



Response to the Final Development Consent Order

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

Schedule	Clause & page number	dDCO wording	RSPB comments
DML	18 (p.89-90)	<p>18.—(1) The undertaker must submit a landscape and ecological mitigation strategy in writing to the MMO for approval in accordance with the procedure in Part 4, following consultation with Boston Borough Council, the Environment Agency, the relevant statutory nature conservation body, Lincolnshire Wildlife Trust and the Royal Society for the Protection of Birds, at least 13 weeks prior to the commencement of any of licensed activity.</p> <p>(2) The MMO’s approval of the landscape and ecological mitigation strategy is restricted to the parts of that strategy that relate to any activities below MHWS, with the remainder approved by the relevant planning authority under requirement 6 of Schedule 2 (requirements).</p> <p>(3) The landscape and ecological mitigation strategy submitted for approval under subparagraph (1) must be substantially in accordance with the outline landscape and ecological landscape mitigation strategy.</p> <p>(4) The landscape and ecological mitigation strategy approved under subparagraph (1) must include details of—</p> <p>(a) mitigation measures required to protect protected habitats and species, non-statutory designated sites and other habitats and species of principal importance during the construction of the authorised development;</p> <p>(b) mitigation measures required to protect protected habitats and species, non-statutory designated sites and other habitats and species of principal importance during the operation of the authorised development;</p> <p>(c) the results of the Defra biodiversity off-setting metric together with the off-setting value required, the nature of such off-setting and evidence that the off-setting value provides for the required biodiversity compensation, risk factors (including temporal lag) and long term management and monitoring;</p> <p>(d) the site or sites on which the compensation off-setting required pursuant to (c) will be provided together with evidence demonstrating that the site or sites has/have been chosen in accordance with the prioritisation set out in the outline landscape and ecological mitigation strategy;</p>	<p>We welcome that the RSPB has been identified as a consultee for the Landscape and Ecological Mitigation Strategy (LEMS).</p> <p>However, we have serious concerns regarding clause 18(1), specifically, the provision of the OLEMS 13 weeks prior to the commencement of any licensed activity. There is no indication that the mitigation area adjacent to the Application site will be developed and assessed to be fully functioning prior to construction commencing and adverse impacts occurring.</p> <p>If the Examining Authority and Secretary of State agree with the Applicant that the “Habitat Mitigation Area” is to be treated as mitigation under the Habitats Regulations, then it must be implemented and fully functional <u>before</u> any damaging activity commences. This is in order to meet the requirement to avoid an adverse effect on the integrity of the functionally linked SPA/Ramsar site. If it is not implemented on a timescale to achieve this, then it cannot be approved of as mitigation (see final point below). This is why we are concerned with the 13-week period before licensed activity as it appears to relate solely to <u>submission</u> of the LEMS, not to its successful implementation.</p>

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		<p>(e) certified copies of the completed legal agreements securing the site or sites identified in (d) to enable enactment of the biodiversity off-setting scheme and the biodiversity off-setting management and monitoring plan as approved in the landscape and ecological mitigation strategy;</p> <p>(f) any hard and soft landscaping to be incorporated within Work No. 4 including location, number, species, size of any planting and the management and maintenance regime for such landscaping; and</p> <p>(g) an air quality deposition monitoring plan that must be substantially in accordance with the outline air quality deposition monitoring plan and must include the final numbers and locations of deposition monitoring locations, as agreed with the relevant statutory nature conservation body and the Environment Agency.</p> <p>(5) The undertaker must not commence the licensed activities until the MMO has approved in writing the submitted landscape and ecological mitigation strategy.</p> <p>(6) Unless otherwise agreed by the MMO in writing, the landscape and ecological mitigation strategy must be implemented as approved by the MMO.</p>	<p>Therefore the timescale is too short and inappropriate.</p> <p>In addition, paragraph A1.2.10 of the OLEMS (pp.46-47; REP7-037) states that:</p> <p><i>“The objective for the site is to ensure that the same number and abundance of waterbird species could continue to use the adjacent habitat, which would remain as the roost site, as were recorded using the roost site prior to the proposed works. Monitoring of the use of the remaining roost area would be undertaken to ensure that it is maintained as a suitable roost site. This would involve surveys of bird species abundance and distribution which would be undertaken on neap and spring tides monthly through the year for at least the first two years. Annual reports of the monitoring results would be provided to Natural England and the RSPB, followed by discussion of any changes necessary as part of the adaptive management strategy under which the sites will be managed. The monitoring would be adaptive monitoring and as such would change as needed to ensure the objectives were being achieved. Should the proposed measures not be effective at providing habitat for the same numbers of birds that may be displaced as a result of the loss of the habitat in the wharf</i></p>

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			<p><i>area, then additional measures will be initiated through the adaptive management strategy..."</i></p> <p>As we have set out above, if the Examining Authority and Secretary of State agree with the Applicant that the "Habitat Mitigation Area" is to be treated as mitigation under the Habitats Regulations, then it must be implemented and fully functional <u>before</u> any damaging activity commences. Therefore, the post-construction monitoring package must be appropriate to meet these requirements i.e. to determine that the "mitigation" habitat is fully functioning before any licensed activity can commence. Ongoing monitoring would also be required to assess whether the newly created habitat is continuing to function as required.</p> <p>We recommend that the initial period of detailed post-construction monitoring to determine functionality of the new habitat is for 5 years, and thereafter subject to review and adaptation (the adaptive monitoring referred to in the OLEMS quote above) as agreed with Natural England and the RSPB.</p> <p>We remain concerned that if the "mitigation" habitat is shown not to be fully functioning then unspecified adaptive management measures would be applied. We are unable to</p>

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			<p>assess the likely effectiveness of such adaptive management measures given they are not detailed by the Applicant.</p> <p>The uncertainties regarding the proposed redshank and ruff “mitigation” area identified above give further weight to our position set out in response to Q3.3.1.34 of the Third Written Questions (REP7-031) that this measures should actually be incorporated within the Applicant’s ‘Without Prejudice Derogation Case: Compensation Measures’ document. If this area is still to be taken forward by the Applicant this should be as part of Biodiversity Net Gain and not included in the compensation measures given the need to have certainty that this site will provide an effective alternative roost.</p> <p>Finally, if the Examining Authority and Secretary of State agree with the RSPB that the “Habitat Mitigation Area” should properly be treated as compensation, then it should be removed from the LEMS and moved to the compensation plan. Even so, in order to ensure the overall coherence of the National Site Network is protected, it will still need to be implemented and fully functional before damage from any activity occurs.</p>

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11	1 (p.97)		<p>We stated:</p> <p>The draft Ornithology Compensation Plan (as submitted at Deadline 2) was not fit for purpose for the reasons set out in the RSPB’s comments at Deadline 4 (REP4-028). We do not consider the updated Ornithology Compensation Plan submitted at Deadline 6 (REP6-026) to be fit for purpose either and we will provide more detailed comments on this in future submissions...</p> <p>... Therefore, significant revisions will be required to the OCP before it can form the basis of a certified document and any consent.</p> <p>The work described at section 4 of the draft OCP (Deadline 6; REP6-026) provides a starting point for such revisions. However, we note that this work would need to be completed and agreed with Interested Parties as adequate before the end of examination in order for the OCP to be considered fit for purpose.</p> <p>This does not appear to have been considered in the latest revision of Schedule 11.</p>
11	1 (p.97)	<p>“OEG” means the Ornithology Engagement Group, which will include, as a minimum, the relevant statutory nature conservation body and the Royal Society for the Protection of Birds;</p>	<p>We welcome that the RSPB is listed as a member of the OEG.</p>

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			However, we reiterate that to ensure the purpose of the OEG is clearly defined the following text should be added at the end: “...which will oversee the implementation, management and monitoring of the compensation measures in perpetuity”.
11	1 (p.97)	“The Wash SPA and Ramsar Site ” means the site designated as The Wash Special Protection Area and The Wash Ramsar Site .	We welcome the specific inclusion of The Wash Ramsar site.
11	2(p.97)	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, following consultation with the members of the OEG . 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; and (e) minutes from all consultations with the members of the OEG and copies of any written consultation responses from the OEG .	We welcome the amendments based on our Deadline 7 submission (REP7-032), noting that the RSPB has been identified as a named member of the OEG in clause 1 of Schedule 11.
11	3 (p.97)	3. Following consultation with the OEG, the OCIMP must be submitted to and approved by the Secretary of State, (in consultation with the local planning authority or authorities for the land containing the compensation measures, and the relevant statutory nature conservation body). The OEG must be consulted further as required during the approval process .	We welcome that the OEG is to be consulted, however, there has been no effort to address the significant gaps in detail of the compensation measures. This needs to be addressed pre-consent.
11	4 (p.97)	4. The OCIMP submitted for approval must be substantially in accordance with the outline ornithology compensation implementation and monitoring plan .	We are disappointed and concerned that the recommendations we made to strengthen the wording of clause 4 have not been adopted. The changes in wording are required for the reasons set out previously (REP7-032). It is essential that the OEG has a role in agreeing that all necessary measures have been

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			implemented to enable construction and the activities that would generate harm to waterbirds using The Haven to commence. The views of the OEG must be provided as part of the written notification to the Secretary of State.
11	5 (pp.97-98)	5.The OCIMP must include measures to compensate for [the roosting and foraging habitat loss as a result of the construction of Work No. 4 and] the predicted disturbance to roosting, bathing and loafing waterbirds from The Wash SPA and Ramsar Site [(and functionally linked habitat)], must be based on the criteria set out in paragraph 3.5.5 of the compensation measures document, must contain the relevant matters set out in paragraph 4.10.4 of the compensation measures document and must include in particular—	<p>We welcome the clarity provided on the ecological functions that need to be compensated for as a result of the Application.</p> <p>Whilst clause 5 provides an appropriate framework for the OCIMP, this is critical detail (e.g. site location, site design, timetable for delivery, criteria for assessing effectiveness, adaptive management measures etc) that must be addressed pre-consent. This is necessary to provide the necessary level of confidence that the coherence of the National Sites Network will be protected.</p>
	5a (p.98)	(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);	Whilst we agree this detail is required, it is information that needs to be provided during the Examination in order for interested parties to review. In the absence of detailed location and design, we do not consider the Secretary of State can have confidence the compensation measures will protect the coherence of the National Site Network.
	5b (p.98)	(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;	Whilst we agree this detail is required, it is information that needs to be provided during

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			the Examination in order for interested parties to review.
	5c (p.98)	(c) details of designs of the compensation measures and how risks from avian or mammalian predation and unauthorised human access will be mitigated;	Whilst we agree this detail is required, it is information that needs to be provided during the Examination in order for interested parties to review. In the absence of detailed location and design, we do not consider the Secretary of State can have confidence the compensation measures will protect the coherence of the National Site Network.
	5d (p.98)	(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 habitat loss as a result of the construction of 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 by the increased number of vessels, the measures will be in place for at least two years prior to the hot commissioning of line 2 of Work No. 1A);	<p>Whilst we welcome the additional clarity provided on what will be provided as compensation, our previous comment on this (when identified as clause 3(d)) remain (REP7-032). It is imperative that compensation measures need to be fully functioning prior to harm occurring in order to protect the coherence of the National Site Network. We do not consider that the Applicant's approach is realistic. We recommend the following amendments:</p> <p><u>"an implementation timetable for delivery of the compensation measures that ensures all compensation measures are in place and fully functioning prior to the start of construction, which will need to be confirmed by the OEG and provided in writing to the Secretary of State."</u></p>

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			To reiterate, however, this information should have been provided during the Examination and scrutinised prior to consent. In its absence, we do not consider the Secretary of State can have confidence the compensation measures will protect the coherence of the National Site Network.
	5e (p.98)	(e) criteria for assessing the effectiveness of the compensation measures;	Whilst we agree this detail is required, it is information that needs to be provided during the Examination in order for interested parties to review.
	5f (p.98)	(f) 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;	Whilst we agree this detail is required, it is information that needs to be provided during the Examination in order for interested parties to review. In the absence of this information, we do not consider the Secretary of State can have confidence the compensation measures will protect the coherence of the National Site Network as there is nothing before the Secretary of State to describe how the effectiveness of the compensation measures will be assessed and what practical management measures are genuinely available to make any necessary adaptation to management to ensure they are effective in the long term.
	5g (p.98)	(g) details of any adaptive management measures;	Whilst we agree this detail is required, it is information that needs to be provided during the Examination in order for interested parties to review. See 5(f) above.

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	5h (p.98)	(h) 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 at the authorised development and at the mouth of The Haven;	Whilst we agree this detail is required, it is information that needs to be provided during the Examination in order for interested parties to review.
	5i (p.98)	(i) details of the management and maintenance prescriptions and maintenance schedule appropriate to the habitats to be created at each compensation location ; and	<p>These details must have been provided during the Examination and scrutinised prior to consent. Any details of management and maintenance prescriptions should be in accordance with the relevant examination documents that provide sufficient detail for all interested parties to have scrutinised. It is not acceptable that this level of detail is left until post-consent.</p> <p>In the absence of this information, we do not consider the Secretary of State can have confidence the compensation measures will protect the coherence of the National Site Network as there is nothing before the Secretary of State to describe the critical detail on how the compensation measures will be managed and maintained. Such information is crucial to determine whether the compensation measures will have a reasonable guarantee of success and depends on detailed site-based information and assessment which is completely missing.</p>

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	5j (p.98)	(j) minutes from all consultations with the OEG and copies of any written consultation responses from the OEG on matters relating to the development of the OCIMP.	We welcome this amendment.
	6 (p.98)	6. 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. [For habitat loss as a result of the construction of Work No. 4, the relevant measures must be in place prior to any dredging or construction works on the intertidal habitat.] For the compensation for disturbance by the increased number of vessels, the [relevant] measures set out in the OCIMP must be in place for at least two years prior to the hot commissioning of line 2 of Work No. 1A.	<p>Whilst we welcome the additional clarity provided on what will be provided as compensation, this clause needs to ensure that any compensation measures are functioning and effective prior to any harm happening. We therefore reiterate our previous recommendation for amending this text:</p> <p>“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.</p> <p>Construction and no part of the authorised development may not begin until the OEG has agreed that the measures set out in the OCIMP to compensate for the adverse effects on The Wash SPA/Ramsar site arising from the loss of roosting and foraging habitat at the Application site have been implemented and are fully functional.</p> <p>Operation of the authorised development may not begin until the OEG has agreed that the measures set out in the OCIMP to compensate</p>

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			for the adverse effects on The Wash SPA/Ramsar site arising from displacement from areas of The Haven for roosting, foraging, bathing and loafing until the implementation of the measures set out in the OCIMP have been implemented and are functioning fully functional.”
	8 (p.98)	8. Results from the monitoring scheme must be submitted at least annually to the Secretary of State and the relevant statutory nature conservation body and made publicly available. This must include details of any finding that the measures have been ineffective in creating suitable roosting site(s) to support any birds that have been displaced through [the habitat loss as a result of the construction of Work No. 4 or] disturbance by the increased numbers of vessels using The Haven as a result of the authorised development and, in such case, proposals to address this. Any proposals to address effectiveness must thereafter be implemented by the undertaker as approved in writing by the Secretary of State in consultation with the relevant statutory nature conservation body.	We welcome the amendment to this clause.
	11 (p.99)	11. [Unless otherwise agreed in writing by the Secretary of State, the compensation measures in place for habitat loss as a result the construction 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.]	We continue to disagree with the suggestion that compensation habitat can be decommissioned. To reiterate: given that any compensation measures are to compensate for all harm that will or may be caused and to maintain the integrity of The Wash SPA/Ramsar in line with its Conservation Objectives, any habitat created should be developed to a standard that enables it to become a formal component of those sites and the National Site Network to ensure compliance with regulation 68, Conservation of Habitats and Species Regulations 2017 (as amended), which requires

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			<p>that compensation be secured to ensure the overall coherence of the National Sites Network. We therefore do not agree that compensation measures can be “decommissioned” after a defined period of time, rather, such measures should be maintained in perpetuity</p>
	12 (p.98)	<p>12. 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 information set out in the ornithology compensation measures document 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 compensation measures document.</p>	<p>We are disappointed that “principles” has been amended to “information”. This adds to our concerns about the lack of detail currently before the Examination and the level of detail that the Applicant is proposing to develop post-consent.</p> <p>We repeat, as we provided to the Applicant on the need to develop a derogation case through 2020 onwards (see our Deadline 9 submission (REP9-065)) that sufficient information should be available both to Interested Parties and crucially the Examiners, including confidence that any land required can be secured with appropriate levels of detail with respect to delivery of the compensation measures to provide confidence that they could be effectively delivered and maintained.</p> <p>We also highlighted the uncertainty in the Applicant’s assessment due to the significantly higher vessel speeds that would be allowed along The Haven (up to approximately 12 knots</p>

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			<p>compared to the 6 knots that the Applicant's HRA and derogation case has been built on), as detailed in our cover letter at Deadline 8 (REP8-028). It is therefore not clear if the conclusions made on ecological impacts arising from the Application may be greater than has been set before the Examination. This simply highlights the outstanding level of uncertainty that remains with the Application.</p> <p>We are also disappointed that the role of the OEG has not been set out within this clause. It is essential that where there are amendments that the OEG is consulted and its views used to determine whether the amendments are appropriate. We therefore reiterate our request for the following amendment:</p> <p><i>"Any amendments to or variations of the approved OCIMP must be in accordance with the principles set out in the ornithology compensation plan and <u>following consultation with and the agreement of the OEG</u> 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."</i></p>