitted for Deadline 10

7 April 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

Introduction

1.1 The following provides a response to the Applicant's comments to our submissions at Deadline 8. We have also reviewed Natural England's submissions at Deadline 8 and agree with, and support, their position regarding ornithological impacts and outstanding issues. We agree with Natural England that much of the information and many of the documents submitted by the Applicant are too high level to provide any comfort that adverse effects on integrity of The Wash SPA and Ramsar site will be avoided beyond reasonable scientific doubt, for example:

- **The Applicant's compensation measures document** (REP8-005) – please refer to our comments at Deadline 7, 8 and 9 and those set out below against No. 1 in the table below. The RSPB fully supports Natural England's position. Our submissions to date have also identified the same issues with the Applicant's data and conclusions as Natural England. We will not repeat our position which has been clearly set out in submissions to date on the key points raised by Natural England. With respect to redshanks and ruffs, the RSPB disagrees with the Applicant's view that harm will occur once the facility becomes operational. Harm (disturbance and displacement of waterbirds and loss of foraging habitat) will occur once construction of the wharf commences. We also highlight the serious concerns we have with the Applicant's timeline for delivery of compensation measures, as set out in our comments on the Applicant's 'Without Prejudice Derogation Case: Compensation Measures' document (REP8-005) submitted at Deadline 10. We therefore disagree that a two-year period during construction to develop the compensation habitat is realistic. We also remain concerned that the Applicant is only looking to secure leases for 30 years. Any compensation habitat will be developed to a standard where it should be incorporated within the National Site Network. We have made this point in previous submissions and remain seriously concerned by the proposed approach by the Applicant.
- **The outline Ornithology Implementation and Monitoring Plan** (REP7-013) - The RSPB supports Natural England's position that the Outline Ornithology and Implementation Plan is too high level. We disagree with the Applicant's position that such detail will be suitably secured through the DCO and DML. We have provided our detailed comments on the lack of detail provided by the Applicant in our comments on the Without Prejudice Derogation Case: Compensation Measures document (REP8-005), which fails to provide the required level of detail to give confidence that compensation measures can be secured, will be of a design that can be delivered to meet the required ecological functions and will be suitably maintained in perpetuity (as discussed in our Rule 17 response submitted at Deadline 10 and other submissions).
- **The Navigation Management Plan template** (REP8-011) - The Navigation Management Plan sets out the framework by which statutory bodies and other interested parties will be consulted, but it provides no specific details or options regarding how conflict between navigation and conservation objectives will be achieved. The Applicant is merely suggesting that this will all be resolved through further discussion and all will be well. There is no confidence given that there are solutions that are available that would address the concerns regarding the conservation objectives for The Wash SPA and Ramsar site, specifically that species distributions will be maintained. This is set against the need to reduce overall disturbance levels and enable species that have declined on The Wash to be restored. We see no evidence before the Examination that directly addresses this issue.

1.2 All of the points raised by Natural England regarding ornithological issues are mirrored in our submissions. We remain seriously concerned by the Applicant's position with respect to issues such as functional linkage of the Application site to The Wash SPA and Ramsar site (as

set out in our comments on the Third written questions (REP7-031) and response to comments on the Third Written Questions (REP8-029)) and the lack of night time surveys given impacts at night could be more significant than during the day (as set out in our Written Representations (REP1-060) and comments on the Ornithology Addendum (REP4-026) and comments on the RIES (REP9-065)).

- 1.3 Our responses to the Applicant's comments to our Deadline 8 cover letter (REP8-028) are set out below to further aid the Examining Authority.

Para	The Applicant's Response	RSPB comments
Table 2-8 Cover letter to the RSPB's Deadline 8 submissions to the Boston Alternative Energy Facility Examination (REP8-028)		
1	<p>The Applicant thanks RSPB for its response. While the Applicant maintains its position at Deadline 5 that there is no evidence that populations of bird such as redshank wintering at the Principal Application Site are functionally linked to populations within The Wash SPA/Ramsar/SSSI, the Applicant's Without Prejudice Derogation Case (document reference 9.30 (2), REP8-006) proceeds on the basis that a functional link throughout The Haven cannot be ruled out, as a precaution, following Interested Parties' comments in Examination. This Deadline 8 submission also provides detail of the management and composition of securable sites which should give confidence that the mitigation and compensation measures can be delivered and will prove effecting in maintaining the integrity of The Wash SPA and Ramsar.</p>	<p>Whilst we welcome that some additional detail has been provided by the Applicant in the compensation measures document submitted at Deadline 8 (REP8-005) this does not address the significant deficiencies with the Applicant's approach to developing their derogation case.</p> <p>Paragraph 3.2.6 states that "<i>However, should it still be determined that there is an AEOI then the HMA would provide compensation and no further compensation is considered to be necessary for roosting habitat loss at the Principal Application Site the options for compensation would be required.</i>"</p> <p>We consider this unacceptable. The concerns regarding the 'Habitat Mitigation Area' are to do with the level of disturbance to the area from the construction and operation of the facility, as well as lack of detail on management measures to prevent dogs and people accessing the site. For these reasons we believe alternative roosting and foraging habitat must be included in the Applicant's compensation measures to be delivered at a different location. The site within Area B cannot simply be designated as compensatory habitat, as this does not address the inherent uncertainties regarding the effectiveness of that site for providing a suitable alternative roost and some additional foraging habitat.</p> <p>We maintain that the Applicant's surveys do show the importance of The Haven in supporting important numbers of waterbirds that are features of The Wash SPA. We therefore disagree with paragraph 3.4.7 of the revised compensation measures document (REP8-006). We provide more detailed comments at Deadline 10 in our comments on the final waterbird surveys.</p> <p>The Applicant admits in paragraph 3.4.9 that additional searches are ongoing for alternative compensation sites. This detail is therefore not set before the Examination for scrutiny. This detail should have been secured prior to the Examination starting.</p>

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		<p>We welcome the Applicant's attempt to summarise the numbers of birds and area of habitat affected that would need to be compensated in Table 3-1. We remain concerned that the area affected remains underestimated due to uncertainty that indirect impacts have been considered in the calculations. Disturbance and displacement can occur several hundred metres from operations. This area of habitat can then become unusable by waterbirds. This habitat loss must be factored into the Applicant's compensation measures calculations. Again, this detail should have been addressed prior to examination and certainly by this stage in the Examination.</p> <p>We also highlight that the lack of disturbance to waterbirds in the central part of The Haven (as set out in Table 3-1) cannot be considered accurate due to the lack of targeted surveys to robustly investigate this area of The Haven. The issue of lack of survey data to fully understand compensation requirements also applies to the area between the mouth of The Haven and the Port of Boston anchorage area.</p> <p>Whilst the Applicant highlights an aspiration to develop a network of sites for waterbirds in paragraph 3.5.3, there is still no detail on specific locations (i.e. fields) that are being explored by the Applicant. Again, this detail should have been addressed prior to examination.</p> <p>Whilst we welcome generic criteria for developing compensation sites in paragraphs 3.5.5 and 3.5.7, specific compensatory site locations are needed to inform what habitat it is possible to create and for which species, to understand the measures and consents needed to develop the habitat, to ensure that essential requirements such as water can be secured to ensure habitat is viable in the short and long term and that there is a good baseline understanding of the site to ensure the most appropriate management will be established. The necessary level of detail to provide confidence that any compensation measures will be effective is still lacking.</p>

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		<p>We continue to disagree that golden plover is not a qualifying feature of The Wash SPA (para 3.5.6, p.26; REP8-006).</p> <p>Section 4 provides a potentially appropriate framework for identifying compensation sites and securing them. However, this work and detail must be provided pre-consent to provide the required level of confidence that any sites identified will be deliverable and effective at providing the necessary ecological functions in the short and long-term. We specifically highlight paragraph 4.6.1 which highlights that no sites are secured and due diligence is still taking place to determine if the sites are even viable. Again, this detail should have been addressed prior to examination. This goes to the heart of whether the necessary compensatory measures can be secured to protect the overall coherence of the National Site Network.</p> <p><i>Paragraphs 4.6.3-4.6.7: timeline to secure, develop and implement compensation</i></p> <p>We consider that the Applicant's assumption that planning permission will not be required is inaccurate based on our experience of delivering habitat creation projects along The Haven (which is supported by Boston Borough Council's submission at Deadline 7 (REP7-021)). We therefore disagree with paragraphs 4.6.3 to 4.6.7. The consenting process will have serious implications for the Applicants timeline for delivery of necessary mitigation and compensation measures, and creates significant uncertainty as there are no guarantees planning permission for <u>each</u> compensation measure will be granted, as we have commented on in detail at Deadline 9 (see REP9-065).</p> <p>Whilst section 4.7 is welcome in providing more detail on what the Applicant intends to deliver on compensation sites, this is again set against the lack of locational detail, which is necessary to evaluate potential for success, to enable proper scrutiny of the proposals to confirm if they would be effective. Again, this detail should have been addressed prior to examination.</p>

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		<p>We remain seriously concerned by the Applicant's timeline for developing and delivering the compensation measures as set out in section 4.8.</p> <p>There is a critical path of site assessment, design, consents, implementation and management to go through in order to deliver successful (compensation) habitat creation. The fundamental starting point is defining the compensation objectives for the selected site and from those the species targets and associated management objectives for the site to achieve them.</p> <p>At present, we do not have agreement on these. Even if they were agreed, there is a substantive amount of work required to determine whether a selected site is viable, assuming baseline surveys have already been carried out to understand the existing conservation value of the area of land. Baseline surveys might for example identify existing importance which may require incorporating into site design, or could even cause the site to be unfavourable for compensation (as the applicant has identified themselves for another site considered and discounted). This information is unknown for the proposed sites. Furthermore there are significant site specific considerations based on the likely conditions required for successful habitat creation that need to be reviewed and assessed before the site can be determined as being suitable. These include, but are not limited to;</p> <ul style="list-style-type: none"> • Baseline ecological surveys • Soil type • Groundwater levels • Fresh/salt water availability • Water quality • Salinity (current and future water supply) • Topography • Archaeology • Easements/wayleaves • Minerals licences • Disturbance (PRoWs etc)

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		<p>From these flow necessary practical considerations (e.g. is pumping of water required?) and if so, can the essential consents be secured, including power supplies?</p> <p>If these various factors cannot be addressed (and this is the case in many sites that have potential on paper), then the site may not be able to deliver the appropriate management to deliver the species targets, which means in this case the compensation would not be deliverable. It would be very unwise to proceed with securing tenure of such a site.</p> <p>Finally, it is usually necessary to obtain various permits and consents to ensure the desired conditions (which we note in this case have not been identified yet) can be met. These permits and consents are another major risk to a site being viable. Likely consents required include, but are not limited to;</p> <ul style="list-style-type: none"> • Planning permission • Environmental permit • Abstraction licence • Impoundment licence • Habitats Regulations Assessment • Archaeological assessment <p>This simple explanation above underlines why the RSPB considers it essential that all of these matters be explored and secured in advance of consent, otherwise there is a very genuine probability the proposed compensatory habitat will simply fail to work.</p> <p>In addition, there is no allowance made for the need for compensatory habitat to mature and become fully functioning. It is not simply a case of create the habitat and the job is done. For a site to be deemed functioning could take anywhere between 1 and 4 years depending on the habitat and ecological functions that need to develop (based on baseline assessment, design and</p>

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		<p>implementation described in the previous paragraph). The habitat must be fully functioning prior to harm occurring which will be when construction starts.</p> <p>We welcome the additional detail in section 4.9, but the adaptive management measures are again generic and not site-specific.</p> <p>Whilst there has been additional detail provided by the Applicant, there remain significant and fundamental (ecological, technical and legal) concerns regarding the level of detail that has been made available to enable any certainty that the proposed compensation measures will be effective. We therefore still do not consider the Applicant's proposed <u>outline</u> set of compensation ideas provides anywhere near the necessary level of confidence required to demonstrate the coherence of the National Site Network can be protected for the range of SPA species impacted and be guaranteed to provide the ecological functions they depend on for their survival.</p>
2	<p>The Applicant maintains its position at Application Submission, that the area referred to in its assessments as the Habitat Mitigation Area is suitable for providing (expanded) roosting habitat and high tide foraging habitat of sufficient scale and quality for the numbers of redshank and other Scolopacidae recorded during project-specific high-tide surveys at Area A and B. Furthermore, the Without Prejudice Derogation Case (document reference 9.30 (2) REP8-006) has included further offsite compensation should the birds using the HMA be subject to disturbance from vessels (contra expectations of the Applicant) and this is determined to be an AEOI.</p>	<p>Our position on this has been clearly set out in our response to the third written questions (REP8-029). We also refer back to our response on line 1, if the ExA agrees that the alternative roosting and foraging for redshanks and ruffs constitutes a compensation measure, then it will not be possible for the Applicant to use this site as "compensation" as this does nothing to address the vessel disturbance, recreational pressures etc that have given rise to the uncertainty about the effectiveness of the site to deliver the required ecological functions. Consequently, the roost and foraging area will need to be incorporated into the Applicant's compensation measures calculations and an alternative site found to deliver the necessary compensation.</p> <p>We also note that no, or limited, assessment of the availability or capacity of other roost sites has been carried out by the Applicant. There is also no detail provided on the locations of compensation sites or detail on how they will be designed to demonstrate that they will deliver the ecological functions required. Our position on this was set out in REP7-031.</p>

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4	<p>The Applicant has updated all documents to take account of the Port of Boston's view that vessel speeds are in line with COLREGS (i.e. a 'safe speed'). None of the changes to updated documents change any of the assessments presented in the ES or other application documents.</p> <p>The Technical Note for Navigation Management and Ornithology (document reference 9.70, REP6-033) states that the final Navigation Management Plan (NMP) will have to consider, <i>"Opportunities for managing vessel movements so as to reduce vessel speed where appropriate and beneficial to do so"</i> as well as, <i>"opportunities for minimising vessels being held on-station at or near the MOTH. Measures outlined in the PoB's Pilotage Statement (document reference 9.73), paragraphs 8.6 and 8.7 describe how vessels are managed in this regard and is applicable for minimising this kind of disturbance"</i>.</p> <p>The Navigation Management Plan Template (document reference 9.80, REP7-012) identifies a clear and overt linkage to REP6-033 and Condition 14(3)(e) of the DCO requires that the NMP also should include <i>"measures for managing disturbance to designated bird species developed in accordance with the process in the Navigation Management Planning Process: Risk to Birds (REP6-033)"</i>.</p> <p>The securing mechanism for vessel speeds to be a consideration within the development of the NMP is clear and unambiguous. Natural England is identified as a statutory body that will be consulted in the development of the NMP with the views of the RSPB also sought.</p>	<p>We welcome that the RSPB would be consulted on future plans to manage navigation and ornithological issues. The Applicant has, however, provided no evidence that mitigating vessel speeds can be secured and is a viable option based on the position outlined by the Port of Boston. The only option for mitigating impacts from vessels put forward by the Applicant has been to reduce vessel speeds. It is therefore difficult to see how this issue can be resolved unless the Applicant is aware of additional measures that will be explored. If there are further options, then these should have been set before the Examination for scrutiny. We note that these concerns are shared by Natural England in their various submissions at Deadlines 8 and 9.</p>
5	<p>As noted in the Outline Marine Mammal Mitigation Protocol, the current practice on The Haven is 'safe speed at all times', in</p>	

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	<p>accordance with the Convention on the International Regulations for Preventing Collisions at Sea, 1972 (COLREGS). An enforced speed limit is inconsistent with current safe practice and would restrict the number of vessels able to transit to the Port each tide (i.e. it would increase the transit time, reducing the number of vessels able to transit each tide, and significantly increase the number of vessels within the anchorage area).</p> <p>The OMMMP identifies that the Facility's vessels will aim to travel at below 10 knots, where it is safe to do so. This will help reduce any potential impacts on marine mammals without imposing a set speed limit which is inconsistent with navigational safety requirements.</p> <p>These measures are secured Condition 17 of the DML which requires the approval of a final MMMP, which must be substantially in accordance with the Outline MMMP. Additionally, the Navigation Management Plan secured by Condition 14 of the DML will include measures for managing potential risks to marine mammals in accordance the approved MMMP.</p> <p>The Applicant has updated all documents to take account of the Port of Boston's view that vessel speeds are in line with COLREGS (i.e. a 'safe speed'). None of the changes to updated documents change any of the assessments presented in the ES or other application documents.</p>	
6	<p>See responses above in row 4 and 5.</p> <p>The Applicant has discussed the potential effect of erosion at length with the Environment Agency and submitted a Response to the Environment Agency's queries on Estuarine Processes (document reference 9.44, REP3-020) to the Examination. This</p>	<p>We remain unconvinced that the full effect of speed and ship wash on waterbirds has been fully assessed.</p> <p>We accept that ship wash around the mouth of The Haven is not likely to cause a significant impact to waterbirds, as the Applicant's evidence does show that it</p>

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	<p>document has been updated at Deadline 9 (document reference 9.44(1)) in relation to vessel speeds and the Applicant awaits the Environment Agency's response to this. The previous report was accepted by the Environment Agency and a comprehensive plan for monitoring any erosion in the inter-tidal area is presented in Appendix 1.5 or the Outline Landscape and Ecological Mitigation Strategy (OLEMS) (document reference 7.4(2), REP7-037). The Environment Agency are happy with the outline approach provided for.</p> <p>The Applicant's consultation with RSPB on 8 February 2021 (as reported within the HRA (document reference 6.4.18, APP-111)) noted that "the proximity of larger vessels [exerts] the impact rather than ship wash. Therefore slowing vessels down might not be a useful measure and may not be possible due to minimum speeds required." The Applicant recognises the prevalence of visual impact in bird disturbance data compared to wave wash, and stresses that this indicates that re-assessment with an altered maximum value for vessel speed, but no change to vessel traffic scenarios, is expected to yield similar conclusions. The Applicant therefore stands by its assessments as of Deadline 5.</p>	<p>is the visual presence of vessels (along with the speed of the pilot boats) that causes the most significant disturbance and displacement of waterbirds.</p> <p>However, data along the central part of The Haven have not been collected to enable a full assessment of the effect of ship wash and visual disturbance (which is linked to vessel speed based on the evidence from the mouth of The Haven) to have been carried out. There is no evidence presented to show how far ship wash extends up the banks along The Haven or whether it has the ability to impact on roost areas or any areas that would remain exposed and could continue to be used for foraging.</p>
8	<p>The Applicant acknowledges the effects of disturbance outlined here, but maintains its position from Deadline 5 that the magnitude and frequency of disturbance above baseline conditions is insufficient to drive this mechanism and potentially exert an AEOI of The Wash SPA/Ramsar/SSSI.</p>	<p>Our position remains as set out in our submissions to date and we continue to disagree with the Applicant that an adverse effect on integrity of The Wash SPA and Ramsar site will be avoided beyond reasonable scientific doubt.</p>
9	<p>The Applicant stresses that assessment has aimed to establish whether project-alone or in-combination effects can bring an adverse effect on site integrity (and concluded that they cannot bring such an effect), and inclusion of the baseline under either column is not appropriate.</p>	<p>Our position remains as set out in our submissions to date and we continue to disagree with the Applicant that an adverse effect on integrity of The Wash SPA and Ramsar site will be avoided beyond reasonable scientific doubt.</p>