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Dear Mr Campbell

PLANNING ACT 2008

APPLICATION FOR A NON-MATERIAL CHANGE TO THE EAST ANGLIA THREE OFFSHORE WINDFARM ORDER 2017

1. I am directed by the Secretary of State for Business, Energy and Industrial Strategy (“the Secretary of State”) to advise you that consideration has been given to the application which was made by East Anglia Three Limited (“the Applicant”) on 15 March 2019 for a change which is not material to The East Anglia THREE Offshore Wind Farm Order 2017 (“the 2017 Order”) under section 153 of, and Schedule 6 to, the Planning Act 2008 (“the 2008 Act”). This letter is the notification of the Secretary of State’s decision in accordance with regulation 8 of the Infrastructure Planning (Changes to, and Revocation of, Development Consent Orders) Regulations 2011 (as amended) (“the 2011 Regulations”).
2. The original application for development consent under the Planning Act 2008 was submitted to the Planning Inspectorate by the Applicant in November 2015 and was granted development consent on 7 August 2017. Consent was granted for the construction and operation of an offshore wind farm, situated approximately 69km from the coast of Suffolk at Lowestoft at its closest point to land with a gross electrical output of up to 1,200MW and comprising up to 172 wind turbines (“the Development”). The 2017 Order was subsequently corrected by The East Anglia THREE Offshore Wind Farm (Correction) Order 2018.
3. The Applicant is seeking consent for a change to:

- Increase the maximum electricity generating capacity from 1,200MW to 1,400MW;
 - amend paragraph 8(3) of requirement 3 of the 2017 Order to allow more flexibility in delivery of the two offshore phases; and
 - to limit the maximum number of gravity base foundations to 100.
4. The Applicant has also requested the Secretary of State to confirm that the 2017 Order does not set a maximum capacity output for individual wind turbine generators.

Consideration of the materiality of the proposed change

5. The Secretary of State has given consideration to whether the Application is for a material or non-material change. In doing so, he has had regard to paragraph 2(2) of Schedule 6 to the Planning Act 2008 which requires the Secretary of State to consider the effect of the change on the 2017 Order.
6. There is no statutory definition of what constitutes a 'material' or 'non-material' amendment for the purposes of Schedule 6 to the Planning Act 2008 and Part 1 of the 2011 Regulations.
7. So far as decisions on whether a proposed change is material or non-material, guidance has been produced by the then Department for Communities and Local Government, the "Planning Act 2008: Guidance on Changes to Development Consent Orders" (December 2015) ("the Guidance")¹, which makes the following points. First, given the range of infrastructure projects that are consented through the 2008 Act, and the variety of changes that could possibly be proposed for a single project, the Guidance cannot, and does not attempt to, prescribe whether any particular types of change would be material or non-material. Second, there may be certain characteristics that indicate that a change to a consent is more likely to be treated as a material change, namely:
- (a) whether an update would be required to the Environmental Statement (from that at the time the original development consent order was made) to take account of likely significant effects on the environment;
 - (b) whether there would be a need for a Habitats Regulations Assessment, or a need for a new or additional licence in respect of European Protected Species;
 - (c) whether the proposed change would entail compulsory acquisition of any land that was not authorised through the existing development consent order; or
 - (d) whether the proposed change have a potential impact on local people and businesses.
8. Third, that although the above characteristics indicate that a change to a consent is more likely to be treated as a material change, these only form a starting point for assessing the materiality of a change. Each case must depend on thorough consideration of its own circumstances.
9. The Secretary of State began his consideration of the materiality of the proposed variation by considering the 4 matters lettered (a), (b) (c) and (d) above:
- (a) The Applicant supplied a document entitled 'DCO Non-Material Change – Supporting Statement' ("the Supporting Statement") providing further environmental information which concludes that the increase in the maximum generating capacity will not have

¹ <https://www.gov.uk/government/publications/changes-to-development-consent-orders>

any new significant effects or materially different effects from those already assessed in the original Environmental Statement for the 2017 Order. In the light of the analysis supplied by the Applicant and the responses to the consultation, the Secretary of State concludes that an update to the Environmental Statement is not required.

- (b) The Secretary of State has concluded that, given the nature and impact of the change proposed and the advice of Natural England, there is not likely to be a significant effect greater than those originally identified. Therefore, the Secretary of State is satisfied that a Habitats Regulations Assessment is not required. Furthermore, in respect of European Protected Species, the Secretary of State is satisfied that the proposed change does not bring about the need for a new or additional licence as the amendments sought are not anticipated to give rise to any new or different effects from an ecological perspective.
 - (c) The proposed change does not entail any new compulsory acquisition of land.
 - (d) The potential impacts on local people and businesses are no greater than those that arise from the development permitted by the 2017 Order.
10. The Secretary of State therefore concludes that none of the specific indicators referred to in the Guidance, or other relevant considerations, suggest that this proposed change is a material change. He has also considered whether there are any other circumstances in this particular case which would lead him to conclude that the proposed change is material, but has seen no evidence to that effect.
11. The Secretary of State is therefore satisfied that the change proposed in the Application is not material and should be dealt with under the procedures for non-material changes.

Consultation

12. The Applicant publicised this Application in accordance with regulation 6 of the 2011 Regulations and on 20 March 2019 consulted the persons required by regulation 7 of the 2011 Regulations, in the manner prescribed. The deadline for receipt of representations on the Application was 24 April 2019, and the Secretary of State granted an extension to this deadline to Natural England and the Marine Management Organisation. Due to an administrative error, an incorrect deadline for responses was included in a notice in Fishing News. The Applicant published a further notice in Fishing News on 2 May 2019 providing a further week of consultation with a deadline of 10 May 2019.
13. The Application was made publicly available on the Planning Inspectorate's website on 20 March 2019, such that there was opportunity for anyone not notified to also submit representations to the Planning Inspectorate.
14. Representations were received from Trinity House, National Federation of Fishermen's Organisation, Ministry of Defence, Marine Management Organisation, Historic England, Maritime & Coastguard Agency and The Crown Estate who did not raise an objection to the change being sought.
15. VisNed (Dutch Fisheries) did not raise any objections to the proposed change but responded to seek clarification as to whether reducing the limit of the gravity base foundations would have an impact on spacing between turbines, and whether the proposed amendment to the 2017 Order would result in a longer period of restriction of fishing in the area of the Development. The Applicant responded to confirm that the spacing of the wind turbines is limited by the 2017 Order to a minimum 900m x 675m (but that the final design would be subject to the procurement of the turbines), and that the flexibility would not change practical

elements of the project and the change relates to amendments to the marine licences so that the project has a single marine licence rather than two licences for transmission and two licences for generation. The Secretary of State notes that VisNed did not provide any further comments.

16. The Wildlife Trusts did not raise an objection to the proposed change, but sought confirmation as to whether an increase in pile diameter or hammer energy would be required to install the higher capacity wind generating turbines, and whether the change would result in an alteration to the number of cables required for the project. The Applicant responded to confirm that the capacity change relates to improved technology within the turbines (and that there would be no change to the physical parameters of the turbines set out in the 2017 Order), there would be no increase in pile diameter or hammer energy and that the proposed amendment would not affect the number of cables required for the Development. The Wildlife Trusts did not submit further representations following the Applicant's response.
17. The Royal Society for the Protection of Birds ("RSPB") responded to say that Table 2.1 of the Applicant's Supporting Statement states that the minimum clearance of the turbines above sea level must not exceed 22m, and queried whether this was an error and whether that Table 2.1 instead should state that the minimum clearance should not be less than 22m as set out in Requirement 2 of the 2017 Order. The RSPB also queried whether it would be possible to retain the 70%:30% split between turbines with a draught height of 24m (70%) and 22m (30%). The Applicant responded to confirm that Table 2.1 does contain a typographical error and that the proposed amendment does not include a change to Requirement 2 of the 2017 Order, and that while the percentage split would not be maintained, because the Applicant intends to install fewer than 172 turbines (from the Collision Risk Model Report it appears the intended number is 134 turbines) the overall impact will be reduced compared with the consented position. The RSPB did not make any further comments following the Applicant's response.
18. One private individual responded to seek clarification on whether the Applicant was retaining the option of a one or two phase construction period, whether it was the Applicant's intent to use the electrical ducts installed during the construction of the East Anglia ONE project and whether the Applicant intended to bring forward a future project connecting at Bramford. The Applicant responded to confirm that it would retain the option to construct in either one or two phases, that it would use the ducts installed during construction of the East Anglia ONE project, and that it does not intend to bring forward a project connecting at Bramford. There were no further representations submitted in response to the Applicant's response.
19. The Secretary of State has considered the representations received in response to the consultation and does not consider that any further information needs to be provided by the Applicant or that further consultation of those already consulted is necessary.

Environmental Impact Assessment

20. The Secretary of State has considered whether the Application would give rise to any new significant effects or materially different effects when compared to the effects set out in the Environmental Statement for the development authorised by the 2017 Order.
21. The Secretary of State is satisfied that the Supporting Statement provided by the Applicant is sufficient to allow him to make a determination on the Application.
22. The Secretary of State has considered the information provided and the views of consultees. The Secretary of State agrees with the Applicant's conclusions that there will not be any

new or materially different likely significant effects when compared to the effects set out in the environmental statement for the development authorised by the 2017 Order and as such considers that there is no requirement to update the Environmental Statement.

23. As there are no new significant environmental impacts as a result of the proposed change, the Secretary of State does not consider that there is any need for consultation on likely significant transboundary effects.

Habitats

24. The Secretary of State has considered the relevant and important policies in respect of the United Kingdom's obligations as set out in the Conservation of Habitats and Species Regulations 2017 ("the Habitats Regulations"), which transpose the Habitats Directive (92/43/EC) into UK law. The Habitats Regulations require the Secretary of State to consider whether the Development would be likely, either alone or in combination with other plans and projects, to have a significant effect on a European site, as defined in the Habitats Regulations. If likely significant effects cannot be ruled out, then an Appropriate Assessment must be undertaken by the Secretary of State, pursuant to regulation 63(1) of the Habitats Regulations, to address potential adverse effects on site integrity. The Secretary of State may only agree to the Application if he has ascertained that it will not adversely affect the integrity of a European site.
25. The Secretary of State has considered the Supporting Statement submitted with the Application, alongside the response from Natural England, and is satisfied that the Application will not have a likely significant effect on any European site. Following the consent of the 2017 Order, the Outer Thames Estuary Special Protection Area ("SPA") and Flamborough and Filey Coast SPA have been designated as SPAs. As both of these sites were assessed as potential SPAs in the Application for the 2017 Order, and because the conservation objectives remain unchanged, further assessment of these sites are not required for this Application. The Secretary of State is satisfied that there is sufficient evidence to conclude that allowing the change set out in the Application to the development authorised by the 2017 Order will not have a likely significant effect upon any European sites; and a further Habitats Regulations Assessment is therefore not required.

General Considerations

Transboundary Impacts

26. Under Regulation 32 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (as amended), the Secretary of State has considered whether the proposed development is likely to have a significant effect on the environment in another European Economic Area ("EEA") State. In making his decision on whether to grant the 2017 Order, the Secretary of State concluded that there would be no likely significant effects on the environment of another EEA State. The Secretary of State has considered whether the change sought through this Application will have any potential impacts on another EEA State and, as set out above, has concluded that there is no change in the environmental impacts considered within the existing environmental statement for the project. Consequently, the Secretary of State has concluded that there would not be likely significant effects on the environment of any other EEA state whether the Application is considered of itself or cumulatively with the environmental effects already considered for the 2017 Order.
27. The Secretary of State has also considered whether there may be potential impacts on European sites in other EU Member States, known as transboundary sites, from this Application. Noting that the Secretary of State has reached a conclusion that there will be no Likely Significant Effects on European sites (over and above those already assessed in the Habitats Regulation Assessment for the 2017 Order), the Secretary of State has also

concluded that there is no route whereby sites in other EU Member states may be impacted by this Application.

28. The Secretary of State therefore concludes there is no need for transboundary consultation with other EEA States.

Equality Act 2010

29. The Equality Act 2010 includes a public sector equality duty. This requires a public authority, in the exercise of its functions, to have due regard to the need to (a) eliminate discrimination, harassment and victimisation and any other conduct prohibited by or under the Act; (b) advance equality of opportunity between persons who share a relevant protected characteristic (e.g. age; gender; gender reassignment; disability; marriage and civil partnerships;² pregnancy and maternity; religion and belief; and race) and persons who do not share it; and (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
30. The Secretary of State has had due regard to the need to achieve the statutory objectives referred to in s149 of the Equality Act 2010, and is satisfied that there is no evidence that granting this Application will affect adversely the achievement of those objectives.

Human Rights Act 1998

31. The Secretary of State has considered the potential infringement of human rights in relation to the European Convention on Human Rights, by the amended development. The Secretary of State considers that the grant of development consent would not violate any human rights as enacted into UK law by the Human Rights Act 1998.

Natural Environment and Rural Communities Act 2006

32. The Secretary of State, in accordance with the duty in section 40(1) of the Natural Environment and Rural Communities Act 2006, has to have regard to the purpose of conserving biodiversity, and in particular to the United Nations Environmental Programme Convention on Biological Diversity of 1992, when granting amended development consent. The Secretary of State is of the view that biodiversity has been considered sufficiently in this Application for an amendment to accord with this duty.

Secretary of State's conclusions and decision

33. The Secretary of State notes that in order that the Applicant can construct and operate the Development efficiently and effectively, it has concluded that it is necessary to increase the maximum generating capacity from 1,200MW to 1,400MW and to limit the maximum number of gravity base foundations to 100. The Secretary of State notes that while the 2017 Order does not specify a maximum generating capacity for each individual turbine, the Development must be constructed in a manner that does not result in any environmental impacts beyond those assessed for the 2017 Order.
34. The Secretary of State has considered the ongoing need for the development. The Secretary of State notes that the Overarching National Policy Statement for Energy (EN-1) and the National Policy Statement for Renewable Energy (EN-3) both set out that for the UK to meet its energy and climate change objectives, there is an urgent need for new electricity generation plants such as offshore wind farms. The Secretary of State considers, therefore, that the ongoing need for the project is established.

² In respect of the first statutory objective (eliminating unlawful discrimination etc.) only.

35. The Secretary of State has considered the nature of the proposed change, noting that it would have no additional significant environmental effects. He notes that the proposed change to the Development would not result in any further environmental impacts and will remain within the parameters consented by the 2017 Order. He concludes that the proposed change is not material. Having considered the effects of any change and the benefits of the change in facilitating the deployment of the Development, the Secretary of State has concluded that it would be appropriate and advantageous to authorise the proposed change as detailed in the Application.
36. For the reasons given in this letter, the Secretary of State considers that there is a compelling case for authorising the proposed change to the 2017 Order as set out in the Application. The Secretary of State is satisfied that the change requested by the Applicant is not a material change to the 2017 Order, and has decided under paragraph 2(1) of Schedule 6 to the 2008 Act to make a non-material change to the 2017 Order so as to authorise the change detailed in the Application.

Modifications to the draft Order proposed by the Applicant

37. Minor drafting improvements have been made by the Secretary of State to the draft Order proposed by the Applicant. These changes do not materially alter the terms of the draft Order.

Challenge to decision

38. The circumstances in which the Secretary of State's decision may be challenged are set out in the note attached at the Annex to this letter.

Publicity for decision

39. The Secretary of State's decision on this Application is being notified as required by regulation 8 of the 2011 Regulations.

Yours sincerely,

Gareth Leigh

Gareth Leigh
Head of Energy Infrastructure Planning

LEGAL CHALLENGES RELATING TO APPLICATIONS FOR DEVELOPMENT CONSENT ORDERS

Under section 118 (5) of the Planning Act 2008, a decision under paragraph 2(1) of Schedule 6 to the Planning Act 2008 to make a change to an Order granting development consent can be challenged only by means of a claim for judicial review. A claim for judicial review must be made to the Planning Court during the period of 6 weeks beginning with the day after the day on which the Order is published. The Amending Order as made is being published on the date of this letter on the Planning Inspectorate website at the following address:

<https://infrastructure.planninginspectorate.gov.uk/projects/eastern/east-anglia-three-offshore-wind-farm/?ipcsection=overview>

These notes are provided for guidance only. A person who thinks they may have grounds for challenging the decision to make the Order referred to in this letter is advised to seek legal advice before taking any action. If you require advice on the process for making any challenge you should contact the Administrative Court Office at the Royal Courts of Justice, Strand, London, WC2A 2LL (0207 947 6655)