

16<sup>th</sup> June 2022

National Infrastructure Planning

The Planning Inspectorate

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Dear Sirs

**Planning Act 2008 and the Infrastructure Planning (Examination Procedure) Rules 2010**

**Application by Ørsted Hornsea Project Four Limited ("the Applicant") for an Order granting Development Consent for the proposed Hornsea Project Four Offshore Wind Farm ("HOW4")**

I refer to the Examining Authority's letter dated 14 April 2022 addressed to the Applicant and BP Exploration Operating Company Limited (bp) and issued under Rule 17 of the Infrastructure Planning (Examination Procedure) Rules 2010. This followed the Issue Specific Hearing on the draft Development Consent Order, which was held on 12 April 2022 and included a request for the Applicant and bp to provide legal submissions and supporting evidence on the issue of whether the Interface Agreement should be set aside by the Order.

As the Examining Authority will be aware, the Interface Agreement governs the activities associated with both HOW4 and the Northern Endurance CCUS Project in an area of overlapping seabed known as the Overlap Zone and was entered into by the promoters of those projects (roles that are now fulfilled by the Applicant and bp) and The Crown Estate. As party to the Interface Agreement, The Crown Estate has taken a keen interest in the submissions and representations on the issue of whether it should be set aside by the Order, including the Position Statement agreed between the Applicant and bp submitted for Deadline 1, bp's Response to Deadline 3, bp's Response to Deadline 4 and most recently, the Applicant's comments (dated 10 June 2022) on bp's legal submissions in response to Deadline 5.

I am writing in order to ensure that the Examining Authority's further consideration of this issue is informed by the position of The Crown Estate on the following matters:

- The nature of The Crown Estate's interest in the Interface Agreement
- The suggested powers of the Secretary of State to include provision in the Order for setting aside the Interface Agreement
- If such a provision were to be included in the Order, the need for The Crown Estate's consent

### **The Crown Estate's interest in the Interface Agreement**

The Interface Agreement was completed simultaneously with The Crown Estate entering into the agreement for lease for the proposed CCUS Project on 14 February 2013. Prior to this date (on 22 December 2009) The Crown Estate had concluded a Zone Development Agreement (ZDA) in respect of Offshore Wind Leasing Round 3 Zone 4 and subsequently, an agreement for lease for HOW4 was entered into on 3 March 2016 pursuant to the ZDA. The agreement for lease for the CCUS Project and the agreement for lease for HOW4 each contain an obligation to adhere to the Interface Agreement.

As the recitals to the Interface Agreement make clear, its provisions were intended to manage and co-ordinate the activities associated with Zone 4 (which now includes HOW4) and the CCUS Project and to manage and resolve any conflicts between the two. The Interface Agreement provides certainty and clarity in relation to the operation of the Applicant's and bp's respective agreements for lease in circumstances where there are conflicts between the two projects in the Overlap Zone. With the ZDA already in place, the Interface Agreement was a required pre-requisite to The Crown Estate's decision to enter into the agreement for lease for the CCUS Project.

The Examining Authority already have the benefit of seeing a copy of the Interface Agreement and the summary produced by bp's solicitors (included at Appendix 3 to bp's Response to Deadline 3) but The Crown Estate wishes to draw the Examining Authority's attention to the following provisions of the Interface Agreement:

- The promoters (i.e., the Applicant and bp) acknowledge and accept that The Crown Estate may approve the siting of one promoter's infrastructure in the Overlap Zone under that promoter's agreement for lease before the other promoter has submitted details of its infrastructure for approval under its agreement for lease.

- The promoters also acknowledge and accept that The Crown Estate may withhold approval for the siting of proposed infrastructure by one party in the Overlap Zone under the relevant agreement for lease and specifically, that The Crown Estate may do so in the following circumstances:
  - If the siting of infrastructure conflicts with a use which is current at the time of the submission for approval; and
  - Where The Crown Estate has already approved the siting of the other party's infrastructure or activities in the same location or in close proximity to the proposed infrastructure.

In the second of these circumstances, The Crown Estate may continue to withhold approval until the two promoters have reached commercial agreement or, failing that, the potential conflict between the two sets of infrastructure has been resolved in accordance with the Interface Agreement.

- The Interface Agreement confirms that where the promoters reach commercial agreement this must be documented in writing and The Crown Estate will withhold consent for the siting of infrastructure under an agreement for lease until the commercial agreement has been executed and a copy provided to The Crown Estate.
- Where the location of proposed infrastructure is the subject of expert determination under the Interface Agreement, there is provision for the withholding of consent by The Crown Estate for the siting of infrastructure under the relevant agreement for lease until one of a number of outcomes have occurred.
- The promoters also agree that they will not bring any claim, action, proceedings or demand against The Crown Estate (under their agreements for lease or otherwise) in relation to any matter determined under the Interface Agreement (by the promoters themselves or by an expert in the event of dispute).

In summary, these provisions set out how The Crown Estate will approach approval of the siting of infrastructure under each of the agreements for lease in the event of any actual or potential conflicts between the CCUS Project and HOW4 in the Overlap Zone and specifically allow The Crown Estate to refuse approval in the event of such conflicts. They also make clear that the responsibility for resolving any conflict rests with the promoters themselves and not The Crown Estate and that the promoters will not make any claim against The Crown Estate under the agreements for lease (or otherwise) where it relates to any determination or resolution of a conflict under the Interface Agreement.

We note that bp wish to disapply the Interface Agreement through protective provisions in the Order and that in support of this, bp suggest that there is no adverse impact on The Crown Estate through the disapplication of the Interface Agreement - see paragraph 15.13 of the summary of bp's position included in the Position Statement agreed between the Applicant and bp and submitted for Deadline 1.

The Crown Estate does not accept this. The Interface Agreement and the specific provisions identified above provide a material benefit to The Crown Estate and their disapplication would have an adverse impact on The Crown Estate. This would remove the clarity and certainty that the Interface Agreement provides in relation to the operation of the agreements for lease and the rights and obligations under them, where there is conflict between the CCUS Project and HOW4 in the Overlap Zone.

Until the parties agree otherwise, the Interface Agreement remains the contractual vehicle through which conflicts in the Overlap Zone are to be resolved. The Crown Estate considers that its disapplication is not necessary for HOW4 to be consented and delivered.

### **The Powers of the Secretary of State**

The Crown Estate has reviewed the submissions of bp on the question of the disapplication of the Interface Agreement in bp's response to Deadline 3 (including the scope of section 120(3) of the Planning Act 2008) as well as the Applicant's comments on bp's legal submissions in response to Deadline 5.

The Crown Estate is in agreement with the Applicant: section 120(3) may not be used to disapply the Interface Agreement without provision for compensation.

Without duplicating the Applicant's comments, The Crown Estate is of this view for the following reasons:

- The Crown Estate accepts that Section 120(3) is a broad power but it is constrained: any provision included in a development consent order in reliance on Section 120(3) must still relate to the development for which consent is granted or to matters ancillary to the development.
- The Crown Estate agrees that protective provisions for the CCUS Project are within the scope of Section 120(3) but does not accept that this power allows the Secretary of State to include in the Order a provision which has the effect of setting aside the Interface Agreement in circumstances where bp has voluntarily agreed to the rights and obligations under that same Agreement. Such an outcome would be unreasonable and disproportionate, as well as unprecedented.
- The proposal to extinguish the rights and obligations of bp, the Applicant and The Crown Estate (including rights to compensation as between bp and the Applicant) and to remove the framework for how the relevant agreements for lease should operate in the event of a conflict in the Overlap

Zone is not necessary for the development which is the subject of the application (i.e., HOW4) to proceed; the effect of disapplying the Interface Agreement would be to improve the financial viability of the CCUS Project and that is not related or ancillary to the development of HOW4 in the sense those terms are used in Section 120(3).

- Interpreting Section 120(3) in a way which allows the Interface Agreement to be overridden without payment of compensation would not be consistent with the remaining provisions of the Planning Act 2008 and would be contrary to Section 3 of the Human Rights Act 1998, which requires primary legislation and subordinate legislation to be read and given effect in a way which is compatible with the Convention rights. The Applicant has made extensive legal submissions on the infringement of Convention rights and the public interest and The Crown Estate does not wish to comment further on this. However, with regard to the issue of consistency with the remainder of the Planning Act 2008:
  - In the context of compulsory acquisition of land, Section 126(3) of the Planning Act 2008 provides that an order shall not exclude compensation. There is no reason compulsory extinguishment of private contractual rights should be treated any differently.
  - Consistent with this approach, in the non-exhaustive list of matters which may be covered by Section 120(3) in Schedule 5 of the Planning Act 2008, there is express provision for compensation alongside matters such as the abrogation or modification of agreements relating to land.
  - There are well-established rules concerning the interpretation of legislation including a presumption that the common law position is unaltered, as well as a presumption that in the absence of express provision in legislation or necessary implication, the liberty of individuals is not restricted and property rights are not interfered with without compensation. There is nothing in the Planning Act 2008 which either expressly or by necessary implication mandates interference with private contractual rights without compensation whether under Section 120(3) or otherwise.

#### **The Crown Estate's consent**

If the Examining Authority or the Secretary of State were to take the view that disapplication of the Interface Agreement is both necessary and within the scope of Section 120(3) then the inclusion of such a provision in the Order will require the consent of The Crown Estate under Section 135(2) Planning Act 2008. This is on the basis that either the Interface Agreement relates to Crown land (i.e., the seabed in the Overlap Zone) or, for the reasons detailed above, the provision would affect rights benefiting The Crown Estate.

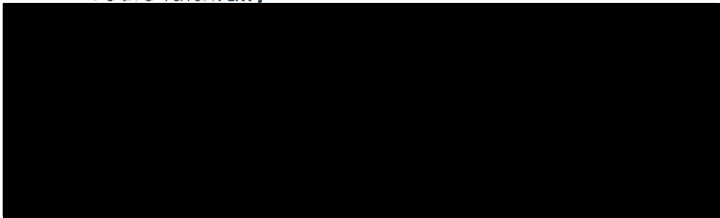
## **Conclusion**

Until and until all the parties agree otherwise, the Interface Agreement remains the contractual vehicle through which to resolve conflicts between the CCUS Project and HOW4 and provides clarity and certainty to all parties around the operation of the relevant agreements for lease where there is an actual or potential conflict in the Overlap Zone. The Crown Estate has rights and benefits under the Interface Agreement which would be lost if that agreement were disappplied.

The Crown Estate takes the view that disapplication of the Interface Agreement is neither necessary for HOW4 to proceed nor justified. In addition, The Crown Estate's view is that disapplying the Interface Agreement - particularly without compensation - is not within the scope of the power under Section 120(3) of the Planning Act 2008.

If, notwithstanding this, either the Examining Authority or the Secretary of State considers that the Order should contain a provision which has the effect of disapplying the Interface Agreement then The Crown Estate considers that its consent will be required under Section 135(2).

Yours faithfully



**Simon Goodwin**

Head of Marine Delivery