Hornsea Project Three
Offshore Wind Farm

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Response to the Secretary of State's Consultation Appendix 1 Annex A: Case Law, Guidance & Previous Decisions on Alternative Solutions

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Ørsted

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Appendix 1 Annex A: Case Law, Guidance & Previous Decisions on Alternative Solutions

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Case Law, Guidance & Previous Decisions on Alternative Solutions

1. Introduction

1.1 The Habitats Regulations[1] do not define the phrase "*no alternative solutions*" or provide a clear indication as to the precise scope of and approach to be taken to the consideration of alternative solutions.

1.2 In the absence of a clear statutory framework, the Applicant has considered the approach advocated in relevant case law and guidance and the approach of the Secretary of State in previous decisions in order to extrapolate some key legal principles and determine the correct approach to the consideration of feasible alternative solutions.

2. Structure of this Annex

2.1 To assist the Secretary of State this Annex is structured on a thematic basis, with cases, guidance and decisions (or parts thereof) addressing like issues or principles grouped and considered together under the following headings:

- Roles & Responsibilities;
- A Multi-Stage/ Stepped Process;
- Nature and Range of Potential Alternatives;
- The Importance of the Project Objectives;
- The “Do Nothing” Option;
- Discounting Theoretical Alternatives;
- Geographical Limitations;
- Feasibility; and
- Approach to Evaluation of Feasible Alternatives.

3. Source references

3.1 For ease of reference, given the thematic structure of this Annex, the key cases, guidance and decisions referred to are listed immediately below. Judicial consideration and decisions by the Secretary of State, as authoritative decisions, are given greater weight over guidance in the event of any conflict.

3.2 **UK Case Law:**

[1] The Conservation of Habitats and Species Regulations 2017 and The Conservation of Offshore Marine Habitats and Species Regulations 2017

- R (Spurrier and Others) v Secretary of State for Transport[2] (*Spurrier*).
- Humber Sea Terminal v Secretary of State for Transport[3] (*Humber Sea Terminal*)

3.3 **ECJ Case Law & Advocate General (AG) Opinions:**[4]

- **C-239/04**: EC v Portugal and Opinion of AG Kokott (Castro Verde SPA).
- **C-209/04:** EC v Austria and Opinion of AG Kokott (Lauteracher Ried SPA).
- **C-399/14 Grune Liga Sachsen eV and others v Freistaat Sachsen**

3.4 European Commission (EC) Opinions:

- Rosenstein Portal, Germany (2018)[5];
- Elbe River Dredge, Germany (2011)[6]
- Granadilla Port, Spain (2006)[7]; and
- Bothniabanen Railway Line, Sweden (2003)[8].

3.5 UK Decisions:

- Able Marine Energy Park (2013)[9];
- Bathside Bay Container Port (2006)[10]; and
- Hull Harbour Revision Order (HRO) (2005)[11].

3.6 **UK Guidance**: Habitats Directive: guidance on the application of article 6(4), published by DEFRA in December 2012 ("**DEFRA 2012**")[12].

3.7 EC Guidance

[2] [2019] EWHC 1070 (Admin).
[3] [2005] EWHC 1289
[4] ECJE decisions available at: EUR-lex: https://eur-lex.europa.eu/homepage.html?locale=en
[5] C(2018) 466 final
[6] C(2011) 9090 final
[7] COM(2006)
[8] C(2003)1309.
[9] https://infrastructure.planninginspectorate.gov.uk/projects/yorkshire-and-the-humber/able-marine-energy-park/
[10] Bathside Bay (2006). Inspectors Report to the First Secretary of State for Transport, 23 March 2005; (ii) First Secretary of State for Transport's Minded View Letter, 21 December 2005; and (iii) First Secretary of State for Transport's Decision Letter, 29 March 2006. Documents are available at http://www.dft.gov.uk/stellent/groups/dft_shipping/documents/divisionhomepage/032185.hcsp.
[11] Hull Harbour Revision Order (2005). First Secretary of State for Transport's Decision Letter, 22 December 2005. Documents available at http://www.dft.gov.uk/stellent/groups/dft_shipping/documents/divisionhomepage/032185.hcsp.
[12] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/69622/pb13840-habitats-iropi-guide-20121211.pdf

- Managing Natura 2000 Sites: The provisions of Article 6(3) of the 'Habitats' Directive 92/43/EEC (2000), first published by the EC in 2000 but updated in November 2018[13] ("**MN 2000**").
- EC Methodological Guidance: Assessment of plans and projects significantly affecting Natura 2000 sites, methodological guidance on the provisions of articles 6(3) and 6(4) of the Habitats Directive (2000)[14] ("**Methodological Guidance**").

4. Roles & responsibilities

4.1 It is the task of the relevant competent authority to be satisfied that there are no feasible alternative solutions to the project in question. DEFRA 2012 recognises that, in practice, the applicant has a responsibility to consider and help demonstrate the absence of potential alternatives, although the relevant competent authority may consult other parties too.

4.2 Regardless, of the source of the information and evidence, DEFRA 2012 advises that the competent authority should ensure the information provided (whether by the applicant or others) allows it to be objectively satisfied of the absence of feasible alternative solutions [paragraphs 80 and 85].

5. A multi-staged/ step process

5.1 UK and EC guidance and previous decisions all suggest that the consideration of alternative solutions is essentially a multi-staged process. MN 2000 suggests two main stages:

- Stage 1: identification of feasible "alternative solutions"; and
- Stage 2: assessment of any identified feasible alternative solutions (i.e. those short-listed at stage 1).

5.2 In practice, each of the above stages necessarily involves a number of sub-stages or steps, as reflected in DEFRA 2012, which identifies that the "first step" (of stage 1) is to identify the overall project objectives. Similarly, the Methodological Guidance[15] identifies the following steps (relating to stage 1):-

- Identify and characterise the key objectives of the project or plan (step 1);
- Identify all alternative means of meeting the objectives of the project or plan (step 2); and
- Provide as much information as possible on the alternatives, acknowledging any gaps in information (step 3).

5.3 This stepped or staged approach is also reflected in the approach followed by the applicant for the Able Marine Energy Park[16] in relation to alternative solutions, an approach accepted by both the Panel and Secretary of State and involved 4 main stages as follows (in summary):

[13] Available at: http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/Provisions_Art_._nov_2018_endocx.pdf
[14] Available at: https://ec.europa.eu/environment/nature/natura2000/management/docs/art6/natura_2000_assess_en.pdf
[15] Box 14 on Page 35.
[16] See Chapter 7 of the Able Marine Energy Park: Habitats Regulations Assessment Report, December 2011

- Stage 1 – Zero Option;
- Stage 2A – 2C – Alternative sites/ locations;
- Stage 3A – 3B – Alternative designs; and
- Stage 4 – Alternative means of operation.

5.4 In conclusion, in keeping with the guidance and precedent set out above, the Applicant considers it appropriate to adopt a staged/ stepped approach to the consideration of any feasible alternative solutions for Hornsea Three.

6. Nature and range of potential alternative solutions

6.1 DEFRA 2012 advises that alternative solutions must be considered *"objectively and broadly"* and that this could include *"options"… at a different location, using different routes, scale, size, methods, means or timing"* [paragraph 16].

6.2 MN 2000 and the Methodological Guidance offer similar advice. MN 2000 suggests that alternative solutions could "…involve alternative locations (routes in the case of linear developments), different scales or designs of development, or alternative processes. The 'zero option' should be considered too."

6.3 The Methodological Guidance indicates that potential alternative solutions might include variants of the following [paragraph 3.3.2]:

- locations or routes;
- scale or size;
- means of meeting objectives (e.g. demand management);
- methods of construction (e.g. silent piling);
- operation methods;
- decommissioning methods at the end of a project's life; and
- scheduling and timescale proposals.

6.4 However, the consideration of alternatives is plainly project and fact sensitive and specific. It must relate to a specific project and the particular objectives that project is designed to achieve (see further at **Section 7** below). As such, not all of the generic categories of potential alternative are relevant to every case. DEFRA 2012 advises the competent authority to use its judgement to ensure the range and type of alternatives is reasonable [paragraph 15].

6.5 Furthermore, the objective of the consideration of alternative is focussed on measures or options which would better respect the integrity of the relevant European site. As such, the consideration of alternatives is, to that extent, narrowly focussed on the particular aspects of a project found to give rise to an AEOI in respect of a European site and it is possible alternatives to those aspects that must be considered.

7. The importance of the project objectives

7.1 The most recent UK judicial consideration of alternative solutions is *Spurrier*[17]. This case considered a series of grounds of challenge to the Airports National Policy Statement ("**NPS**"), including the legality of the Secretary of State's decision that, for the purposes of the NPS, the Gatwick scheme was not an alternative solution to expansion at Heathrow because it would not deliver the objective of "*maintaining the UK's hub status*".

7.2 The principal focus of one ground of challenge concerned the meaning of "alternative solutions" and the relevance of the project objectives. In addressing this matter, the court found **[our emphasis]**:

"Even by itself, the noun "alternative" carries the ordinary, Oxford English Dictionary meaning of "a thing available in place of another", which begs the question what are the relevant objectives or purposes which an alternative would need to serve. However, article 6(4) does not refer simply to the absence of an "alternative" but to an "alternative solution", "alternative" appearing as an adjective, which makes this meaning plain beyond any doubt. ***In our view, "an alternative" must necessarily be directed at identified objectives or purposes; that it is beyond doubt that "an alternative solution" must be so aimed****" [paragraph 334]*

7.3 The interpretation of the UK courts affirms the approach described in DEFRA 2012, which advises that the competent authority must consider if there are any other feasible ways to deliver the "*overall objective of the project*" [paragraph 10].

7.4 To that end, the first step must be to identify the objective(s) of the Hornsea Three project to frame the consideration of alternatives [paragraph 11]. Alternative solutions are then "*limited to those which would deliver the same overall objective as the original proposal*" [paragraph 11]. In that context, NPS EN-1 and EN-3 and other documents setting out Government policy in relation to renewable energy, offshore wind and climate change will provide important context for the Secretary of State when considering the scope of alternative solutions [paragraph 14].

7.5 DEFRA 2012 recommends that the competent authority should use its judgement to ensure that the "*framing*" of alternatives (i.e. the identification of the project objectives) is reasonable [paragraph 82, 83]. For example and of direct relevance to Hornsea Three:

"In considering alternative solutions to an offshore wind renewable energy development the competent authority would normally only need consider alternative offshore wind renewable energy developments. Alternative forms of energy generation (e.g. building a nuclear power station instead) are not alternative solutions to this project as they are beyond the scope of its objective" [paragraph 13]

[17] [2019] EWHC 1070 (Admin).

7.6 The Applicant considers that the above approach is entirely logical, sound and, above all, lawful. In considering alternative solutions to Hornsea Three, the Secretary of State may start from a position whereby the field is narrowed to a consideration of alternative locations, scale and designs for an offshore wind development.

7.7 It is noted that the RSPB appear to consider otherwise (**REP10-056b** at paragraph 40) and suggest DEFRA 2012 is in conflict with MN 2000 and that the latter should be preferred. RSPB contend that the correct approach to alternatives seeks to identify an abstract "aim"[18] divorced from the project in hand (e.g. reduce climate emissions) and consider every possible alternative to that "aim".

7.8 The following headline points can be made in response to the RSPB position:

- First, there is no legal or policy reason why guidance in MN 2000 must or should be preferred by the Secretary of State over DEFRA 2012, as contended by the RSPB. That is particularly so following Brexit.
- Second, there is in fact no fundamental conflict. The advice in DEFRA 2012 is broadly consistent with MN 2000 and the Methodological Guidance. MN 2000 notes that: "*All feasible alternatives that meet the plan or project aims… have to be analysed*"[19]. We see no substantive difference between identifying a 'project objective' (DEFRA 2012) and identifying the 'project aim' (MN 2000).
- Third, S*urrier* supports the approach advocated in DEFRA 2012.

7.9 *Spurrier* considered the concern that, at an early stage, objectives may be defined with "deliberate narrowness"[20] so that potential alternatives are unreasonably or unlawfully excluded. In finding that the "hub objective" was narrow but lawful, the court essentially found the charge of 'narrowness' had no force if the formulated objectives were "genuine and critical". Therefore, in principle, there is nothing unlawful or wrong with specific objectives reflective of the project in hand, if they reflect the need identified by policy and are genuine and important in the context of the relevant project.

7.10 Conversely, the approach advocated by the RSPB creates an unduly wide and impossible test: there would inevitably always be an alternative, e.g. energy efficiency measures should be promoted instead of offshore wind.

7.11 RSPB has taken this stance before. The Applicant notes that, at the Bathside Bay Public Inquiry[21], RSPB similarly argued that the approach that should be taken to the identification of alternative solutions is to identify a general "problem" and then identify alternative ways of solving that problem (as opposed to identifying the objectives of the project in hand and identifying alternative means of achieving those objectives).

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[18] In quoting from MN 2000 RSPB place emphasis on the word "aims", which ignores the fact that it is preceded by the word "project".
[19] MN 2000, 3rd paragraph, in section 5.3.1.
[20] [2019] EWHC 1070 (Admin), at paragraphs 341 – 343.
[21] Bathside Bay (2006). (i) Inspectors Report to the First Secretary of State for Transport, dated 23 March 2005; (ii) First Secretary of State for Transport's Minded View Letter, dated 21 December 2005; and (iii) First Secretary of State for Transport's Decision Letter, dated 29 March 2006 on Applications by Hutchinson Ports (UK) Ltd and the Harwich Haven Authority in connection with the Bathside Bay, Harwich, Container Terminal. Copies of these documents are available from the DfT website at http://www.dft.gov.uk/stellent/groups/dft_shipping/documents/divisionhomepage/032185.hcsp.

7.12 This problem-led approach was criticised by the Inspector in his Report. The Inspector considered that rather than to ask "are there any alternative solutions to this problem" the correct approach was to ask the question – "are there any alternatives to the plan or project in question?" To illustrate the difference between the two approaches the Inspector referred to the following example:

"An authority may propose to build a swimming pool in a coastal water (adversely affecting a protected habitat) because it is concerned about the inadequate level of physical activity undertaken by some people. On RSPB's approach the problem might be defined as inadequate levels of physical activity. A running track or treadmill might solve that problem. But the correct question is whether there is an alternative to the swimming pool plan or project. One answer might be that there is a disused swimming pool which can be brought back into use."

7.13 In summary, alternative solutions must relate to and be considered in the context of a particular project: in this case, a large-scale offshore wind farm, Hornsea Three. The consideration of alternative solutions can be legitimately limited to those which can deliver the same core or overall objectives as may be identified for Hornsea Three, having regard to national policy articulated in NPS EN-1 and EN-3 and the regulatory framework relating to climate change, which provide important terms of reference.

8. The 'do nothing' option

8.1 The Habitats Regulations do not expressly provide that the competent authority must consider the "do nothing" option and there appears to be no EU case law which addresses this specific point.

8.2 In *Humber Sea Terminal*[22], the court observed that it was far from clear how the "do nothing" option can be an alternative in the sense of that phrase in the Habitats Regulations, noting that it is a consideration more relevant to whether or not there are IROPI: "*the question of whether there are imperative reasons of overriding public interest clearly raises the question of whether it is better to do nothing*".

8.3 However, previous EC opinions and UK decisions consider the "do nothing" option (e.g. Able Marine Energy Park) and DEFRA 2012, MN 2000 and the Methodological Guidance all advise that the "do-nothing" or "zero option" should be included in the analysis.

8.4 DEFRA 2012 goes on to explain that the "do nothing" option "is not normally an acceptable alternative solution" because it would not deliver the objective of the proposal [paragraph 17]. This is reflected in a range of previous UK planning decisions.

8.5 In Able Marine Energy Park (2012), the Panel considered that although a 'do nothing option' must be considered "an application must reasonably relate to a specific project, and it is in the context of that project that alternatives arise" [paragraph 10.50, Panel Report]. The Secretary of State for Transport in turn concluded:

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[22] Ouseley J, at paragraph 84, [2005] EWHC 1289 (Admin)

"The zero option would clearly fail the objectives of the development to decarbonise the means of electricity production, to provide secure energy supplies for the UK and to improve EU competitiveness by creating jobs and growth in a sector in which European business is a global leader." [paragraph 15, Decision Letter][23]

8.6 In the EC opinion relating to Granadilla Port, the EC ruled out the "do nothing" alternative on the basis that "the existing port facilities will not be able to handle the expected increase in maritime traffic and that additional facilities and increased port capacity is necessary for the economic development of the island." (Page 5). In his Report from the Bathside Bay Inquiry the Inspector similarly ruled out the "no development" solution on the basis that:

"If the ports industry did not respond to market growth, the result would be, amongst other things, that port facilities would become increasingly congested and there would be constraint on the introduction of larger vessels, a lack of capacity to handle demand, a reliance on continental ports and loss of the transhipment business." (Paragraph 18.130).

8.7 In summary, in line with the guidance and previous cases, the "do nothing" option should be considered and, by identifying the implications should the given project not proceed, may provide a helpful contextual frame. However, it is unlikely to be an acceptable alternative solution in most cases.

9. Discounting theoretical alternatives

9.1 In **C-209/04** (Lauteracher Ried) the AG noted that while the examination of alternatives for HRA purposes cannot be limited to the 'main alternatives studies by the developer' (as for EIA), that did not mean that "*every theoretically imaginable alternative stands in the way of project approval*" Consequently, the competent authority should consider alternatives that are not obviously out of the question [AG opinion at paragraph 73]. In a similar vein, in **C-239/04** (Castro Verde) indicates that projects that can be ruled out immediately do not need to be analysed further [see paragraph 38].

9.2 In the *Hull HRO* decision the Secretary of State examined other proposed alternative sites to the Quay 2005 site located within the port of Hull. In doing so, the Secretary of State considered that it was *"reasonable only to consider realistic alternative projects before him."* On the basis that there were no "live" schemes proposed for the alternative sites in Hull (even in outline) for him to consider as credible alternatives he could only carry out a generalised assessment of alternatives.

9.3 In short, while consideration of alternatives must be comprehensive, it is not necessary to consider hypothetical or improbable options or scenarios.

10. Geographical limitations

10.1 There is no UK or ECJ case law on the geographical limits of the consideration of alternative solutions. DEFRA 2012 and MN 2000 are also silent on this matter.

10.2 The Methodological Guidance suggests at the end of paragraph 3.3.1 that:

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[23] See Annex 1 of the Secretary of State's decision letter.

"It is the Member State's responsibility to consider alternative solutions, which could be located even in different regions/countries."

10.3 However, clearly if the legitimate project objectives limit the scope of the project to a particular country or region then logically there is no requirement for the decision-maker to consider solutions in different regions/countries outside that area.

10.4 Moreover, the advice above from the Methodological Guidance may have had some force in the context of membership of the EU where policy may operate at a EU plain as well as Member State level (though even in that context the principle of subsidiarity would make such cases exceptional[24]), we see no basis for that to apply now the UK has left the EU.

10.5 Decisions on significant port developments in the UK also serve to illustrate that the geographical scope of the consideration of alternative locations for a plan or project is typically narrower in scope and would usually depend on, and be delineated by, the project objectives. For example, the Secretary of State for Transport, when approving the Hull HRO[25], considered and rejected alternatives outside the Port of Hull since such sites would not meet the economic and social needs of the City of Hull (per the project objectives).

11. Feasibility

Legitimate to consider technical, legal and financial barriers

11.1 DEFRA 2012 advises that the consideration of alternatives "should be limited to options which are financially, legally and technically feasible" [paragraph 88]. It adds that, while an alternative should not be ruled out simply because it would cause greater inconvenience or cost to the applicant, "there is a point where an alternative is so very expensive or technically or legally difficult that it would be unreasonable to consider it a feasible alternative" [paragraph 88].

11.2 The advice in DEFRA 2012 is reflected in a series of previous EC opinions and UK decisions.

11.3 In the *Bathside Bay* case, the Inspector dismissed the RSPB's contention that the alternatives test is only concerned with ecological factors and commented that he did not see any such inhibition on what factors could be taken into account. The Inspector considered that the "practicality of any alternative solution must be a relevant element. If not, why are we looking only at coastal locations with a deep water channel?"

[24] We have not been able to identify and are not aware of any decisions or cases where a project has been refused on the basis that it was possible to implement an alternative solution in another country.

[25] Hull Harbour Revision Order (2005). See First Secretary of State for Transport's Decision Letter, 22 December 2005. Documents available from the DfT website at http://www.dft.gov.uk/stellent/groups/dft_shipping/documents/divisionhomepage/032185.hcsp.

11.4 A similarly pragmatic approach is evident in the EC Opinion given to the Spanish authorities in connection with the proposed construction of a new port of Granadilla in Tenerife[26]. The Spanish authorities looked at three main possible alternatives; "do nothing", expansion of the existing port in Santa Cruz, and alternative locations for a new port project. The EC accepted the Spanish authorities' decision to rule out the expansion of existing port facilities as an alternative for the following practical reasons:-

- "It would not have a quarry in the surrounding area thus creating problems during construction;
- It would not have the necessary land available for development of the associated industrial and logistical support facilities in the adjoining areas;
- It would further increase North to South transport imbalance of the island transport system; and
- It would compromise the plan to develop a natural gas storage terminal on the island thereby diversifying the energy mix available to the local economy. Due to the proximity of the current port to the town of Santa Cruz, developing such a facility on the existing site would not be possible."

11.5 The EC also accepted that there were no alternative sites for a new port "based on different technical reasons that have to be considered when identifying a site for the construction of a new port." The EC agreed those factors would include: "the depth of the seabed at shore, the presence or not of a quarry close enough to the envisaged site, the availability of free adjacent land surface for handling and logistic operations, the adequacy of the transport connections with the hinterland and the proximity to port users."

11.6 The EC opinion on the Bothniabanen Line rail project (2003) provides a further example of technical barriers outweighing ecological concerns. Here the EC accepted Sweden's view that there were only two possible alternative routes to a chosen route for a railway line that met the objectives of the project and that, in relation to these alternatives, the technical limitations were such that the chosen route was the only viable option, despite being the most damaging option (i.e. even though the alternative routes presented to the Commission showed very limited or zero impact on Natura 2000 sites).

Alternatives can be discounted on grounds of disproportionate cost or impact on competitiveness

11.7 In Bothniabanen Line the alternatives were not viable because, although not more expensive in terms of capital costs, the alternatives would result in routes that would present operating difficulties - such as longer journey times and service restrictions due to steeper inclines and less direct routes - for the railway. The EC agreed that the technical difficulties would ultimately limit the projected long term income and therefore the long term social benefits of the project.

[26] *"Opinion of the Commission pursuant to Article 6(4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of habitats and of wild fauna and flora, concerning the "Request by the Kingdom of Spain in relation to the construction project of the new port of Granadilla (Tenerife)"* A link to this opinion is available at: http://ec.europa.eu/environment/nature/nature_conservation/eu_nature_legislation/specific_articles/art6/index_en.htm

11.8 The EC opinion in Bothniabanen Line therefore confirms that increased costs can be a legitimate basis to exclude potential alternatives, and that consideration can be given to operating expenses (OPEX) and capital expenditure (CAPEX) costs.

11.9 This is supported by the EC opinion in the Elbe River Dredge case. The EC opinion in that case notes that 6 potential alternatives were considered. Of those two possible options were discounted on grounds relating to "time losses" during the unloading of containers, leading to a competitive disadvantage, meaning ships may unload at alternative ports.

11.10 It is also necessary to consider the Barksore Marshes decision[27] in this context as it is often cited as authority for the proposition that possible alternative solutions cannot be discounted even if many, many times more expensive. In that case, the Inspector noted in passing that a fourfold increase in the cost of dispensing with dredge arisings would not necessarily jeopardise the continued commercial success of the port.

11.11 However, that portion of the Barksore Marshes decision must be read in its proper context and does not read across to an offshore wind farm which is subject to different commercial and market forces. In Barksore, dredging costs represented only a small fraction when set against the income of the relevant Port. A fourfold increase was therefore in relative terms, neither here nor there. It is a matter of context and proportionality. While an alternative cannot be ruled out simply on the grounds that it is not equivalent in cost, a proposed alternative option can be ruled out if cost increases get to the level that it would jeopardise the commercial success of the project.

11.12 In the context of offshore wind, marginal increases in CAPEX and/or OPEX cost could quickly get to that level where a project is jeopardised. For offshore wind, cost must be considered not only in the context of the overall build cost of a project (which is significant) but also in the context of the UK government policy and regulatory objectives of affordability to consumers, as implemented through the Contract for Difference (CfD) auction process (or alternative funding mechanism) and offshore transmission owner (OFTO) regime requirements for the development of offshore transmission assets, which impose cost controls and competition.

11.13 The CfD Auction Process, established through The Energy Act 2013, makes provision to incentivise investment in low carbon electricity generation, ensure security of supply, and help the UK meet its emission reduction and renewables targets, whilst reducing cost to the consumer. CfD allocation is subject to a competitive tender mechanism, whereby projects must submit bids in an auction for a fixed quantity of funding.

11.14 The adoption of this competitive auction mechanism is a key driver in the significant cost of energy reduction in the UK offshore wind industry. For example, compared with the £140/MWh strike price obtained by Hornsea 1 in the Financial Investment Decision (FID) Enabling Scheme in 2014, Hornsea 2 obtained a strike price of £57.50/MWh in 2017. In 2019 Sofia Offshore Wind Farm obtained a strike price of £39.65/MWh. In this competitive environment, even modest additional cost can hinder if not directly threaten a project's prospects of success.

[27] Barksore Marshes (1998). See Secretary of State Decision Letter, dated 9 November 1998.

11.15 In conclusion, it is clear that cost can be a legitimate basis on which to discount a potential alternative factor. And while the fact that 'Option A' costs more than 'Option B' is not a basis of itself to exclude an alternative, there is a point when the additional cost of an alternative can (properly considered in the commercial context applicable to offshore wind) legitimately be regarded as disproportionate.

11.16 Feasibility is therefore considered and applied by the Applicant using each of the following broad criteria:

- **Legal Feasibility**: A potential alternative would not be legally feasibility where there is a legal impediment or where, from a legal or consenting perspective, it would be unreasonably difficult, or improbable that consent would be granted, on account of 'unacceptable' impacts.
- **Technical Feasibility**: A potential alternative would not be technically feasible where it is incapable of being implemented, technically unsound, unsuitable for deployment in the North Sea environment and/or would not meet industry safety and regulatory requirements.
- **Financial Feasibility**: A potential alternative would not be financially feasible where its cost could render the project (or a component part) unviable or is disproportionately high in the context of the scale of the reduction in the environmental effect that the alternative would achieve.

12. Approach to evaluation of feasible alternatives

12.1 If a range of feasible alternatives are identified then the final stage involves the examination and evaluation of those feasible alternatives so identified.

12.2 In this context it is self evident that any feasible alternatives which would meet the project objectives but are clearly equally or more environmentally damaging either to the European site(s) affected or any other European site(s) would not be an alternative solution to the proposed development.

12.3 ECJ case law indicates that an alternative which itself would lead to damage or deterioration to a European site is not an alternative: C-399/14 [at paragraph 75]. This is similarly illustrated in the *Hull HRO* decision, where the Secretary of State examined other proposed alternative sites to the Quay 2005 site located within the port of Hull. The Secretary of State concluded that since all the alternative sites in Hull would be in a similar position with regard to impact on designated sites (i.e. would be likely to affect the same European sites as Quay 2005), not only were there no sites in Hull which would not have some impact on the designated areas, but there were no alternative sites in this area which would have an impact materially different from that of Quay 2005.

12.4 The Applicant submits that, contrary to what might be inferred from MN 2000 and the Methodological Guidance, on a proper examination of case law and EC opinions, this is an evaluative and not a pure ecological ranking exercise and involves striking the best balance between ecological and other objectives, taking into account the relevant IROPI, in line with the proportionality principle.

<u>The EC Guidance: Ecological Ranking Exercise?</u>

12.5 MN 2000 provides [at paragraph 5.3.1] that: "It rests with the competent national authorities to assess alternative solutions. This assessment should be made against the site's conservation objectives". This ensures that any feasible alternative is similarly judged in terms of its effect on European site integrity.

12.6 The Methodological Guidance suggests each alternative should be assessed against the same criteria used in the appropriate assessment to assess the impact of the proposed development on the conservation objectives of the relevant European site. These aspects of MN 2000 and the Methodological Guidance are uncontroversial and accepted.

12.7 It is when dealing with the factors which can be considered at this stage and the nature of the exercise that MN 2000 and the Methodological Guidance are unduly simplistic and potentially misleading.

12.8 Each advises that ecological considerations are to the fore at this stage (which is accepted by the Applicant) but the Methodological Guidance goes much further and suggests that is to the exclusion of any other consideration:

"The examination of alternative solutions requires, therefore, that the conservation objectives and status of the Natura 2000 site will outweigh any consideration of costs, delays or other aspects of an alternative solution."

12.9 MN 2000 [again paragraph 5.3.1] is more nuanced, accepting that economic criteria may be a factor but one that should not automatically overrule ecological concerns:-

"It should be stressed that the reference parameters for such comparisons deal with aspects concerning the conservation and the maintenance of the integrity of the site and its ecological functions. In this phase, therefore, other criteria, such as economic criteria, cannot be seen as overruling ecological criteria."

12.10 MN 2000 and the Methodological Guidance may suggest that the task at this stage is a rigid ecological ranking exercise. Having considered a number of cases and examples, the Applicant believes that this advice is misplaced and not reflective of practice.

The Best Balance between Ecological and Economic Objectives

12.11 The AG opinion in **C-239/04** (Castro Verde) is important to this analysis and, to ensure proper context, the relevant passages are set out below in full [original emphasis maintained]:

- [42] That prerequisite for authorising a project is intended to prevent protected sites from being adversely affected even though "the aims of the project could also be achieved in a manner which would affect the protected site less adversely or not at all". The absence of alternative solutions corresponds in that respect to a stage in the test of proportionality, according to which, when there is a choice between several appropriate measures, recourse must be had to the least onerous.
- [43]. The absence of alternatives cannot be ascertained when only a few alternatives have been examined, but only after *all* the alternatives have been ruled out. The requirements applicable to the exclusion of alternatives increase the more suitable those alternatives are for achieving the aims of the project without giving rise — beyond reasonable doubt — to manifest and disproportionate adverse effects.
- [44]. Among the alternatives short-listed in that way, the choice does not inevitably have to be determined by which alternative least adversely affects the site concerned. Instead, the choice requires a balance to be struck between the adverse effect on the integrity of the SPA and the relevant reasons of overriding public interest.

- [45]. The necessity of striking a balance results in particular from the concept of 'override', but also from the word 'imperative'. Reasons of public interest can imperatively override the protection of a site only when greater importance attaches to them. This too has its equivalent in the test of proportionality, since under that principle the disadvantages caused must not be disproportionate to the aims pursued.
- [46]. The decisive factor is therefore whether imperative reasons of overriding public interest require the implementation of specifically *that* alternative or whether they can also be satisfied by another alternative with less of an adverse effect on the SPA. That comparison presupposes that the various alternatives have been examined on the basis of comparable scientific criteria, both with regard to their effects on the site concerned and with regard to the relevant reasons of public interest.

12.12 Paragraph 44 is important and highlights that there is a relationship between the alternatives and IROPI stages of the Derogation Provisions, i.e. they are not to be applied in silos. The AG's opinion includes a footnote (footnote 30)[28] which notes that MN 2000 (wrongly) suggests that inevitably the choice is determined by which alternative least adversely affects the European site concerned. In other words, the exercise is not a simple ecological ranking exercise and the identification of a less harmful alternative is not itself fatal. The proportionality principle applies. A less harmful alternative may be discounted if the reduction in harm is marginal when set against a material reduction in benefit having regard to the IROPI which justify the project in question.

12.13 In this context, it is essential to note that the infraction proceedings in Castro Verde concerned the failure of The Portuguese authorities to look at the possibility of routes which avoided the SPA entirely (such routes may or may not have been feasible – the issue was there was no evidence any such routes were considered at all, even briefly). Crucially, no objection or criticism was levelled by the EC at the fact that the Portuguese authorities examined and rejected various alternatives routes (to the preferred route) within the SPA which, in some cases, would have had less adverse effect on the SPA than the preferred route.

12.14 The evaluative nature of the exercise therefore appears to involve seeking to strike the "best balance between ecological and economic objectives". This approach is reflected in a large number of EC opinions. For example in Rosenstein Portal (2018), it was noted that none of the alternatives would give rise to a significantly lower impact than the chosen option. Thus the proposed solution offered "the best balance between ecological and economic objectives". This approach is evident in at least three other EC opinions[29].

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[28] The footnote relates to the first sentence of paragraph 44 of the AG opinion and reads: "*However, that is how the Commission could be understood in its guide Managing Natura 2000 sites, the provisions of Article 6 of the 'Habitats' Directive 92/43/EEC.* In other words, the guidance is misleading.

[29] See C(2015) 9085 final (widening of the B 173 between Lichtenfels and Kronach); C(2013) 1871 final (widening of ship fairway of the river Main); C (2012) 3392 final (Elbe River Dredge).

12.15 In short, it is not the case, as MN 2000 might appear to suggest that, in applying the alternatives test, the decision-maker is under an obligation to rank those alternative solutions that had been identified in terms of their ecological impact (from most to least harmful or vice versa), with the mere availability of one (or more) less harmful alternatives a decisive factor.

13. Conclusions

13.1 In summary, the following key principles can be distilled from case law, guidance and previous decisions and applied when considering whether it is possible to resort to alternative solutions:

i. The consideration of alternatives should be approached as a multi-staged or stepped process.

ii. The first step is to identify the relevant objective(s) which any alternative would need to address. That requires an understanding of the relevant need and public benefits to which the project is designed to respond (e.g. as described by the NPS and/or other documents setting out Government policy).

iii. The project objective(s) that frame the search for alternatives can legitimately be narrow in scope, provided they are genuine and important.

iv. Conversely, the notion of alternatives cannot reasonably be cast so wide by reference to an abstract "aim" or "problem" so as to include any and every possible alternative strategy. It is in the context of a given project that the alternatives question arises.

v. The need and project objective(s) identified in the manner described above frame the consideration of any alternatives – options which do not address the need and/or fail to meet the objective(s) are not an "alternative solution".

vi. The "do nothing" option should be considered but will not be an alternative solution (unless the need and project objectives can be delivered by doing nothing).

vii. It is not necessary to consider every theoretically imaginable alternative. The Secretary of State is entitled to discount alternatives that are obviously out of the question or improbable without the need for detailed assessment.

viii. The detailed consideration of alternatives should be limited to options which are demonstrably feasible: financially, legally and technically.

ix. Consideration of cost and viability are relevant and legitimate consideration in determining feasibility. Alternative solutions need not be equivalent in terms of costs, but additional costs should not be disproportionate in the context of the competitive market conditions applicable to offshore wind.

x. If after applying the stages/ steps above a number of *feasible* alternatives have been identified, those should be subject to further examination in terms of their relative effects on the integrity of the national site network as compared to the project in question.

xi. At this final stage (evaluation of feasible alternatives), feasible alternative solutions which are likely to give rise to similar or greater adverse effects on the European site concerned or the national site network can be immediately discounted.

xii. Conversely, the availability of a feasible alternative solution with a lesser effect on integrity is not necessarily decisive. The principle of proportionality applies and the decision maker may legitimately strike the best balance between ecological and other factors including economic objectives. An alternative providing marginal reduction in harm for corresponding material loss of public benefit may not be a proper alternative.