

Date: 07 June 2023  
Our ref: Boston Alternative Energy Facility  
Your ref: EN010095



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**BY EMAIL ONLY**

Dear Sir

**NSIP Reference Name: Boston Alternative Energy Facility (BAEF)**

Natural England is a non-departmental public body. Our statutory purpose is to ensure that the natural environment is conserved, enhanced, and managed for the benefit of present and future generations, thereby contributing to sustainable development.

**1. Main areas of concern**

Natural England thanks the Secretary of State for the final opportunity to comment on the BAEF proposal and our outstanding nature conservation concerns. As indicated at the start of Examination Natural England has been unable to advise beyond all reasonable scientific doubt that an Adverse Effect on Integrity (AEoI) can be excluded on The Wash SPA due to impacts on Annex I redshank and waterbird assemblage. Due to insufficient data/evidence being presented on waterbird usage within key areas of designated site and supporting habitats the scale and significance of the AEoI has yet to be fully quantified, and we consider that conducting a robust appropriate assessment will be challenging in these circumstances.

We believe that with the adoption of best practice, mitigation measures and positive environmental measures for Annex II Harbour Seal features of The Wash and North Norfolk Coast SPA [Our response to SoS dated 10th March 2023]; impacts to priority saltmarsh habitats (Section 40 NERC Act 2006) are the only other outstanding issue. Regarding impacts on saltmarsh, our advice remains unchanged from that provided during the Examination.

## 2. Outstanding Ornithological Impacts

It is standard best practice across all sustainable development for 24 months of bird data to be presented where there are potential impact pathways from a plan/project within the boundary of an SPA and/or on functionally linked land utilised by designated bird features. In order to determine the scale and significance of potential impacts, there is an expectation that the survey data is fully analysed prior to the submission of an application.

Whilst this remains an outstanding issue for the BAEF; we advise that even with insufficient baseline characterisation and analysis, the information which has been presented on bird usage, potential construction and operational activities and the level of mitigation measures proposed, there are clear risks of adverse effects. An AEoI on The Wash SPA cannot be excluded. However, the missing data/evidence has hampered NE advising with certainty on the scale of the necessary requirements to offset the impacts should a derogations case be progressed. Therefore, we can only advise in this scenario that a more precautionary approach with a significantly higher ratio than 1:1 is adopted for any compensation measures. Nevertheless, there remains the risk that the compensation does not sufficiently address the impacts because they are not fully understood.

## 3. Derogations Case

At Deadline 2 of the BAEF examination the Applicant submitted an Imperative Reasons of Overriding Public Interest (IROPI) case. Within the document reference is made to the DEFRA HRA guidance <https://www.gov.uk/guidance/habitats-regulations-assessments-protecting-a-european-site#derogation> and whilst they have quoted a part of the IROPI guidance, the section relating to alternative solutions is not provided. Natural England considers it has not been demonstrated that there are no feasible alternative solutions that would be less damaging or avoid damage to the site, and also that there has not been full consideration of all factors including environmental impacts to inform the IROPI test.

**Without further consideration of these tests as advised below we consider that any decision would be at risk from legal challenge.**

### i) Alternative Test

The DEFRA guidance sets out that the competent authority must consider the following: -

**Test 1: Consider alternative solutions**

*To allow a derogation you must decide that there's no alternative solution that would be less damaging to the site.*

*You should work with the proposer and consider whether any alternative solutions are available. This might include considering whether the proposal could:*

- *happen at a different location*
- *use different routes across a site*
- *change its scale, size, design, method or timing*
- *Alternatives must be suitable*

*Alternatives need to meet the original objectives of the proposal.*

*An alternative solution is acceptable if it:*

- *achieves the same overall objective as the original proposal*
- *is financially, legally and technically feasible*
- *is less damaging to the European site and does not have an adverse effect on the integrity of this or any other European site*

Natural England considers that 'alternatives' have not adequately been considered by Applicant, and therefore it has not been sufficiently demonstrated to DESNZ that i) there are no alternative locations available that would be less damaging to the SPA or any other site in the national site network (NSN), and ii) alternative options for disposal of waste and renewable energy sources that would be less damaging to the SPA or other NSN site.

For example, Natural England considers that it has not been demonstrated that waste couldn't be transported over land, or to another existing facility, or to a new facility in a port, which if implemented would reduce/remove the impacts on interest features of The Wash SPA from vessel disturbance/displacement. Natural England also notes from United Kingdom Without Incineration Network's (UKWIN) Deadline 9 and 10 submissions that it is considered that there are alternative options for waste disposal which are more environmentally beneficial, with particular emphasis on the national drive for less incineration and more recycling.

ii) IROPI

Natural England's nature conservation remit means we cannot advise DESNZ whether the project meets the tests of IROPI. We can only highlight that the Secretary of State should be fully satisfied that the project is 'imperative' taking into account legislation, planning guidance, site proposals and national need. The DEFRA guidance provides the following:

**Test 2: Consider imperative reasons of overriding public interest**

*If there are no feasible alternative solutions, you must next be able to show that there are imperative reasons of overriding public interest why the proposal must go ahead. These must justify the proposal, despite the damage it will or could cause to the European site.*

*You must decide if the proposal is:*

- imperative - it's essential that it proceeds for public interest reasons*
- in the public interest - it has benefits for the public, not just benefits for private interests*
- overriding - the public interest outweighs the harm, or risk of harm, to the integrity of the European site that's predicted by the appropriate assessment*

*National strategic plans, policy statements and major projects are more likely to have a high level of public interest and be able to show they are imperative and overriding. Plans or projects that only provide short-term or very localised benefits are less likely to be able to show imperative reasons of overriding public interest.*

With regards to the 'overriding' aspect (3<sup>rd</sup> bullet), we advise that DESNZ should have a full understanding of the anticipated impacts in the context of the ecological value of the site. Again, the insufficient information on impacts to SPA waterbirds presents considerable challenge for evaluating whether the production of 80MW of alternative energy (should this level of energy production be considered 'imperative') would be sufficient to 'override' the impacts on the SPA.

**4. Compensation measures**

If the Secretary of State is satisfied that there is an absence of alternatives and there is IROPI and wishes to consent the proposals, then compensatory measures are required. Section 68 of the Conservation of Habitats and Species Regulations 2017 states that the *“appropriate authority must secure that any necessary compensatory measures are taken to ensure that the overall coherence of Natura 2000 is protected.”*

In addition, to the DEFRA HRA guidance, Natural England has developed a checklist of those aspects of compensatory measures that need to be described in detail. Whilst not exhaustive, it lists key areas where sufficient detail is needed to provide the Secretary of State with appropriate confidence that compensatory measures can be secured.

<b>Checklist</b>	<b>Advice on the BAEF proposals</b>
<b>a) What, where, when: clear and detailed statements regarding the location and design of the proposal.</b>	Natural England advises that whilst potential locations have been identified, the design of the compensation in those areas remains too high-level. Whilst the experience of nature conservation organisations indicates that creation of wetland habitats is feasible, for the
<b>b) Why and how: ecological evidence to demonstrate compensation for the impacted</b>	

<p><b>site feature is deliverable in the proposed locations</b></p>	<p>proposal in question there is insufficient evidence at this stage that suitable habitat for the bird species impacted can be created and maintained prior to the impacts occurring, over the lifetime of the project and potentially beyond.</p> <p>Natural England draws the Secretary of State's attention to the RSPB's post-examination submission which sets out the necessary resource requirements and challenges for the creation and maintenance of a similar bird habitat in the Boston area.</p> <p>In addition, we have concerns with regards associated direct and indirect habitat change/loss of Annex I features of The Wash and North Norfolk Coast SAC from the creation of areas of hard standing/groynes. This will require a full HRA to be completed and a marine licence from the MMO due to structures being placed on the seabed. We consider that DESNZ would need to be confident that AEOI on the SAC can be avoided before mandating these measures. However, at this stage it is entirely unclear whether the construction and presence of these structures will result in adverse effects on the SAC arising, and therefore Natural England consider that these not be included in the compensatory package.</p>
<p><b>c) For measures on land, demonstrate that on the ground construction deliverability is secured and not just the requirement to deliver in the DCO e.g., landowner agreement is in place. For measures at sea, demonstrate that measures have been secured e.g., agreements with other sea or seabed users.</b></p>	<p>As per our previous advice we do not believe that the necessary land-owner agreement has been secured. In addition, a key requirement of the proposed compensation measure is maintaining water levels. It is not clear from the proposals how this will be achieved, where the required water supply is intended to be sourced from, and whether or not the necessary environmental permits and/or</p>


	marine licences can be secured from the relevant regulators.
<b>d) Policy/legislative mechanism for delivering the compensation (where needed)</b>	Please see previous point in relation to further environmental permits and consents.
<b>e) Agreed DCO/DML conditions</b>	Please see our previous advice [dated 25 May 2023] on the DCO requirements for compensatory measures to not only be in place, but delivering its ecological benefits, prior to impacts occurring. This relates to the uncertainties identified within this table.
<b>f) Clear aims and objectives of the compensation</b>	<p>Natural England advises that due to insufficient data/ evidence presented on bird usage within key areas of designated site and supporting habitats the scale and significance of the AEoI has yet to be fully quantified.</p> <p>It is also our view that the proposed compensation measures will not offset the impacts to all bird species.</p>
<b>g) Mechanism for further commitments if the original compensation objectives are not met – i.e., adaptive management</b>	Natural England advises that there needs to be certainty at the consenting phase that adaptive management options are available and deliverable. Limited information on this point has been provided
<b>h) Clear governance proposals for the post-consent phase – we do not consider simply proposing a steering group is sufficient</b>	Natural England notes that much of the detail and agreement has been pushed to the post-consent phase with no guarantee that it is technically feasible and deliverable. This being the case it is hard to see how the measures can be considered secured. Natural England notes the RSPB's post examination submission which sets out the necessary requirements for the creation and maintenance of a similar bird habitat in the Boston area.
<b>i) Ensure development of compensatory measures is open</b>	This information has not been provided.

<b>and transparent as a matter of public interest, including how information on the compensation would be publicly available</b>	
<b>j) Timescales for implementation especially where compensation is part of a strategic project, including how timescales relate to the ecological impacts from the development</b>	Please see our previous advice on the DCO requirements for compensatory measures to not only be in place, but delivering its ecological benefits, prior to impacts occurring. This relates to the uncertainties identified within this table.
<b>k) Commitments to ongoing monitoring of measure performance against clear objectives with specified success criteria</b>	This is yet to be determined especially as the level of compensation required cannot be agreed.
<b>l) Proposals for ongoing ‘sign off’ procedure for implementing compensation measures throughout the lifetime of the project, including implementing feedback loops from monitoring.</b>	This information has not been provided.
<b>m) Continued annual management of the compensation area, including to ensure other factors are not hindering the success of the compensation e.g., changes in habitat, increased disturbance as a result of subsequent plans/projects.</b>	This information has not been provided.

## Conclusions

- Natural England’s advice previously provided into examination, and subsequently, remains unchanged in relation to requiring sufficient information to determine the full scale and significance of the impacts.
- We advise that the evidence/data gap and uncertainties warrant a more precautionary approach to any derogations case under Article 6.4 of the Habitats Regulations.
- Without further evidence to support the alternative test and to demonstrate nationally imperative reasons for the project to progress; we consider that there a risk of legal challenge and a significant risk of setting a precedent for future plans/projects.
- We advise that limited reliance can be placed on the proposed compensation measures because not only is there insufficient evidence regarding the impacts on SPA waterbirds, but insufficient

details, assurances and agreements in place for the Secretary of State to have confidence in the feasibility and deliverability of the proposed compensation measures.

If you have any queries relating to the advice in this letter, please contact Andy Stubbs at  [@naturalengland.org.uk](mailto:andy.stubbs@naturalengland.org.uk)

Yours faithfully

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