



Department
of Energy &
Climate Change

Matt Mears
Renewables Developer
RWE Innogy UK Ltd

(By e-mail)

Department of Energy & Climate Change

3 Whitehall Place,
London SW1A 2AW

T: +44 (0)300 068 5770

E: giles.scott@decc.gsi.gov.uk

www.decc.gov.uk

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Dear Mr Mears

PLANNING ACT 2008

APPLICATION FOR A NON-MATERIAL CHANGE TO THE BRECHF A FOREST WEST WIND FARM ORDER 2013

1. I am directed by the Secretary of State for Energy and Climate Change (the "Secretary of State") to advise you that consideration has been given to the application (the "Application") which was made by RWE Innogy UK Ltd (formerly RWE Npower Renewables Limited) ("the Applicant") on 14 August 2015 for a non-material change to The Brechfa Forest West Wind Farm Order 2013 ("the 2013 Order") under paragraph 2 of Schedule 6 to the Planning Act 2008 (the "2008 Act").
2. The original application for development consent under the 2008 Act was submitted to the Planning Inspectorate by the Applicant. Examination of that application began on 13 March 2012 and development consent was granted on 13 March 2013 for the construction and operation of a wind energy generating station, comprising up to 28 wind turbine generators and other associated infrastructure, with an installed capacity of between 56-84 MW in the Brechfa Forest, Carmarthenshire.
3. The Applicant has applied for changes to the 2013 Order to optimise access track layout and to conform to requirements for turbine delivery.

Summary of the Secretary of State's Decision

4. The Secretary of State has decided under paragraph 2(1) of Schedule 6 to the 2008 Act to make non-material changes to the 2013 Order, so as to authorise the changes as detailed in the Application. 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 (“the 2011 Regulations”).

Consideration of the materiality of the proposed change

5. The Secretary of State has given consideration as to whether the Application is for a material or a non-material change.
6. There is no statutory definition of what constitutes a “material” or “non-material” change for the purposes of Schedule 6 to the 2008 Act. Paragraph 2(2) of Schedule 6 to the 2008 Act requires the Secretary of State, when deciding whether a change is material, to have regard to the effect of the changes on the development consent order as originally made. The Secretary of State notes that the changes do not relate to the wind turbine generators, but relate to other matters such as access tracks, cable routes and felling, and that the effect of those changes is relatively small on the order as originally made.
7. In addition, so far as decisions on whether a proposed change is material or non-material, the Department of Communities and Local Government’s “Guidance on Changes to Development Consent Orders” (December 2015)¹ document makes the following points. Given the range of infrastructure projects that are consented through the Planning Act 2008 and variety of changes that could possibly be proposed for a single project, it is not possible to attempt to prescribe whether any particular types of change would be material or non-material. Such decisions will inevitably depend on the circumstances of the specific case. However, the guidance states that there may be certain characteristics that indicate that a change to a consent is more likely to be treated as a material change. Four examples are given in the guidance as a starting point for assessing the materiality of a proposed change, namely (a) whether an update would be required to the Environmental Statement (from that at the time the original development consent order (“DCO”) was made) to take account of new, or materially different, likely significant effects on the environment; (b) whether there would be a need for a Habitats Regulations Assessment (“HRA”), or a need for a new or additional licence in respect of European Protected Species (“EPS”); (c) whether the proposed change would entail compulsory acquisition of any land that was not authorised through the existing DCO; and (d) the potential impact of the proposed changes on local people and business (for example, in relation to visual amenity from changes to the size and height of buildings; impacts on the natural and historic environment; and impacts arising from additional traffic).
8. The Secretary of State has considered the 4 matters in (a), (b), (c) and (d) above:
 - a) The Secretary of State considers that in respect of the Environmental Statement (“ES”), the Applicant has given consideration to whether the proposed changes would give rise to any environmental effects that:
 - i) are new significant effects not identified in the ES for the consented project; or

1

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/485064/Making_changes_guidance_to_Development_Consent_Orders.pdf

- ii) are materially different effects when compared with the environmental effects set out in the ES for the project.

The Secretary of State notes that the Applicant considers this is not the case because the effects of the proposed amendments, all of which fall within the area of the 2013 Order limits assessed by the ES, were included within the original parameters of the ES. The Secretary of State has considered the environmental information supplied with the Application and the responses received from consultees during the consultation, and supports the Applicant's conclusions that there are no new or materially different likely significant effects not previously identified. The Secretary of State has, therefore, concluded that no update is required to the ES as a result of the proposed amendments to the 2013 Order.

b) In respect of the need for an HRA, as far as impacts on sites and species designated under the Birds and Habitats Directives is concerned, the Secretary of State notes that the Examining Authority ("ExA") concluded in its consideration of the 2013 Order application that there was not likely to be a significant effect on two Special Areas of Conservation (SAC) in the vicinity of the Brechfa project – the Afon Teifi SAC (some 1.7km north west from the site) and the Afon Tywi SAC (some 9.1km south of the site). In the light of this conclusion, the ExA advised the Secretary of State in his report that there was no need for an Appropriate Assessment (AA) to be undertaken by the Secretary of State. The Secretary of State agreed. In respect of the current Application, given there would be no change to the likely significant effects on protected sites identified for the BFWWF project by what is now proposed, the Secretary of State remains of the view that there is no need for an AA to be undertaken.

c) In respect of compulsory acquisition, the Secretary of State notes that the proposed changes do not require any compulsory purchase of land.

d) In respect of impacts on business and local people, the Secretary of State notes that the intention of the proposed changes is to help avoid especially steep or otherwise difficult areas in construction and reduce the overall amount of work required to construct the access tracks. No changes are anticipated to the impacts already assessed in the ES. As considered further below, the Welsh Government Historic Environment Service ("Cadw") and Natural Resources Wales ("NRW") have also confirmed to the Secretary of State that they are content that the proposed changes will not have an additional impact on the historic environment and that that appropriate surface water management arrangement and pollution prevention measures can be implemented on site to protect controlled waters. Although concerns regarding the impact of tourism on the changes have been raised, no evidence to support this has been provided. The Secretary of State is satisfied therefore that there nothing to warrant taking a different view on this matter to that set out in the decision letter dated 12 March 2013 (i.e. that little weight should be given to such concerns).

- 9. On the basis of the above and because the Secretary of State considers that there are no other circumstances such that the changes should be considered material, the Secretary of State has therefore concluded that the proposed changes are appropriately categorised as non-material changes (for the purposes of paragraph 2

of Schedule 6 to the 2008 Act). The Application has therefore been handled in accordance with Part 1 of the 2011 Regulations.

Consultation and Responses

10. In accordance with the requirements of regulation 7(1) of the 2011 Regulations, parties required to be notified by that regulation were notified of the Application on 17 August 2015. Consultation ran until 24 September 2015.
11. The Application was also published for two consecutive weeks in the local press and made publicly available on the Planning Inspectorate's website, such that there was opportunity for anyone not notified to also submit representations to the Planning Inspectorate.
12. Representations were received during the consultation and considered from: Cadw, Welsh Government's Transport Division, Carmarthenshire County Council ("the Council") and NRW, who all raised no objections. Eight representations from members of the public objecting to the proposed changes were also received. The grounds of objection related to: impacts on hydrology and watercourses; impact on historic monuments/archaeological sites (which it was claimed are not shown on the Applicant's plans submitted with the Application) and associated tourism; and incorrect use of a property name to describe the project site. In view of the nature of some concerns relating to hydrology and archaeology (including alleged inaccuracies in the plans provided by the Applicant), the Secretary of State considered it prudent to re-consult Cadw, NRW and the Council. The Secretary of State also sought clarification from the Applicant about a reference to the felling plans in the proposed amending Order.
13. The Secretary of State has considered all the representations received during the two rounds of consultation and does not consider that any further information needs to be provided by the Applicant or that further consultation of those already consulted or wider consultation is necessary before determining the Application.

Historic Monuments/Archaeological Sites and Associated Tourism

14. The Secretary of State has considered representations received in relation to the impact of the proposed changes on the historic environment, including burial mounds and historical features within the area. She notes that the entire area was assessed in the supporting ES and that the proposed changes all fall within the 2013 Order limits and the parameters of the ES. The Secretary of State also notes that the Supporting Statement to the Application concludes that in respect of Chapter 7 to the ES covering Historic Environment no changes are anticipated to the impacts assessed with the ES as a result of the proposed changes. To support this conclusion, the Applicant has resubmitted Figures 7.1 and 7.2 from the ES to show there are no recorded historical sites within the vicinity of the proposed changes. The Secretary of State notes that the minor amendment to track WR22 is the closest to a Historical Environment Record (22625) at approximately 188m, while the minor amendment to tracks WR3/WR10 is approximately 382m from Scheduled Ancient Monument CM033b at the closest point. Furthermore, the Secretary of State is content that Requirement 26 of the 2013 Order, which requires the Applicant to provide a scheme

of archaeological investigation, monitoring and action in the event of finding of previously unrecorded historical sites, will ensure adequate protection measures are out in place during construction works. This view is also supported by the representations received from Cadw, who consider the amendments to track alignments and bends proposed are non-material and will have no additional impact on the historic environment. As indicated above, no evidence has been provided to support the claim that the proposed changes will impact on tourism, and the Secretary of State has therefore given little weight to such concerns.

Hydrology and Pollution

15. Representations have also been made in respect of the impact of proposed changes on flooding in Gwyddgrug village, risk of pollution if the changes impact on a particular culvert and the potential for increased level of surface water run-off. As indicated above, the Secretary of State notes that the proposed changes are all within the Order limits and were considered in the original parameters of the ES. It is also noted that the Supporting Statement to the Application concludes that in respect of Chapter 8 to the ES, covering Geology, Soils and Hydrology, there are no changes anticipated to the impacts previously assessed. In respect of concerns regarding the impact of the extension of track WR29 as a replacement for track WR36, the Secretary of State is content that mitigation measures will be secured by Requirement 28 of the 2013 Order, which requires details of the surface water drainage system (including means of pollution control) to be submitted to and approved by the Council, will ensure that adequate protection measures are put in place. In respect of concerns raised regarding the watercourse in the vicinity of the access track from the A485 to the forest, it is noted this relates to the crossing along the access track which is not affected by any of the proposed amendments because the proposed amendments are all within the forestry land. The Secretary of State has also received confirmation from NRW that they are satisfied that appropriate surface water management arrangements and pollution prevention measures can be implemented on site by Requirements 9 and 28 (covering the approval by the Council of the Construction Method Statement and details of the Surface Water Drainage System) in order to protect controlled waters.

Additional Tree Felling

16. The Secretary of State has also considered a representation objecting to the “extensive felling of immature plantings” to accommodate to the proposed changes. It is noted that these would require up to 0.29 hectares of additional felling at locations that have already been assessed within the ES. The Applicant considers that the additional felling (i.e. an increase from 141 hectares of up to 141.29 hectares) are minor in the context of the site as a whole and will not create a new or significant effect. The Secretary of State agrees.

Incorrect use of a Property Name to describe the Project Site

17. The Secretary of State notes the concerns raised, but does not consider this is a matter material to her consideration of the Application.

General Considerations

Equality Act 2010

18. The Equality Act 2010 includes a public sector “general equality duty”. This requires public authorities to have due regard in the exercise of their functions to the need to eliminate unlawful discrimination, harassment and victimisation and any other conduct prohibited under the Act; advance equality of opportunity between people who share a protected characteristic and those who do not; and foster good relations between people who share a protected characteristic and those who do not in respect of the following “protected characteristics”: age; gender; gender reassignment; disability; marriage and civil partnerships²; pregnancy and maternity; religion and belief; and race. This Secretary of State is satisfied that there is no evidence of any harm, lack of respect for equalities, or disregard to equality issues in relation to this Application.

Human Rights Act 1998

19. The Secretary of State has considered the potential infringement of human rights in relation to the European Convention on Human Rights by the Application. The Secretary of State notes that the proposed changes would not require compulsory purchase of land and is satisfied that the grant of changes would not be incompatible with any Convention right protected by the Human Rights Act 1998.

Secretary of State’s conclusions and decision

20. For the reasons given in this letter, the Secretary of State considers that there is a compelling case for authorising the proposed changes to the 2013 Order as set out in the Application. The Secretary of State is therefore making the amending Order requested by the Applicant subject to a number of minor modifications set out below.

Modifications to the draft Order proposed by the Applicant

21. The Secretary of State sought clarification from the Applicant regarding the effect of the proposed amendment in relation to the revised felling plan, given there is no reference in the 2013 Order to the original ones. Following the response received from the Applicant, the Secretary of State has decided that it would be appropriate to include the revised felling plan in the documents requiring certification in accordance with article 18 of the 2013 Order; and therefore Requirement 7, which imposes an obligation to carry out the authorised development in accordance with such plans, will apply in relation to the revised felling plan.

22. The draft Order as submitted by the Applicant has been modified so that the definition of the revised work plan and the obligation to submit the revised work plan and the revised felling plan to the Secretary of State for certification appears in the amended 2013 Order, rather than in the amending Order. Further minor drafting changes have also been made to improve the drafting of the amending Order. These changes do not alter the effect of the draft Order as submitted.

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

Challenge to decision

23. 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

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

Yours sincerely

Giles Scott
Head of National Infrastructure Consents and Coal Liabilities

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 making the change 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:

<http://infrastructure.planninginspectorate.gov.uk/projects/wales/brechfa-forest-west-wind-farm/>

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)