

11 July 2011

Mr. Jacob Hain
Triton Knoll Development Manager
RWE Npower Renewables Limited

By email

Dear Jacob,

**EN010005: Proposed Triton Knoll Offshore Wind Farm
Proposed consent strategy and preliminary draft Development Consent Order**

I am writing with reference to your recently supplied preliminary draft Development Consent Order (DCO) and legal submission in respect of the proposed scope of the DCO for Triton Knoll Offshore Wind Farm. Thank you for providing these documents at this stage.

The draft DCO is one of the central documents submitted with any application for an Order granting development consent and experience to date has highlighted the importance of refining the draft Order as far as possible before submission of an application to the Infrastructure Planning Commission (IPC).

We have now considered the documents provided and set out our comments below, taking each document in turn. I hope that the comments are helpful at this stage in the process and will assist in the preparation of further drafts of the DCO. Our comments do not prejudice any future decisions of the IPC, including that of the Commissioner appointed to consider the acceptance of any future application made under s.55 of the Planning Act 2008 ('the 2008 Act').

1. Legal submission: proposed scope of the draft DCO

a. Consent strategy

The legal submission entitled 'proposed scope of the draft DCO' outlines the reasons why RWE NPower Renewables proposes to submit a draft DCO only for the Triton Knoll offshore array and other offshore infrastructure, and to seek separate consents for the electrical connections to the grid (both offshore and onshore). This matter was the subject of discussion during the meeting between the IPC and yourselves on 23rd February 2011.

As highlighted at that meeting, the IPC is not able at this stage to give a definitive formal opinion about the acceptability or otherwise of this consenting strategy. To do so could

prejudice the IPC's decision as to whether or not to accept any future application under section 55 of the 2008 Act.

It is for the developer to seek its own legal advice on which it can rely in order to be properly advised of the risks of such an approach. You will therefore need to satisfy yourselves that the proposed approach is robust and defensible.

Notwithstanding the above, the proposed consenting strategy set out in your legal submission, and the reasons presented for this strategy, are noted. It will be for the Explanatory Memorandum to explain the proposed consenting strategy and how this is reflected in the draft Order. This includes in particular the decision to omit the offshore export cable(s) from the definition of the development for which consent is sought.

b. Grid connections

Paragraph 5 of the legal submission refers to draft National Policy Statement (NPS) EN-1 as it relates to grid connections. You will be aware that the Secretary of State laid a final set of energy NPSs before Parliament for approval on 23rd June 2011 and paragraphs 4.9.1-3 remain largely unchanged from the revised draft version to which you refer.

Whilst it is clearly the developer's commercial risk to progress an application seeking consent for a generating station without the infrastructure necessary to connect it to the electrical grid, as acknowledged in paragraph 4.9.1 of draft NPS EN-1, the IPC will *'want to be satisfied that there is no obvious reason why a grid connection would not be possible'*. We would highlight the statement in paragraph 4.9.3 of EN-1 that the IPC's decision to consent one project would not in any way fetter its subsequent decisions on any related projects.

We would also note paragraph 4.9.3 of draft NPS EN-1 that *'if this option is pursued, the applicant(s) accept the implicit risks involved in doing so, and must ensure they provide sufficient information to comply with the EIA Directive¹ including the indirect, secondary and cumulative effects, which will encompass information on grid connections'*. This Directive is transposed into UK legislation, in relation to the 2008 Act regime, through the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 (SI No. 2263) (the EIA Regulations), which sets out the procedures that must be followed so that the consideration of applications for Nationally Significant Infrastructure Projects (NSIPs) fully reflect the requirements of the 'EIA Directive'.

The IPC considers that the cumulative effects of any infrastructure which is related to the proposed development should be considered as part of an integrated approach to environmental impact assessment. This approach reflects the provisions of Schedule 4 Part 1 of the EIA Regulations, which (inter alia) require the inclusion in an Environmental Statement (ES) of a description of any cumulative effects of the proposed development. As you know, if the IPC fails to take into account the ES and any other environmental information, this will be a breach of the EIA Regulations. The ES should therefore provide both a general description of the intended grid connection arrangements and a high level assessment of any likely impacts including, for example, those arising from both the offshore and onshore connection related infrastructure. The level of this assessment will clearly depend on the information available (having regard to current knowledge) at the

¹ European Council Directive 85/337/EEC – as amended

time the ES is written. The ES should also, at the minimum, provide an outline of the main alternatives which were considered (if any), both for the connection(s), and the substation location(s).

You may also wish to consider the implications of this approach on the requirements of the Habitats Directive and the need to assess the likely significant effect on European sites, both alone and in-combination with other developments. We would refer you to IPC Advice Note ten: Habitats Regulation Assessment in this regard. The IPC encourages developers to submit draft Habitats Regulations Assessment reports and any supporting documents to us at the pre-application stage in order that the IPC can identify any quality issues and take a view on the level of resources required to carry out our duty during the examination.

You should be mindful that Regulation 6(1)(b) of The Infrastructure Planning (Applications: Prescribed Forms and Procedure) (APFP) Regulations 2009 states that an application for the construction of an offshore generating station must, amongst other matters, be accompanied by “*details of the proposed route and method of installation for any cable*”. You should be satisfied that the required information will be available at the time of submission of the development consent application to the IPC in order for it to be provided with that application. Given the requirements of section 55(3)(b), and by reference s.37(d) and Regulation 6(1)(b) of the APFP Regulations, failure to provide this information at submission stage could mean that the IPC is not able to accept the application for examination.

The IPC notes the statement at paragraph 6.2 of the legal submission that when the application is submitted it will provide “*as much information as possible about the likely grid connection options*”. We would encourage you to set this information out clearly as part of the application, bearing in mind the requirements of Regulation 6(1)(b) of the APFP Regulations highlighted above.

In this vein, we welcome the intention to provide as part of the application a schedule of the further consents likely to be required for the grid connection works and the prospects for obtaining the necessary consents, in addition to the Schedule of Consents for the proposed application.

c. NSIP definition and proposed associated development

The IPC would expect applicants to clearly describe in their draft DCO those elements they regard as being integral to an NSIP, any associated development and any ancillary works, and to explain the approach taken in their Explanatory Memorandum.

The IPC seeks to take a generally consistent approach to the identification of associated development between different applications, types of associated development, and NSIP categories, albeit that each application has to be looked at on its particular facts. This requires the IPC to consider (inter alia) the distinction drawn by applicants in their draft DCOs between integral and any associated development, and applicants’ explanations for the approach they have taken.

In view of this, we would suggest that the Explanatory Memorandum should include an explanation of and justification for not only why the export cable may be associated development (albeit that this is not included in this draft DCO), but also why it is not considered to be integral to the development for which consent is being sought, and

therefore why it is not proposed to include it in this forthcoming DCO application. In setting out the explanation and justification for your proposed approach, you may wish to refer to the different approaches to this specific matter being suggested by the developers of other proposed offshore wind farms coming forward under the 2008 Act regime. You may also wish to explain and justify in the Explanatory Memorandum the distinction that has been drawn in this case between the export cable and the inter-array cables, the latter of which have been included as an integral element of this proposed project.

2. Draft Development Consent Order (DCO)

The IPC has reviewed the preliminary draft DCO, but notes the absence of a draft Explanatory Memorandum at this stage. The Explanatory Memorandum, which has to be submitted with the application, should clearly explain the purpose and effect of provisions in the draft DCO, including in particular any divergences from the model provisions (set out in The Infrastructure Planning (Model Provisions) (England and Wales) Order 2009).

a. Parameters of the proposed development

Schedule 1 Part 1, paragraphs 2 (a-e) and 3 of the draft DCO define the authorised project and associated development. We note that this preliminary draft DCO does not yet specify all the figures or ranges of the proposed parameters that might define the possible scope of the authorised development. The IPC is therefore unable to comment in detail on the proposed parameters within the draft Order until there is further clarity about the likely range of these.

We would, however, reiterate advice previously given, as reflected in the meeting note of 23 February 2011 and IPC Advice Note 9 (Rochdale Envelope), that developers should make every effort to finalise as much of the project as possible prior to submission of their DCO application. Where flexibility is required within the draft DCO, the maximum adverse scenario (the 'worst case') should be assessed in every instance. With this in mind, the EIA should reflect the worst case in terms of environmental impacts. You should note that in defining the 'worst case' for the proposed development, you may be required to apply different environmental parameters, and that care will need to be taken in preparing and demonstrating the worst case. You should consult the relevant prescribed consultees on this issue.

In view of the currently wide range of variables proposed in this draft DCO we would particularly reiterate the advice set out in IPC Advice Note 9 in relation to pre-application consultation, the EIA and content of the draft DCO. The project should be described within the draft Order in such a way that it is consistent with the EIA. By submission stage, you must be able to demonstrate that you have complied with your duties, amongst other matters, under sections 42, 47 and 48 of the 2008 Act.

Advice Note 9 (on page 9) advises that one way of refining the parameters of the proposed development would be for the draft to DCO to set out specified maxima and minima. For example, for offshore wind farms, these could be in terms of:

- maximum number of turbines;
- minimum number of turbines;
- maximum nacelle (hub) height;
- minimum nacelle (hub) height;

- maximum blade tip height;
- minimum blade tip height;
- minimum clearance above mean sea level;
- minimum separation distances between turbines;

Draft DCOs for such developments should also specify the particular foundation type(s) to be used. At present the definition of “foundation” within the draft DCO, although it refers to four types, would actually allow a potentially unlimited number and mix of foundation types to be used. We would suggest that the DCO seeks to limit the potential number of such variables so far as possible, for example by specifying that only one foundation type may be used within each phase of the proposed development or within other specifically defined areas.

We note that certain of the proposed parameters or amended versions thereof are already included within the wording of the draft DCO, either in the description of the proposed development in Part 1 of Schedule 1 or as draft requirements in Part 2 of Schedule 1, albeit that not all the requisite figures/ranges are specified. We would suggest that where the parameters advised in Advice Note 9 (as highlighted above) are not currently included in this draft DCO these should be included in subsequent iterations. In addition, where such parameters are already included these should be further refined so as to provide a more focussed description which ensures that the potential degree of flexibility is limited so far as possible.

If the DCO is granted, any flexibility of the project will need to be reflected in appropriate development consent provisions and requirements and any conditions on a deemed marine licence.

b. Proposed approach to phasing

The definition within Schedule 1 Part 1, paragraph 1 (Interpretation) seeks to define the principles of a “phasing area” but this proposed approach is not at present sufficiently clear. For example, it is unclear how the draft Order will define the phasing area(s) or articulate the parameters of each phasing area(s). No specific phasing plan is provided nor is it proposed to include such a plan with the application. No reference is made to the proposed phasing arrangements being shown on the works, land or other plan.

It is therefore currently unclear as to how the proposed phasing will be secured in the absence of a plan, or of a sufficiently detailed, precise description of the arrangements in the draft DCO, or any requirement specifically dealing with phasing, and of any explanation as to the approach to be taken in a draft Explanatory Memorandum. We also note that the draft requirements refer to “phasing areas” whereas the draft Marine Licence describes “build phases”, although whether these are the same or different is not made clear. The next iteration of the draft Order (and its Explanatory Memorandum) should seek to explain these matters further.

c. Detailed drafting points

Whilst we recognise that the draft DCO provided was not intended to be either complete or at an advanced stage of drafting, we would like to make the following, more detailed, points about the drafting of the document which we hope will be of assistance moving forward.

Interpretation

- Article 2 (interpretation), “the Applications Rules”: the APFP Regs 2009 are Regulations as opposed to Rules.
- Article 2 (interpretation), “maintain”: the inclusion of “adjust” and “alter” within this proposed definition is insufficiently clear, and arguably makes this definition unacceptably wide.

Other articles

- Article 3(2) (Development consent etc. granted by the Order): the Explanatory Memorandum will need to explain this in more detail, particularly regarding the “works plan” given the flexibility proposed to be included in the Order. We would also wish to see (as a minimum) draft copies of the land and works plans prior to the application being submitted.
- Article 4(2) (Power to construct and maintain authorised project): this seems to us to cover a very wide definition of other works. This should be limited at least to the scope of the development that has been assessed by the EIA. The Explanatory Memorandum will need to explain the purpose and effect of this.
- Article 8 – we are unclear as to why reference is made here to “the Order limits plan” since no such plan is referred to in the APFP Regulations or in the Model Provisions, and this draft article is shown as being un-amended from the Model Provisions. The Explanatory Memorandum should explain any departures from the Model Provisions. In any event, the order limits would generally be shown with any limits of deviation on the works plan (Reg. 5(2)(j) of the APFP Regs.).
- Article 10 (Crown rights): the Explanatory Memorandum should explain the inclusion of this provision and its effect.

Schedules

- Schedule 1, Part 1 (authorised development) and part 2 (requirements) – as mentioned above, further refinement and details are required.
- With regards paragraph 2(1)(d) of Part 1 of Schedule 1, we are unclear as to the specific purpose(s) of the platforms referred to here since the definition of “platform” is currently too broadly drawn. The different type(s) of platforms required should be specifically defined and the numbers of each of these to be constructed specified. We also note that although a maximum number of 8 of these platforms are referred to here, there is no minimum number specified.
- Schedule 2 (Deemed Marine Licence): We note that the current wording in the draft Order for the deemed licence under the Marine and Coastal Act 2009 is based on previous FEPA licences and is likely to be significantly amended in consultation with the Marine Management Organisation (MMO). We will be happy to review an amended draft once consultation with the MMO has taken place, and a revised version is available. The IPC will also at that time be able to give more detailed advice on the wording of the proposed draft requirements.

I trust that the above will prove to be of assistance. However, if you require any further advice or clarification, or if you would find it helpful to meet to discuss the above, then please do not hesitate to contact me.

Yours sincerely,

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