Hornsea Project Four

Net Zero Teesside Development Consent Order

Comments on the Applicant's Submissions at Deadline 8 and 11

Deadline: 12, Date: 01 November 2022

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1 Introduction

1.1 At Deadline 9, in REP9-033, Orsted Hornsea Project Four Limited ("Hornsea Four") sought clarification from Net Zero Teesside Power Ltd and Net Zero North Sea Storage Ltd ("the Applicant") on points raised in its comments on the legal advice of Richard Harwood KC submitted at Deadline 8 (REP8-049).

1.2 The Applicant has provided its response to those points of clarification, and has also provided a response to the legal advice of James Maurici KC submitted by Hornsea Four at Deadline 8 (REP11-014).

1.3 This submission sets out Hornsea Four's comments in response to the Applicant's submission made in REP8-049 and REP11-014 in so far as they are applicable to Hornsea Four .

2 Response to the Applicant's Comments at Deadline 8

2.1 Having considered the Applicant's position in response to the advice of Richard Harwood KC, there is nothing within that submission that changes Hornsea Four's position in relation to the need for protective provisions for the benefit and protection of Hornsea Four. As such, Hornsea Four's position is not repeated in full in this submission. Hornsea Four's position on this matter is set out in the following documents:

2.1.1 REP1-052 Written Summary of Orsted Hornsea Project Four Limited's Oral Case at Issue Specific Hearing 2

2.1.2 REP2-089 Written Representation

2.1.3 REP2-092 Legal Submission Note

2.1.4 REP5-022 Position Statement

2.1.5 REP5-038 Written Summary of Orsted Hornsea Project Four Limited's Oral Case at Issue Specific Hearing 3

2.1.6 REP6-139 Hornsea Four Responses to ExQ2 (which included the legal advice of Richard Harwood KC)

2.1.7 REP8-056 Comments on the Applicant's Submissions at Deadline 7

2.2 However, there are matters raised in the Applicant's Deadline 8 submission on which Hornsea Four would like to further respond. These are set out below.

2.3 The Applicant, at paragraph 6.2.21 of its comments on the Deadline 7 submissions, states in response to paragraph 23 of the Richard Harwood KC Advice, that no explanation has been provided regarding the adequacy of the assessment provided by the Applicant of the impacts of the wider NEP Project on Hornsea Four Offshore Wind Farm (REP8-049). Hornsea Four has clearly set out that it disagrees with the conclusions of the assessment, based on its position that the suggested mitigation would not be appropriate, as it would impact on the renewable energy contribution and render the project far less commercially competitive. Even with application of the mitigation

suggested by the Applicant therefore, a significant adverse effect would be experienced. Hornsea Four's position on this is set out in the following documents:

2.3.1 REP2-089 Written Representation

2.3.2 REP5-037 Comments on the Applicant's Submissions at Deadline 4

2.3.3 REP7-016 Comments on the Applicant's Submissions at Deadline 6

2.4 In addition, paragraph 31 of the Richard Harwood KC Advice makes the point that if it were possible to have more or larger turbines, then that could be done in any event, which would still therefore result in the loss of wind turbine capacity in the Overlap Zone should Hornsea Four Offshore Wind Farm be excluded from developing in that area.

2.5 At paragraph 6.2.27 of the Applicant's comments on the Deadline 7 submissions, the Applicant states:

2.5.1 *"the Applicant's position has always been that the project includes the storage and injection of CO2 into part of the Endurance Store, and that the part of the store that is required for storage of CO2 from the "proposed development" (the DCO project) lies largely outside of the Overlap Zone. That being the case, the EIA "project" (the DCO project and the transportation and injection of CO2 from that project into the Endurance Store) is viable and deliverable without affecting HP4."*

2.6 The Applicant clarified, in REP11-014 that based on forecast modelling, it is anticipated that the CO2 would settle within the crest of the Endurance Store which is outside the Overlap Zone, but that this could initially migrate outside of the crest and into part of the Overlap Zone. It is noted that the Applicant considers this to be *de minimis* and not material.

2.7 The Applicant's definition of project differs to that which Hornsea Four considers to be the project in EIA terms. This is set out in paragraphs 15 to 22 of the Richard Harwood KC Advice and concludes that *"the project is therefore the NZT Teesside DCO scheme and the CO_2 Endurance store and offshore infrastructure required for it to proceed."*

2.8 Hornsea Four considers the way in which the Applicant has defined the project by limiting the extent of the project to where the CO_2 emissions from the Proposed Development will be stored artificially cuts out a key component of the overall project, being the storage of CO_2 in the Endurance Store from the other emitters whose CO_2 emissions will be compressed and transported via infrastructure

to be consented by the NZT DCO. The reasons why this forms part of the project are set out in paragraph 18 of the Richard Harwood KC Advice, as follows:

"(a) the power station in the DCO scheme relies on CO2 being stored in Endurance;

(b) the DCO includes the compression equipment and part of the pipeline for the Teesside end of the store;

(c) whilst not essential to the conclusion that it is a single project, the Teesside compression equipment and the store will serve other CO2 generators in addition to the generating station;

(d) and draft DCO requirement 31(1) at Schedule 2 requires the Endurance CO2 store to be licenced and the pipeline consented before all but permitted preliminary works on the development proceed:

> "No part of the authorised development other than the permitted preliminary works may commence until evidence of the following (or such licence or consent as may replace those listed) has been submitted to and approved by the relevant planning authority—
>
> (a) that the carbon dioxide storage licence has been granted;
>
> … and
>
> (c) that any pipeline works authorisation required by section 14 of the Petroleum Act 1998 for offshore pipeline works from Work No. 8 to the carbon dioxide storage site has been granted."

2.9 Even if the Applicant's interpretation of the project was to be preferred, there is no guarantee that Co_2 form the Proposed Development would not settle in the Overlap Zone, as the Applicant notes at paragraph 9.4.9 of REP11-014 that "actual settlement will only be capable of being definitively confirmed following detailed monitoring - the terms of which will be governed pursuant to the relevant offshore consents. Based on the response from the applicant, the potential use of the Overlap Zone for the storage of CO_2 from the Proposed Development is at best uncertain.

2.10 The Applicant has asserted, in multiple submissions and at the Issue Specific Hearings, that Hornsea Four has not justified its reasons for seeking protective provisions. This is disputed.

2.10.1 Hornsea Four has set out the justification for protective provisions to be secured in its favour clearly in the submissions noted at paragraph 2.1 above. While the Applicant may disagree with the reasoning, it cannot be said that no case has been put forward. Hornsea Four maintains its position as set out within previous written submissions.

3 Response to the Applicant's Comments at Deadline 11

3.1 The Applicant, in REP11-014 provided its response to the James Maurici KC legal submission submitted by Hornsea Four at Deadline 8 (REP9-032), referred to as the "Further JMKC Submissions".

3.2 The Applicant contends that:

3.2.1 *"The Further JMKC Submissions do not dispute the central proposition of the JCKC Opinion that it would be rational for the Secretary of State to conclude that the substantial public interest in preserving the viability of the ECC Plan may justify an interference (encompassing below, for ease*

of reference, interference, deprivation or control of use) with Orsted's contractual rights under the Interface Agreement ("IA").” and

3.2.2 *"The Further JMKC Submissions do not dispute that on the evidence before the Secretary of State the terms of the IA pose a real and significant risk to the ECC Plan, nor that there is substantial public interest in the ECC Plan proceeding.”*

3.2.3 The Further JMKC Submissions set out the legal position that a measure can pursue what is self-evidently a legitimate aim that is in the public/general interest but still be found to be disproportionate if it imposes "an individual and excessive burden". This is not conceding that the aim stated by the Applicant is legitimate.

3.2.4 On an objective assessment of the material submitted, Hornsea Four considers that the Applicant has failed to provide any clear evidence that the terms agreed as part of the Interface Agreement would render the ECC Plan unviable. In particular, the Applicant has failed to (i) demonstrate that co-existence is not possible and (ii) evidence that the other provisions in the interface agreement including the compensation provisions would operate in a way that would frustrate the ECC plan even in circumstances where physical co-existence is not preferred.

3.2.5 It is submitted that the Further JKMC submissions ought to carry significant weight in the Secretary of State's assessment of the imposition of Articles 49 and 50.

3.2.6 For the avoidance of doubt, Hornsea Four does not consider that it would be rational for the Secretary of State to conclude that there is substantial public interest in preserving the viability of the ECC Plan, or that in the event the Secretary of State reaches the opposite view on this, that this may justify an interference with Orsted's contractual rights under the Interface Agreement for the reasons set out in paragraphs 12 to 15 of the Further JMKC Submissions.

3.2.7 As set out in the conclusion of the Further JMKC Submissions: "*the Secretary of State is asked to reject the proposed Articles disapplying the IA and to leave the IA in place. Even proceeding on the basis that there is vires for the Secretary of State to do what BP proposes it is submitted that a DCO should not be used to allow a highly sophisticated and well-advised commercial party to escape from obligations it freely entered into because it now regards this as a bad bargain. Moreover, for the above reasons what is proposed continues to constitute an unjustified interference with Orsted's Article 1, Protocol 1 rights notwithstanding the changes made to what is proposed in response to Orsted's earlier submissions.”*

3.2.8 At paragraph 9.3.9, the Applicant disagreed that the uncertainty with regard to the level of compensation being offered to Hornsea Four is highly relevant. For context, certainty as to the amount of compensation that may be paid in the event that Hornsea Four is excluded from the Overlap Zone is a key factor in how Hornsea Four quantifies the detrimental impact of such an exclusion on its business case going forward. The uncertainty of any compensation payable and the disapplication of key parts of the Interface Agreement, compounded with uncertainties in the market such as commodity prices and interest rates, make it challenging for Hornsea Four to make informed decisions about its project. It is important that Orsted have this certainty to seek to ensure that it can take a final investment decision on Hornsea Four and can build out the project within the timescales required, which are driven by a number of factors including Government policies on tackling climate change, supply chain constraints, and the operation of the Contracts for Difference regime. Additionally, certainty is required for Orsted to strategically maximise economies of scale

and ensure that costs to consumers are minimised. Finally, certainty around compensation payable supports Orsted in contributing as much as it can to government's offshore wind targets.

3.2.9 At paragraph 3.9.10, the Applicant disputes that the Interface Agreement was entered into, in part, to deal with a situation whereby one party was excluded from the Overlap Zone. It is quite unbelievable that the Applicant is suggesting that BP, a large commercial entity with a sufficiency of legal and technical advisers at its disposal, would have entered into an agreement without a full understanding of the potential risks of doing so, including the need to pay compensation in the event that Hornsea Four was precluded from installing infrastructure in the Overlap Zone. Indeed, in the Deed of Adherence made on 10 February 2021 between The Crown Estate Commissioners, Hornsea Four, Smart Wind Limited, Carbon Sentinel Limited and BP Exploration Operating Company Limited, and in which BP agreed to adhere to the Interface Agreement, it is stated in Recital (A) to that deed:

"The Interface Agreement provides, among other things, a mechanism for the co-existence of wind and carbon storage projects on an overlapping area of sea bed together with compensation and dispute resolution provisions in the alternative."

3.2.10 It is therefore clear that, at the point BP agreed to adhere to the Interface Agreement, that they were well aware that compensation would be payable in the event that co-existence was not possible.

3.2.11 Hornsea Four maintains its position that the Interface Agreement sets the appropriate mechanism for assessing compensation, and that these provisions should not be set aside because the Applicant or BP now consider that they have entered into a bad bargain.

3.2.12 In response to the Applicant's comments at paragraph 9.4.11-9.4.12, Hornsea Four's position remains as set out in its Written Representation (REP2-089) that the DCO process offers the best opportunity to fully consider the relevant issues and to apply appropriate mitigations and protections. There is no transparency in the storage permit process and whilst there may be the opportunity for limited consultation under the related EIA process, there is no opportunity to discuss issues and propose protections with the advisors to the decision maker. Appropriate mitigations should be considered and secured now – when the merits of the overall project are being weighted.