

FIVE ESTUARIES OFFSHORE WIND FARM

10.52 RESPONSE TO DEADLINE 6 SUBMISSIONS ON ISH6 ACTION POINT 9 REGARDING THE CROW ACT

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1. RESPONSE TO SUFFOLK COUNTY COUNCIL'S DEADLINE 6 SUBMISSION [REP6-074]

1.1 OVERVIEW

- 1.1.1 This submission responds to Suffolk County Council's submission on the application of section 85 of the Countryside and Rights of Way Act 2000 submitted at Deadline 6 [REP6-074] ("SCC D6 Submission").
- 1.1.2 The Applicant maintains its position as set out in its Deadline 6 submission [REP6-048] and supported by the opinion of King's Counsel [REP6-050] and has sought not to repeat those submissions in this response.

1.2 EFFECTS ON THE SCHAONB

- 1.2.1 SCC has compiled a revised version of Table 10.26 of the SLVIA in Appendix A of the SCC D6 submission, which is explained in para 2.3 of the report. It doesn't seek to change the assessment and is consistent with that provided in the SLVIA. This version adds a column which purports to identify the magnitude of change, the nature of effect and duration for each special quality factor (adverse, long-term etc), with cross-references to the paragraphs of the SLVIA that contain these conclusions. This clearly demonstrates that the effects are <u>at worst</u>, of low magnitude and moderate/minor adverse (not significant), as well as being indirect and reversible.
- 1.2.2 The Applicant notes that this table is also still based on the maximum design scenario assessed in the SLVIA with turbines of 399m maximum height, and not the reduced 370m to blade tip now committed to. As the table is based on parameters that have since been reduced, the magnitude of change will reduce and the adversity of any effects will be less than originally assessed in the ES.

1.3 THE STATUTORY DUTY

- 1.3.1 The Applicant does not accept the point made in paragraph 3.9 of the SCC D6 submission that the VE turbines (not the 'array area', the 'area' has no effect) directly 'affect land' in the SCHAoNB. Indeed, the Applicant considers the extent to which the turbines affect the AoNB to be a key point of dispute between the parties.
- 1.3.2 The Applicant maintains that the turbines, at 37km distant to the closest point, will only be visible infrequently and to a very small degree, and which have been assessed as having only a non-significant effect cannot be reasonably said to 'affect' the AoNB in a manner which supports SCC's position that some further enhancement is required.
- 1.3.3 SCC have provided at 4.2 of their submission a definition of natural beauty which reads:
 - "component parts of the natural beauty of an area that should be conserved can include its flora, its fauna, its geological features, and its physiographical features."
- 1.3.4 The Applicant notes that the VE turbines are not affecting any of those components. They have no direct effect on the AoNB and no interaction with its flora or fauna, and will have no impact at all on geological and physiographical features. This definition accordingly supports the Applicant's position that it will not result in any harm to the SCHAONB.

- 1.3.5 The Applicant strongly disputes SCC's assertion in paragraph 4.20 that

 "Given that in this case there is no scope for dispute that the VE array areas
 will have adverse effects on the natural beauty of the SCHAONB".
- 1.3.6 The Applicant does not accept that the non-significant effects, which would not impact any of the components cited in SCC's own definition of natural beauty, adversely affect the natural beauty of the SCHAoNB. It is therefore not beyond dispute and, to the contrary, the Applicant disagrees with SCC's position.

BAYLISS

1.3.7 The Applicant notes the references to Bayliss v SSCLG [2013] EWHC 1612 (Admin) (paragraph 4.4 onwards of the SCC D6 Submission). This case has also been cited in the Applicant's D6 submission where, at paragraph 2.6.6, it is noted that the weight to be attached to any landscape impact must be dependent on the individual facts and circumstances of that application. The Applicant does not dispute that, as a point of principle, development outside an AoNB can affect it, however the facts of this case are that the closest turbine would be 37km distant. That is clearly very different to the 800m separation being considered in Bayliss. The Applicant maintains that on the current facts and circumstances the VE turbines will not have such an effect on the AoNB that any further steps need to be taken. The Applicant also maintains, as it has set out in its submission, that the Court in Bayliss was very clear that mere visibility of turbines outside the designated landscape is not automatically harmful.

SHERINGHAM SHOAL AND DUDGEON EXTENSIONS OWF (SEPDEP) DECISION

- 1.3.8 The Applicant notes SCC's attempt in paragraph 4.19 to dismiss the relevance of the SEPDEP SoS decision because the guidance wasn't in place and the ExA's recommendation was made without the updated wording to section 85. The SoS did have to consider section 85 as it currently applies and explicitly did so in the decision letter. The Applicant considers that failing to have regard to a decision of the SoS, which was made on the current wording of the statutory provision, and which considered a clearly comparable development would be inappropriate That decision is the only guidance available at this time as to how SoS DESNZ is applying the wording of the provision in practice.
- 1.3.9 The SoS determined:

"the Secretary of State has considered the impact on the Norfolk Coast Area of Outstanding Natural Beauty ("AoNB"). The Secretary of State also notes the duty under s245 of the Levelling-up and Regeneration Act 2023 for public bodies to further the purposes of AoNBs and also notes the 2024 NPS EN-1 in this regard. The Secretary of State is satisfied that all possible steps have been taken to further the relevant purposes of the AoNB and comply with the statutory duty in this particular case." (emphasis added).

1.3.10 The DEFRA guidance requires:

"a relevant authority should take <u>appropriate</u>, <u>reasonable</u>, <u>and proportionate</u> steps to explore measures which further the statutory purposes of Protected

¹ Secretary of State decision letter on the application for development consent for the Sheringham Shoal and Dudgeon Offshore Wind Farm Extension project, dated 17 April 2024, paragraph 4.55

Landscapes <u>as far as is reasonably practical</u>, relevant authorities should seek to avoid harm and contribute to the conservation and enhancement of the natural beauty, special qualities, and key characteristics of Protected Landscapes"

- 1.3.11 There is no contradiction in these positions.
- 1.3.12 Accordingly the Applicant maintains that the previous decision of the SoS aligns with the guidance, and not withstanding the later issue of that guidance, and provides a recent and very relevant example as to how the SoS considers the duty should be addressed in the current circumstances.

NPS EN-1

1.3.13 SCC submit at paragraph 4.13 of the SCC D6 submission that:

"Para 5.10.34 of EN-1 repeats the point that the duty applies to projects outside of protected landscapes which may have impacts within them".

- 1.3.14 The Applicant has addressed EN-1 in detail in its Deadline 6 submission² and does not repeat that here, but notes that 'impacts' cannot be equated with 'harm'. The Applicant has complied with EN-1 in assessing the potential impacts on the AoNB, and has found these to be non-significant (as SCC has agreed them to be). The Applicant does not accept that it is a reasonable in exercising a planning function to hold that non-significant impacts of the low level assessed here result in failure to comply with Section 85. The Applicant maintains its position that to do so is to equate visibility and harm contrary to case law, and contrary to the NPS which recognises that development of the scale of a NSIP is likely to have some residual landscape impact no matter how many steps are taken to mitigate that.
- 1.3.15 King's Counsel in the opinion submitted has addressed the position taken by SCC in paragraphs 4.19, 4.22 and 4.23 that in order to comply with the duty the Applicant must take further, undefined steps to demonstrate enhancement. King's Counsel is very clear that he does not agree with this interpretation and that SCC's position is misconceived³, setting out in paragraph 108:

"SCC has characterised the duty as amounting to an obligation "on the decision maker to be satisfied that as much as practicable has been done to further the purposes of the natural beauty of the national landscape". For the reasons set out above I consider that SCC's reformulation does not reflect the terms in which the duty has been framed in the legislation, nor does it reflect the NPS policy requirements which were formulated in the light of that duty, or the AONB Guidance. <a href="If the decision maker adopted SCC's reformulation in determining VE Ltd.'s application, I consider that it would fall into legal error." (emphasis added).

² REP6-048

³ Paragraph 14 of REP6-050



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