

From: Jeffrey Penfold
Sent: Friday, November 23, 2012 5:15 PM
To: Nikki Smith; Melissa.Read@forewind.co.uk
Cc: Jessica Potter; John Pingstone
Subject: Comments on Forewind's draft Consultation Report and responses to queries.

Dear Nikki,

Following on from our meeting last week and as promised, I have provided you with some comments on Forewind's draft Consultation Report which I trust you will find useful. A query which was also raised at the meeting was with regard to the section 48 notice and whether the notice should list the locations where the documents, plans and maps showing the nature and location of the proposed development are available for inspection.

Regulation 4 (3) to the Application Prescribed Forms and Procedures (<http://www.legislation.gov.uk/ukxi/2009/2264/regulation/4/made>) prescribes what the s48 notice must include. Regulation 4 (3) (e) states 'at the places (including at least one address in the vicinity of the proposed development)' which is what ultimately needs to be satisfied. Having looked at some other s48 notices it appears that developers have listed the addresses of the deposit locations. In any case, I would suggest seeking legal advice upon which you can rely.

Dogger Bank Consultation Report:

Thank you for providing your draft Consultation Report outline structure on 26 October 2012 and your draft list of s42 consultees on 6 November. We have reviewed the documents and provided some comments to you at our meeting on 15 November. As agreed at that meeting, I set out below our full comments. This is advice given under s51 of the Planning Act 2008 (as amended) and as such will be published on our website.

All application documents, including the Consultation Report, will have a wide audience. This should be remembered especially when introducing the Consultation Report and its individual sections. Developers should aim to set the historical context at the start of the report - giving details of any issues, changes or amendments relative to the proposal. The introduction could also prove a good opportunity to give an overview of the proposal and of anything pertinent to the application ie. Two DCOs per application as opposed to one. It is also useful to explain upfront how any legislative changes may have affected the project, such as the enactment of the Localism Act on 1 April 2012.

Any guidance that has been issued by the Department for Communities and Local Government (DCLG) should be followed and if it is not, applicants must explain why the adopted approach departs from the guidance. The draft submitted referred heavily to the Planning Inspectorate's non-statutory Advice Note 14 'Compiling the Consultation Report' but very little reference had been given to the statutory DCLG 'Guidance on pre-application consultation'. DCLG guidance is guidance issued under s50 (2) of the Planning Act 2008 as amended (the 2008 Act) and therefore the applicant must have regard to it as per s50 (3) of the 2008 Act.

When applications are submitted to the Planning Inspectorate, as part of the acceptance process under s55 of the 2008 Act, regard will be had to the extent to which an applicant has had regard to any guidance issued under s50 of the 2008 Act.

As we discussed, it will prove useful to both the developer (when checking it has complied with the statutory requirements of the 2008 Act and any other matters as prescribed) and the Planning Inspectorate when checking an application against the s55 checklist (a blank copy of which has been supplied for your perusal) to include a 'compliance page' to list all statutory requirements, what regard has been had to them and or how they have been fulfilled. Paragraph 96 of the DCLG Guidance on pre application consultation is worth remembering which reads: 'set out specifically what the promoter has done in compliance with the requirements of the Act, this guidance, and any relevant guidance published'.



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ance_of_Appli...

Some developers have used the checklist to their advantage by populating a blank version for their own use and submitting this with an application for our reference. This is of course, not required of you statutorily.

The Consultation Report is an evidence base which could be used within an examination if and when an application is accepted for examination. The Consultation Report may need to be defended or justified within an examination. Because of this, it is imperative that statutory guidance is followed to ensure the report has the necessary information in a pragmatic format which is understandable.

Data Protection:

It is for applicants to be satisfied that the Consultation Report complies with the Data Protection act 1998. Specifically, the addresses and other contact information of private individual are treated appropriately within the context of the statutory process. The Consultation Report should be fully redacted and fit for public consumption before submission to the Planning Inspectorate.

Responses to consultation exercises - issue-led approach:

It is noted that the draft Consultation Report intends to present consultation responses as they relate to the main issues, which seems a logical approach. If an issue led approach is adopted, and responses grouped under headline issues then a cautious approach should be given to ensure that responses are not presented in a mis-leading way or out of context from the original views of the consultee. If this approach is adopted, it should be caveated at the start of the relevant section(s) and or the main body of the report.

Explanation should also be given regarding any safeguards and cross-checking that took place to ensure responses are grouped appropriately and ultimately, to demonstrate compliance with s49 of the 2008 Act 'Duty to take account of responses to consultation and publicity'.

Feedback to those involved in the consultation processes:

Paragraph 97 of the DCLG Guidance on pre-application consultation reads: *'It is important that those who have contributed to the consultation are given feedback, to inform them of the results of the consultation exercise and to inform them how the information received by promoters has been used to shape and influence the proposals, and how any outstanding issues will be addressed'*. This should be remembered when explaining how you have complied with s49 of the 2008 Act and could accompany the initial response to the consultation exercise in the proposed tabulated form.

The consultation process:

The consultation report should provide a clear overview of all statutory and non-statutory consultation exercises undertaken. There are some sections within the draft report which overlap this

namely: Section 5 'Fisheries liaison'; Section 7 'non - statutory consultation process'; and Section 9 'consultation on other application documents'. These sections could be amalgamated as appropriate into either statutory or non-statutory consultation exercises. It is important for the Planning Inspectorate and the general public to understand and easily differentiate between the two different types of consultation, ie what the applicant was required to do and what it chose to do in addition to this. Supporting text could aid sub-sections to give clarity on why the consultation exercises are non - statutory and separate from the formal process. Section 10 of the report could be amended in light of this.

As there are two stages to your formal consultation process - it may be sensible to give an overview of the two processes at section 3.5 of the report, any changes made and the evolution of the project.

Statement of Community Consultation (SoCC):

Consultation reports should generally give a clear methodology of the SoCC compilation process. Within this, you should clearly evidence that any timescales (specifically s47 (3) of the 2008 Act)) have been met by providing for evidence of the correspondence (3.11 & 3.12 of the s55 checklist) to the developer and what regard has been had to correspondence from the local authority when commenting on the SoCC. You should seek to justify why recommendations given by the local authority have not been taken on board. Section 3.13 of the s55 checklist will provide for more detail of what is ultimately expected in this respect.

Section 42 Consultation List:

Please see below for responses to your questions in regard to the s42 consultation list:

1. The Scottish Environment Protection Agency was included on our Reg 9 list but has since written to us to confirm that they did not want to be consulted as the project is not within their remit. The MMO is the relevant consultee.

The Scottish Environment Protection Agency relates to all applications likely to affect land in Scotland. This application is not likely to affect land in Scotland and therefore is not required to be consulted with. If not already done so, the Marine Management Organisation should be added and consulted upon as per section 42(1)(aa) of the PA 2008 as amended.

2. The Scottish Fisheries Protection Agency. We have consulted even though not stated in Reg 9 document as relating to fisheries.

Applicant's discretion if it wishes to over consult. Will need to give consideration as to whether they will continue to be consulted upon and that this is explained within the consultation report ie. Additional bodies identified falling under non-statutory consultees. The SFPA is now Marine Scotland.

3. The Relevant Waste Regulation Authority. APFP Regs say we should consult for 'All proposed applications likely to affect waste infrastructure.' It was not included in the Reg 9 list but has been/will be consulted on PEI1 and draft ES as the relevant consultee is East Riding of Yorkshire Council which is being consulted already.

The Relevant Waste Regulation Authority would be the Environment Agency.

4. The Relevant Health Board. APFP Regs say this relates to 'All proposed applications likely to affect land in Scotland' whereas the Planning Inspectorate's Advice Note 3 states this relates to Wales? Are we right not to consult a relevant "Health Board"?

The APFP Regulations state that The Relevant Health Board only applies to applications likely to affect the land in Scotland. This does not apply to the Dogger Bank Creyke Beck project.

Further drafts of the Consultation Report

As discussed at our meeting on 15 November, if resources allow we would be happy to review a future version of your draft Consultation Report. We agreed that the most useful time for this may be in February 2013 although final timings will be dependant on your pre-application programme.

I trust this have been of use to you. If you have any queries, please do not hesitate to contact us.

Best regards,

Jeffrey Penfold
Case Officer

The Planning Act 2008

Section 55 Acceptance of Applications*

(Appendix 2 of [advice note six: Preparation and submission of application documents](#))

- (1) The following provisions of this section apply where the Secretary of State receives an application that purports to be an application for an order granting development consent.
- (2) The Secretary of State must, by the end of the period of 28 days beginning with the day after the day on which the Secretary of State receives the application, decide whether or not to accept the application.
- (3) The Secretary of State may accept the application only if the Secretary of State concludes -
- (a) that it is an application for an order granting development consent,
 - (b) deleted
 - (c) that development consent is required for any of the development to which the application relates,
 - (d) deleted
 - (e) that the applicant has, in relation to a proposed application that has become the application, complied with Chapter 2 of Part 5 (pre-application procedure), and
 - (f) that the application (including accompaniments) is of a standard that the Secretary of State considers satisfactory.
- (4) The Secretary of State, when deciding whether the Secretary of State may reach the conclusion in subsection (3)(e), must have regard to -
- (a) the consultation report received under section 37(3)(c),
 - (b) any adequacy of consultation representation received by the Secretary of State from a local authority consultee, and
 - (c) the extent to which the applicant has had regard to any guidance issued under section 50.
- (5) In subsection (4) -
- “local authority consultee” means -
- (a) a local authority consulted under section 42(1)(b) about a proposed application that has become the application, or
 - (b) the Greater London Authority if consulted under section 42(1)(c) about that proposed application;
- “adequacy of consultation representation” means a representation about whether the applicant complied, in relation to that proposed application, with the applicant’s duties under sections 42, 47 and 48.
- (5A) The Secretary of State when deciding whether the Secretary of State may reach the conclusion in subsection (3)(f) must have regard to the extent to which –
- a) the application complies with the requirements in section 37(3) (form and contents of application) and any standards set under section 37(5) and
 - b) any applicable guidance given under section 37(4) has been followed in relation to the application.
- (6) If the Secretary of State accepts the application, the Secretary of State must notify the applicant of the acceptance.
- (7) If the Secretary of State is of the view that the application cannot be accepted, the Secretary of State must -
- (a) notify that view to the applicant, and
 - (b) notify the applicant of the Secretary of State’s reasons for that view.
- (8) If in response the applicant modifies (or further modifies) the application, subsections (2) to (7) then apply in relation to the application as modified.

* Section 55 of the Planning Act 2008 as amended by the Localism Act 2011

DISCLAIMER - This is for information only and is not a formal application document. It is a non-statutory checklist for the Planning Inspectorate (National Infrastructure Directorate) to complete. Completion or self assessment by the applicant does not hold weight at the acceptance stage.

NB: See DCLG Application Form Guidance for guidance on how the application form should be completed and what should be included with it.

Section 55 Acceptance of Applications

Section 55 Application Checklist¹

Section 55(2) Acceptance of Applications			
Within 28 days (starting day after receipt) the Secretary of State must decide whether or not to accept the application.	Date received	28 day due date	Date of decision
Section 55(3) – the Secretary of State may <u>only</u> accept an application if the Secretary of State concludes that:-		Case Officer Comments	Acceptance Inspector Notes
1. s55(3)(a) It is an application for an order granting development consent			
1.1 Does the application state on the face of it that it is an application for a development consent order (DCO) under the 2008 Act, or equivalent words?			
Acceptance Inspector Summary - s55(3)(a)			
2. s55(3)(c) That development consent is required for any of the development to which the application relates			
NB:- Development consent is required for development to the extent that the development is or forms part of a nationally significant infrastructure project (NSIP) (s31). NSIP is defined generally in s14 with the detailed thresholds for each of the specified categories being set out in ss15-30.			
2.1 Is the development an NSIP. Or does it form part of an NSIP.			
Acceptance Inspector Summary - s55(3)(c)			
3. s55(3)(e) That the applicant in relation to the application made has complied with Chapter 2 of Part 5 (pre-application procedure)			
3.1 Did the applicant before carrying out the s.42 consultation either (a) request the Secretary of State to adopt a screening opinion in respect of the development to which the application relates, or (b) notify the Secretary of State in writing that it proposed to provide an environmental statement in respect of that development. EIA Regulation 6			
NB:- The Secretary of State must have regard to the Consultation Report, and any adequacy of consultation representations received.			
3.2 Have any adequacy of consultation representations been received from “A”, “B”, “C” and “D” authorities.			
3.3 If so, do they confirm whether the applicant has complied with the duties under s42, s47 and s48.			

¹ References in this document to the Secretary of State include references (where applicable) to the Planning Inspectorate National Infrastructure Directorate which carries out functions related to consenting nationally significant infrastructure projects on behalf of the Secretary of State

s42: Duty to Consult		
3.4 Did the applicant consult the following about the proposed application –		
s42(1)(a) person prescribed (statutory consultees set out in Schedule 1 of the APFP Regulations)		
s42(1)(b) each local authority within s43. NB:- Definition of “local authority” in s43(3). NB:- Check those listed in consultation report are correct in relation to land shown on the land plans the “B” authority where the application land is in the authority’s area. the “A” authority where any part of the boundary of A’s area is also a part of the boundary of B’s area the “C” authority (upper tier) where the application land is in that authority’s area the “D” authority where such authority shares a boundary with a “C” authority		
s42(1)(c) the Greater London Authority (if in Greater London area)		
s42(1)(d) each person in one or more of s44 categories Category 1 – owner, lessee, tenant or occupier of land. Category 2 – person interested in the land or has power to sell and convey the land or to release the land. Category 3 – person entitled to make a relevant claim. NB:- There is no requirement to check the accuracy of the list(s) or whether the applicant has made diligent inquiry.		
s45: Timetable for s42 Consultation		
3.5 Did the applicant notify s42 consultees of the deadline for receipt of consultation responses.		
3.6 Was the deadline notified by the applicant 28 days or more starting with the day after receipt of the consultation documents.		
s46: Duty to notify Secretary of State of proposed application		
3.7 Did the applicant supply information to notify Secretary of State of proposed application.		
3.8 Was the information supplied to the Secretary of State at the same as it was sent to the s42 consultees.		
3.9 Was this done on or before commencing consultation under s42.		
s47: Duty to consult local community		
3.10 Did the applicant prepare a statement of community consultation on how it intended to consult people living in the vicinity of the land (“the SOCC”).		
3.11 Were “B” and (where relevant) “C” authorities consulted about the content of the SOCC.		

3.12 Was the deadline for receipt of responses 28 days beginning with the day after the day that “B” and (where applicable) “C” authorities received the consultation documents.		
3.13 Has the applicant had regard to any responses received when preparing the SOCC. NB:- Check consultation report and adequacy of consultation representation.		
3.14 Has the SOCC been made available for inspection in a way that is reasonably convenient for people living in the vicinity of the land and has a notice been published in a newspaper circulating in the vicinity of the land which states where and when the SOCC can be inspected.		
3.15 Has the applicant carried out the consultation in accordance with the SOCC.		
3.16 Does the SOCC set out whether the development is EIA development EIA Regulation 10.		
3.17 Does the SOCC set out how the applicant intends to publicise and consult on the preliminary environmental information.		
s48: Duty to publicise the proposed application		
3.18 Did the applicant publish a notice: (APFP Regulation 4(2))		
(a) for at least two successive weeks in one or more local newspapers circulating in the vicinity in which the proposed development would be situated;		
(b) once in a national newspaper;		
(c) once in the London Gazette and, if land in Scotland is affected, the Edinburgh Gazette; and		
(d) where the proposed application relates to offshore development –		
(i) once in Lloyds List; and (ii) once in an appropriate fishing trade journal.		
3.19 Did the notice include: (APFP Regulation 4(3))		
(a) the name and address of the applicant;		
(b) a statement that the applicant intends to make an application for development consent to the Secretary of State;		
(c) a statement as to whether the application is EIA development;		
(d) a summary of the main proposals, specifying the location or route of the proposed development;		

(e) a statement that the documents, plans and maps showing the nature and location of the proposed development are available for inspection free of charge at the places (including at least one address in the vicinity of the proposed development) and times set out in the notice;		
(f) the latest date on which those documents, plans and maps will be available for inspection (being a date not earlier than the deadline in sub-paragraph (i));		
(g) whether a charge will be made for copies of any of the documents, plans or maps and the amount of any charge;		
(h) details of how to respond to the publicity; and		
(i) a deadline for receipt of those responses by the applicant, being not less than 28 days following the date when the notice is last published.		
3.20 Has a copy of the s48 notice been sent to the EIA consultation bodies and to any person notified to the applicant in accordance with EIA Regulation 9(1)(c) (EIA Regulation 11).		
s49: Duty to take account of responses to consultation and publicity		
3.21 Has the applicant had regard to any relevant responses to the s42, s47 and s48 consultation. NB:- Check the Consultation Report for responses and whether or not they have led to changes to the application.		
Guidance about pre-application procedure		
NB:- The Secretary of State must have regard to the extent to which the applicant has had regard to guidance issued under s.50. 3.22 To what extent has the applicant had regard to DCLG Guidance, The Planning Act 2008: Guidance on pre-application consultation.		
Acceptance Inspector Summary - s55(3)(e)		
4. s55(3)(f) and s55(5A) The application (including accompaniments) achieves a satisfactory standard having regard to the extent to which it complies with section 37(3) (form and contents of application) and with any standards set under section 37(5) and follows any applicable guidance under section 37(4)		
4.1 Does the application specify the development to which it relates (i.e. which category or categories in sections 14-30 does the application scheme fall).		
4.2 Is it made in the prescribed form as set out in Schedule 2 of The Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 ("the APFP Regulations") and includes: a brief statement which explains why it falls within the remit of the Secretary of State a brief statement that clearly identifies the location of the application site, or the route if it is a linear		

scheme		
4.3 Is it accompanied by the consultation report.		
4.4 Is it accompanied by the documents and information set out in APFP Regulation 5(2) and listed below:		
(a) where applicable, the environmental statement required under the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 ("the EIA Regulations") and any scoping or screening opinions or directions;		
(b) the draft proposed order;		
(c) an explanatory memorandum explaining the purpose and effect of provisions in the draft order;		
(d) where applicable, the book of reference (where the application involves any compulsory acquisition);		
(e) a copy of any flood risk assessment;		
(f) a statement whether the proposal engages one or more of the matters set out in section 79(1) of the Environmental Protection Act 1990 (statutory nuisances) and if so how the applicant proposes to mitigate or limit them;		
(g) any report identifying any European site to which regulation 48 of the Conservation (Natural Habitats, &c.) Regulations 1994 ² applies, or any Ramsar site, which may be affected by the proposed development, together with sufficient information that will enable the Secretary of State to make an appropriate assessment of the implications for the site if required by regulation 48(1);		
(h) a statement of reasons and a funding statement (where the application involves any compulsory acquisition);		
(i) a land plan identifying:- (i) the land required for, or affected by, the proposed development; (ii) where applicable, any land over which it is proposed to exercise powers of compulsory acquisition or any rights to use land; (iii) any land in relation to which it is proposed to extinguish easements, servitudes and other private rights; and (iv) any special category land and replacement land;		
(j) a works plan showing, in relation to existing features:- (i) the proposed location or (for a linear scheme) the proposed route and alignment of the development and works; and (ii) the limits within which the development and works may be carried out and any limits of deviation provided for in the draft order;		

² Now Regulation 61 of the [Conservation of Habitats and Species Regulations 2010 SI2010/490](#).

(k) where applicable, a plan identifying any new or altered means of access, stopping up of streets or roads or any diversions, extinguishments or creation of rights of way or public rights of navigation;		
(l) where applicable, a plan with accompanying information identifying:- (i) any statutory/non-statutory sites/ features of nature conservation e.g. sites of geological/ landscape importance; (ii) habitats of protected species, important habitats or other diversity features; and (iii) water bodies in a river basin management plan, together with an assessment of any effects on such sites, features, habitats or bodies likely to be caused by the proposed development;		
(m) where applicable, a plan with accompanying information identifying any statutory/non-statutory sites or features of the historic environment, (e.g. scheduled monuments, World Heritage sites, listed buildings, archaeological sites and registered battlefields) together with an assessment of any effects on such sites, features or structures likely to be caused by the proposed development;		
(n) where applicable, a plan with any accompanying information identifying any Crown land;		
(o) any other plans, drawings and sections necessary to describe the development consent proposal showing details of design, external appearance, and the preferred layout of buildings/structures, drainage, surface water management, means of vehicular and pedestrian access, any car parking and landscaping;		
(p) any of the documents prescribed by Regulation 6 of the APFP Regulations; NB:- These are documents which are relevant to specific types of project (generating stations, highway related development, railways, harbour facilities, pipelines, hazardous waste facilities, dam or reservoirs). Confirm in each case the type of project and the relevant documents which must be included with the application in each case.		
(q) any other documents considered necessary to support the application; and		
(r) if requested by the Secretary of State, three paper copies of the application form and other supporting documents and plans.		
4.5 Are the plans, drawings or sections submitted AO size or smaller, drawn to an identified scale (not smaller than 1:2500) and, in the case of plans, show the direction of north? APFP Regulation 5(3) NB:- It is not intended that information provided in other documents, such as any Environmental Statement submitted, should be duplicated. It is possible therefore to cross refer to the location of relevant information – see CLG Guidance on application forms paragraphs 33 – 38.		
4.6 Where a plan comprises three or more separate sheets has a key plan been provided showing the relationship between the different sheets. APFP Regulation 5(4)		
4.7 The Secretary of State may give guidance about how the requirements under s37(3) are to be complied with.		
Acceptance Inspector Summary - s55(3)(f) and s55(5A)		

The Infrastructure Planning (Fees) Regulations 2010 (SI106)		
Fees to accompany an application		
NB:- The Secretary of State must charge the applicant a fee in respect of the decision by the Secretary of State under section 55. If the applicant fails to pay the fee, the Secretary of State need not consider the application until payment is received by the Secretary of State. The fee payable is presently £4,500 and must be paid at the same time that the application is made.		
Was the fee paid at the same time that the application was made		
Date the fee received and confirmed as bankable		

Acceptance Inspector

Signed

Date:

Case Leader

Signed

Date:

Section 55 Acceptance of Applications

Application Checklist

Appendices

[Scheme name]

A Legal Advice

Withheld from publication as potentially falling within one or more of the following categories of information:-

- excepted internal communications and / or
- excepted because publication would adversely affect the course of justice and/or
- exempted information protected by legal professional privilege

B Habitats Regulation Assessment Checklist

Withheld from publication as potentially falling within one or more of the following categories of information:-

- excepted internal communications and / or
- excepted because publication would adversely affect the course of justice and/or
- excepted because its publication would adversely affect the protection of the environment to which the information relates