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Dear Mr Wagstaff

Hornsea Project Four Development Consent Order Application - Response to letter of 16 December 2022 - protective provisions update

We write on behalf of our client, BP Exploration Operating Company Limited ("bp") in response to the queries raised in your letter of 16 December 2022 with regard to bp's position on protective provisions.

1. bp's position with regard to the protective provisions

Following the close of the examination, bp (on behalf of the Northern Endurance Partnership ("NEP") partners) and Orsted have been engaged in negotiations in an effort to reach a voluntary agreement. If such an agreement is reached the protective provisions in the Hornsea Project Four Development Consent Order ("DCO") should be much simpler than those discussed during the examination. They would provide solely for the Exclusion Area and 'Notification Area' (as detailed in bp's submissions), without the remainder of the protective provisions proposed by bp or Orsted.

There has been significant movement from both sides in the negotiations, but there remains a gap between the NEP partners and Orsted with regard to commercial terms. With Orsted's consent, bp has updated BEIS's CCUS team, which is responsible for developing the TRI model, with respect to the current commercial positions of the NEP partners, Orsted and the Crown Estate in the negotiations. Given the commercially sensitive nature of that information, it is not being provided to the Secretary of State in response to your letter of 16 December.

Pending any commercial agreement, bp's position with respect to protective provisions remains as set out in its submissions to the examination. For ease of reference, a summary of that position with respect to the three specific queries raised in your letter of 16 December is set out in the Appendix to this letter.

As explained throughout the examination[1], in the event that wind turbines are built or authorised by the DCO to be built within the Exclusion Area, the Endurance Store could only be developed to a limited extent such that it would only achieve approximately 30% of its potential capacity. Granting the DCO without protective provisions in bp's proposed form will therefore result in the loss of up to 70% of the Endurance Store's capacity, which would in turn render the East Coast Cluster ("ECC") plan unviable. This loss of 10 – 11 million tonnes per annum of CO2 injection capacity represents more than 50% of the Government's minimum CCUS capacity target for 2030[2] and would therefore be a significant blow to the Government's target of net zero by 2050 and a huge lost opportunity for the UK.

We urge the Secretary of State in the strongest possible terms to consider this when determining the form of protective provisions to impose on the DCO, if granted.

Orsted has confirmed during the examination that Hornsea Project Four would still be viable (just less competitive) if Orsted were unable to use the Exclusion Area[3]. The form of protective provisions put forward by bp would therefore enable the delivery of both the ECC plan *and* a viable wind project in adjacent areas of seabed. This clearly, therefore, represents the best position overall in the public interest.

2. Determination of the Hornsea Project Four DCO application

The Secretary of State's determination of this DCO application clearly has great significance for two nationally important projects and has implications for the UK's delivery of its CCUS capacity target for 2030 and net zero target for 2050[4]. bp appreciates the importance of the statutory deadline for determination of the DCO application (22 February 2023) but would be supportive of a time extension should the Secretary of State believe this is warranted given the progress made recently towards a resolution between the parties.

3. Necessary revisions to Orsted's protective provisions if the Secretary of State is minded to prefer Orsted's case

In the event that the Secretary of State were minded to grant the DCO and favour Orsted's preferred protective provisions, particularly regarding the proposal that a determination by the Secretary of State of the feasibility of co-existence in the overlap area be deferred until after the grant of the DCO, we request that bp is provided with an opportunity to suggest revisions to Orsted's protective provisions to ensure that they do in fact provide for this deferred determination. As set out in bp's previous submissions[5] and elaborated upon in the response to question (c) in the Appendix to this note, no such mechanism is provided for in the protective provisions as drafted by Orsted and so would require amendment to achieve this.

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1 See e.g. section 3 (electronic pages 1 – 2) of bp's Response to Deadline 5 – REP5-091
2 See the UK's Net Zero Strategy, "Build Back Greener" (Oct 2021)
3 See e.g. Orsted's response to question INF.2.1 (electronic pages 43 – 45) in Orsted's Responses to the ExA's Second Written Questions – REP5-074
4 n. 2
5 See paras. 7.7 – 7.8 (electronic page 12) and 5.10 – 5.14 (electronic page 35) of bp's Deadline 5a submission – REP5a-025

The work bp has carried out over the past two years, which is supported by the conclusions of the North Sea Transition Authority's report on co-location of wind and CCUS[6], leads bp to believe there will be no changes in technology in the medium-term which could enable co-existence of the two projects in an area of overlap[7]. Therefore, bp is confident that the Secretary of State (or a suitably qualified arbitrator) would determine that it is necessary to impose the Exclusion Area on Orsted to protect the Endurance Store.

However, it should be noted that in this scenario where the Secretary of State has opted to favour Orsted's approach and concludes that co-existence is not feasible and so subsequently imposes the Exclusion Area, this would still leave outstanding the substantial issues bp have identified with the on-going existence of the Interface Agreement.

bp's fundamental concern with Orsted's protective provisions as regards compensation would remain unaddressed, potentially leading to the inability of the NEP partners to utilise the full extent of the Endurance Store so rendering the delivery of the ECC plan unviable, with the significant impact on the Government CCUS and net zero targets outlined above. Orsted's protective provisions have made no attempt to engage on this component of the submissions and remain flawed by consequence.

The NEP partners will still need certainty that: (i) they will not bear the cost of paying compensation to Orsted at a level that could render the full utilisation of the Endurance Store, and thus the ECC plan, unviable; or (ii) any such compensation is determined by BEIS as TRI regulator to be economic and efficient and thereby allowed to be passed on to CCUS local industry users. The form of protective provisions bp has put forward replaces the uncapped and unquantified compensation under the Interface Agreement with provisions which instead allow the Secretary of State to determine an amount of compensation which balances the commercial interests and viability of the two projects[8]. However, in the event that this approach is not favoured by the Secretary of State and no provision is made as regards the risk of a significant compensation liability to the NEP partners, bp's position remains, as set out in its submissions[9], that the risk of such significant compensation would in all likelihood lead to the NEP partners electing not to develop the part of the Endurance Store within the Exclusion Area, rendering the ECC plan unviable. In the event that the Secretary of State is inclined to this course of action, bp would request the opportunity to propose changes to Orsted's protective provisions to try and mitigate this highly detrimental outcome, though bp cannot currently see that workable changes could be anything less than substantial.

3. Crown Estate – s135 consent

As noted above, bp's protective provisions would **not** disapply the Interface Agreement but would remove bp's liability to Orsted under it (providing, in lieu of this liability, for bp to make a compensation payment to Orsted to be determined by the Secretary of State). Nevertheless, the Crown Estate considers that its consent is still required in order to authorise such a provision, pursuant to s135(2)

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6 Submitted by Orsted at Deadline 7 as Annex 4 (electronic page 88) of their bp Closing Remarks – REP7-087

7 See further at section 3 (electronic page 6) and Annex 2 (electronic page 21) of bp's Response to Deadline 8 – REP8-023

8 See paras. 3.15 – 3.27 (electronic pages 6 – 8) of bp's Response to Deadline 6 – REP6-046 and the most recent version of bp's proposed protective provisions in Annex 3 (electronic page 43) of bp's Response to Deadline 8 – REP8-023

9 See e.g. paras. 3.2 – 3.12 (electronic pages 4 – 5) of bp's Response to Deadline 6 - REP6-046

Planning Act 2008. The Crown Estate has previously stated[10] that it is willing to review its position on consent depending on the recommendations of the Examining Authority and the position of the Secretary of State. bp has pointed out to the Crown Estate that the Secretary of State will not ordinarily give an indication of its position prior to actually making and publishing its decision. It would therefore be appropriate instead for the Crown Estate to confirm to the Secretary of State that it gives its consent pursuant to s135(2) on a contingent basis. This approach would give effect to the intention of the Crown Estate, which is seemingly to not stand in the way of the Secretary of State's granting of the DCO with bp's form of protective provisions if the Secretary of State considers this appropriate.

We would therefore recommend that the Secretary of State asks the Crown Estate to give its consent on this contingent basis, or to otherwise justify and explain why it is unwilling to do so.

Yours faithfully

[redacted]

Catherine Howard
Partner

Herbert Smith Freehills LLP

[10] Including in its letter to the Planning Inspectorate of 16 August 2022, at REP8-025

Appendix

Responses to questions with regard to protective provisions

The following responses address the questions raised by paragraph 6 of BEIS's letter of 16 December 2022:

(a) Whether or not there should be an exclusion area and notification area

bp's position remains that the Exclusion Area and Notification Area (as provided for in bp's protective provisions[11]) are required in the final protective provisions. Even if a commercial agreement is reached with Orsted, bp would wish these areas to be provided for by way of protective provisions on the face of the DCO.

The justification for an exclusion and notification area was originally set out at Deadline 1 (REP1-057) (Appendix 2, bp's position statement as part of the 'joint position statement' submitted with Orsted). In particular, sections 6 to 8 (electronic pages 125 – 132) explain the technical reasons why the 'Exclusion' and 'Notification' areas are required. This submission then formed the basis of a number of counter-submissions between the parties on the 'technical' issues underlying the interface, the most recent response to which was set out in bp's Response to Deadline 8 (REP8-023), section 3 (electronic pages 6 – 7) and Annex 2 (electronic page 21 onwards), which cross-refers to earlier submissions on the matter where relevant.

In particular, contrary to what Orsted has claimed, co-existence cannot occur across the entirety of the Overlap Area because having wind turbines in the Exclusion Zone means:

1. the combined access requirements for Endurance could not be satisfied in terms of:
    a. helicopter access for routine and emergency purposes;
    b. access for drilling rigs (for drilling new wells and for maintenance of existing wells);
    c. access to drill (if necessary) relief wells;
    d. access to other seabed infrastructure (e.g. for maintaining pipelines on the seabed); and
2. NEP would be prevented from using towed streamers to acquire the 3D seismic data that is needed to provide the quality of data necessary to evidence CO_2 migration and settlement and thereby ensure conformance and containment of the CO_2 plume.

(b) Whether or not the interface agreement should be retained

Unless a commercial agreement is reached with Orsted which subsumes, supersedes or replaces the Interface Agreement, bp's position remains that protective provisions should be included within the DCO which remove bp's liability to Orsted under the terms of the Interface Agreement.

It is important for the Secretary of State to note that bp is not seeking to disapply the Interface Agreement in its entirety, but just to remove bp's liability to Orsted pursuant to it.

bp's Response to Deadline 6 (REP6-046), particularly section 3 and paras. 3.15 to 3.50 (electronic pages 4 – 10), explains bp's proposed approach to providing for specific compensation in lieu of the existing compensation provisions/liability under the Interface Agreement and cross-refers to previous submissions which informed the same. bp provided additional response at section 2 (electronic pages 3 – 6) of its Response to Deadline 8 (REP8-023) to address Orsted's comments on the same.

[11] Annex 3 (electronic page 43) of bp's Response to Deadline 8 – REP8-023

(c) The period of time after which the provisions for the benefit of the carbon store licensee would fall away

bp's Response to Deadline 6 (REP6-046), paragraphs 3.28 to 3.31 (electronic page 8), sets out bp's position in relation to the proposed cessation of bp's protective provisions. It highlights the contrast with Orsted's equivalent drafting, which bp had previously commented upon (on a without prejudice basis) at para 6.6.1 of its Response to Deadline 2 (REP2-062) (electronic page 10).

The points made in these submissions continue to represent bp's position. In the event, however, that the Secretary of State is minded to prefer the case presented by Orsted at examination, we request that the Secretary of State provides bp with an opportunity to suggest changes to the drafting of Orsted's protective provisions, to attempt to mitigate some of their flaws in achieving what Orsted claims they achieve.

Firstly, the drafting of paragraph 2 of Orsted's protective provisions, which purports to set out the circumstances in which the protective provisions no longer have effect, is defective[12]. It states that:

> 2. In the event that –
>
> (a) the licence is terminated and no longer has effect;
>
> (b) the consents required to develop the NEP Project are not obtained within four months of the coming into force of this Order; or
>
> (c) the licensee has not undertaken and completed the evaluation and shared that with the undertaker,
>
> the obligations on the undertaker in this Part of this Schedule shall no longer have effect.

We assume that the intention is that the protective provisions fall away if any one of these events occurs. However, there are several immediate concerns:

(i) The "consents" in paragraph 2(b) are not defined but must, we assume, include BEIS's Cluster FID decision (which, according to BEIS's current timeline, is scheduled for March 2024 – later than Summer 2023, which was previously envisaged and which was discussed in bp's submissions) and the granting of a store permit for the Endurance Store which Orsted is also aware will fall well outside the four month period referred to (the application being due to be made after the determination of the Hornsea Project Four DCO and taking approximately 6 months thereafter for the NSTA to determine). As drafted by Orsted, the protective provisions no longer have effect if either of these consents is not granted within 4 months of the coming into force of the DCO. In reality, therefore, Orsted's protective provisions offer no protection to the NEP project at all.

(ii) It is not clear what the deadline is for NEP to complete the "evaluation" in paragraph 2(c), which is defined as an extensive set of assessments which seem intended to address the question of whether co-existence of the two projects is possible in an area of overlap. The term "evaluation" is not used anywhere else in the operative provisions of the Schedule.

There also appear to be no provisions at all requiring this "evaluation" information to be shared with the Secretary of State. The breadth of the studies and field trials defined as part of the "evaluation" are in any event unrealistically wide-ranging, costly and time-consuming

[12] See paras. 7.7 – 7.8 (electronic page 12) and 5.10 – 5.14 (electronic page 35) of bp's Deadline 5a submission – REP5a-025

and therefore do not represent the sort of information which it would be possible to gather and present for the purpose of a post-DCO assessment of the viability of co-existence.

Secondly, there is no operative provision which provides for the Secretary of State to make a determination of the requirement or otherwise for an Exclusion Area. There is reference to dispute resolution (paragraph 11 of Orsted's protective provisions) but this relates only to circumstances where the parties do not agree "whether a crossing and proximity agreement is required pursuant to paragraph 4(b)". Paragraph 4(c) gives the Secretary of State the right to "determine that a coexistence and proximity agreement is not required", but what it does not provide for is a determination by the Secretary of State as to whether an Exclusion Area is required, based on information provided at the time.

We have not offered a mark-up of Orsted's version of the protective provisions to date because bp's case remains, fundamentally, that Orsted's approach will prevent delivery of the full Endurance Store and therefore of the ECC plan even if corrections were made to their provisions. As explained in the main body of this letter, if the Secretary of State wishes to defer the decision as to whether to impose an Exclusion Area until after the grant of the DCO but does not make provision for the risk of significant compensation, this risk would remain.