



Department for  
Business, Energy  
& Industrial Strategy

Sally Holroyd  
DONG Energy Walney Extension (UK) Ltd  
5 Howick Place,  
Westminster  
London  
SW1P 1WG  
(by email)

**Department for Business, Energy &  
Industrial Strategy**

3 Whitehall Place,  
London SW1A 2AW  
T: +44 (0)300 068 5770  
E: Giles.Scott@decc.gsi.gov.uk  
[www.gov.uk/beis](http://www.gov.uk/beis)

27 July 2016

Dear Ms Holroyd,

**PLANNING ACT 2008  
APPLICATION FOR A NON-MATERIAL CHANGE TO THE WALNEY  
EXTENSION OFFSHORE WIND FARM ORDER 2014 AS AMENDED BY THE  
WALNEY EXTENSION OFFSHORE WIND FARM (CORRECTION) ORDER  
2015**

**THE APPLICATION**

1. I am directed by the Secretary of State for the Department for Business, Energy and Industrial Strategy (the "Secretary of State") to advise you that consideration has been given to the application (the "Application") which was made by DONG Energy Walney Extension (UK) Limited (the "Applicant") on 11 December 2015 for a change which is not material to the Walney Extension Offshore Wind Farm Order 2014 as corrected by the Walney Extension Offshore Wind Farm (Correction) Order 2015 ("the Order") under section 153 of, and 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 on 28 June 2013 and was granted consent on 7 November 2014. Consent was granted for the construction and operation of an offshore wind turbine generating station in the Irish Sea approximately 19 kilometres off the Isle of Walney coast and partly within the Renewable Energy Zone, with a gross electrical output capacity of up to 750MW comprising up to 207 wind turbine generators and associated offshore and onshore infrastructure ("the Development").
3. The Applicant is seeking consent for a change to the Order to amend Article 5 (Benefit of the Order), to make provision for the partial transfer of the benefit of the Deemed Marine Licence ("DML") in the future to an as yet unknown undertaker(s).
4. At the time of applying for the Order, the Applicant contemplated that the entire Development would be constructed as a single phased project. However, the Application states that the Applicant is now considering constructing the generation

assets comprised in the Development, which include the wind turbine generators and inter-array cables, in two phases. This would involve dividing the array area (Work Nos. 1 & 2 in the Order) in two (east and west) phases. The Applicant would either: (a) remain the undertaker for one of those phases and a second undertaker would be established for the other; or (b) remain the undertaker for the transmission assets comprised in the Development, and establish two new undertakers, one for each phase of the generation assets. The new undertaker(s) would require the benefit, in part, of the Order and the DML contained in Schedule 9 of the Order, in order to lawfully construct their phase of the Development. Article 5 of the Order makes provision for the partial transfer of the benefit of the Order (Article 5(1)), but not the DML, which must be transferred in whole (Article 5(3)). Therefore, the Application states that amendments are required to Article 5 to enable the partial transfer of the benefit of both the Order and the DML. Subject to such partial transfer, both the Applicant and the new undertaker(s) would each have the power to construct their respective phases of the Development.

### **Summary of the Secretary of State's Decision**

5. The Secretary of State is satisfied that the change requested by the Applicant is not material and has decided under paragraph 2(1) of Schedule 6 to the 2008 Act to make a non-material change to the Order so as to authorise the change detailed in the Application. This letter is 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) Regulation 2011 (as amended) ("the Change Regulations").

### **Consideration of the materiality of the proposed change**

6. There is no statutory definition of what constitutes a 'material' or 'non-material' amendment for the purposes of Schedule 6 to the 2008 Act and Part 1 of the Change Regulations.
7. So far as decisions on whether a proposed change is material or non-material, guidance has been produced by the Department for Communities and Local Government, the "Planning Act 2008: Guidance on Changes to Development Consent Orders" (December 2015)<sup>1</sup> ("Guidance on Changes to DCOs"), which makes the following points. First, given the range of infrastructure projects that are consented through the 2008 Act, and the variety of changes that could possibly be proposed for a single project, the guidance cannot, and does not attempt to, prescribe whether any particular types of change would be material or non-material. Secondly, there may be certain characteristics that indicate that a change to a consent is more likely to be treated as a material 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 likely significant effects on the environment; (b) whether there would be a need for a Habitats Regulation Assessment, or a need for a new or additional licence in respect of European Protected Species; (c) whether the proposed change would entail compulsory acquisition of any land that was not authorised through the existing DCO, and; (d) whether the potential impact of the proposed changes on local people and businesses would be sufficient to indicate that the change should be considered as material. Third, that although the above characteristics indicate that a change to a consent is more likely to be treated as a material change, these only form a starting point for assessing the materiality of a change. Each case must depend on thorough consideration of its own circumstances.

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<sup>1</sup> <https://www.gov.uk/government/publications/changes-to-development-consent-orders>

8. The Secretary of State therefore began his consideration of the materiality of the proposed amendment by considering the 4 matters lettered (a), (b), (c) and (d) above. The Secretary of State concluded that as the extent of the amendments sought are purely administrative in nature and do not in any way physically change the Development comprised in the Order, there is no requirement to update the Environmental Statement, Habitats Regulation Assessment or any other document certified pursuant to the Order, nor is any change required in relation to the compulsory acquisition of land and the proposed amendments would not result in an impact on local people and businesses.
9. The Secretary of State therefore concludes that none of the specific indicators referred to in the Guidance on Changes to DCOs suggest that the proposed amendments to Article 5 of the Order is a material change. The Secretary of State has also had regard to the effect of the change and considered whether there are any other circumstances, in this particular case, which would lead him to conclude that the proposed change is material, but he has seen no evidence to that effect.
10. The Secretary of State is therefore satisfied that the change proposed in the Application is not material and should be dealt with under the procedures for non-material changes.

### **Consultation and Responses**

11. The Secretary of State granted consent on 27 November 2015, in accordance with regulation 7(3) in the Change Regulations, for the Applicant to consult a smaller body of consultees in respect of the Application than would otherwise be required pursuant to regulations 7(1) and (2) of the Change Regulations. The Secretary of State considered the reasons given by the Applicant for requesting consultation to be limited to the Marine Management Organisation and the local planning authority, Lancaster City Council, as the bodies with enforcement responsibilities under the Order. The Secretary of State agreed with the Applicant that there are no other persons or bodies likely to be directly affected by the proposed non-material changes to the Order and noted that the proposals do not make any changes to the Development or the environmental information provided in respect of the Order. The Secretary of State was therefore satisfied that it was not necessary to consult any other party and gave consent under regulation 7 of the Change Regulations for consultation to be limited to the Marine Management Organisation and Lancaster City Council.
12. The Application was publicised in accordance with regulation 6 of the Change Regulations and on 12 January 2015 the Marine Management Organisation and Lancaster City Council were consulted in the manner prescribed. The deadline for receipt of representations on the Application was 18 February 2016. The Planning Inspectorate received representations within the deadline from Lancaster City Council and the Marine Management Organisation. The Secretary of State consulted the Applicant on 26 February 2016 inviting representations on the comments provided by the Marine Management Organisation. The deadline for receipt of representations was Friday 11 March 2016. The Applicant provided a late response on 22 April 2016.

#### *Lancaster City Council*

13. Lancaster City Council responded on 15 January 2016 and stated that *“On the basis that the proposed changes would help to facilitate the delivery of the project and would not in themselves generate environmental impacts, I can confirm that Lancaster City Council has no objection or comments to make”*.

*Marine Management Organisation (“MMO”)*

14. The MMO responded on 16 February 2016 and advised that they had engaged in pre-application discussions with the Applicant on this issue and are in agreement with the principle that a DML can be partially transferred provided that the consent of the Secretary of State is obtained, in consultation with the MMO, prior to the transfer taking place. As such, the MMO advised that the proposed amendments to Article 5 of the Order to allow partial transfer of the DML are acceptable to the MMO.
15. However, the MMO raised concerns that approval from the Secretary of State would not be required for any transfer of the benefit of the Order, including the DML, to existing licence holders under section 6 of the Electricity Act 1989. Instead, in this circumstance, the amended Article 5 would provide that a notification would be provided to the Secretary of State and the MMO or relevant planning authority (depending on regulatory remit) in lieu of obtaining consent. The MMO expressed concern that this provision, in relation to the partial transfer of a DML, may provide the undertaker the freedom to apportion conditions as they see fit without approval from the Secretary of State. The Applicant, when responding to the MMO’s comments, referred to the provision in Article 5 (Article 5(7)(a)(iv) in the amended Article 5), which confirms that the transferee is subject to the same obligations as if it were the undertaker (the transferor), and Article 5(4)(c) in the amended Article 5, merely provides that the obligations that would apply to the transferee are confirmed in the notice to the Secretary of State and, where applicable, the MMO or Lancaster City Council. The Applicant concluded that this provision does not afford freedom to the undertaker to apportion conditions as they see fit without approval from the Secretary of State, as the MMO suggested. The Applicant also noted that the principle, that the Secretary of State does not need to consent to a transfer of benefit to a licence holder under section 6 of the Electricity Act 1989, had been previously accepted by the Secretary of State when determining the Order and on other development consent orders authorising offshore wind farms. Having considered the concerns raised by the MMO and the response provided by the Applicant, the Secretary of State considers that if the Application was granted to allow the partial transfer of the DML, the proposed new Article 5(4)(a) (in the amended Article 5) would ensure that where a benefit is transferred, any corresponding obligations are also transferred with the benefit, addressing the concerns of the MMO.
16. The MMO also raised concerns about the wording in the Article 5(4)(b) (in the amended Article 5), which specifies that *“the transferred benefit shall reside exclusively with the transferee or, as the case may be, the lessee and the transferred benefit shall not be enforceable against the undertaker”*. The MMO explained that it is the MMO’s view that as the post-consent enforcing body for the DMLs, it is for the MMO to determine which party should be enforced against in case of a breach of licence conditions. However, the MMO noted that this paragraph in Article 5 is not included in the Application to be amended and that this provision was permitted by the Secretary of State in determining consent for the Order. The Secretary of State notes that the Guidance to Changes on DCO states that *“Any responses to publicity should focus only on the change that is being proposed to the infrastructure project...Responses should not go into details of wider matters relating to the underlying principles of a project, or other matters not directly related to the change applied for. This would include those matters considered in the examination of the original application for a Development Consent Order and in the Secretary of State’s decision on that application”* (paragraph 34). On this basis, the Secretary of State considers that the MMO’s comments on the wording in Article 5(4)(b) (in the amended Article 5) are not relevant to the determination of the Application and have not been considered further.

## **Environmental Impact Assessment**

17. The Secretary of State has considered whether the Application would give rise to any new significant effects or materially different effects when compared to the effects set out in Environmental Statement for the Development authorised by the Order and concluded that as the extent of the amendments sought are purely administrative in nature and do not in any way physically change the Development comprised in the Order, there is no requirement to update the Environmental Statement.
18. As there are no new significant environmental impacts as a result of this proposed amendment, the Secretary of State does not consider that there is any need for consultation on likely significant transboundary effects.

## **Habitats Regulation Assessment**

19. The Secretary of State considered the relevant and important policies in respect of the United Kingdom's international obligations as set out in the Conservation of Habitats and Species Regulations 2010 (as amended) ("the Habitats Regulations") and the Offshore Marine Conservation (Natural Habitats & c.) Regulations 2007 (as amended) ("the Offshore Habitats Regulations"), which transpose the Habitats Directive (92/43/EC) into UK law. The Habitats Regulations and the Offshore Habitat Regulations require the Secretary of State to consider whether the Development would be likely, either alone or in combination with other plans and projects, to have a significant effect on a European site, as defined in the Habitats Regulations and the Offshore Habitat Regulations. If likely significant effects cannot be ruled out, then an Appropriate Assessment must be undertaken by the Secretary of State pursuant to regulation 61(1) of the Habitats Regulations to address potential adverse effects on site integrity. The Secretary of State may only agree to the Application if he has ascertained that it will not adversely affect the integrity of a European site.
20. The Secretary of State has concluded that as the extent of the amendments sought are purely administrative in nature and do not in any way physically change the Development comprised in the Order, there is no requirement to update the Habitats Regulation Assessment and is satisfied that the Application will not have a likely significant effect on any European site over and above that already assessed in the Appropriate Assessment for the original application (November 2014). The Secretary of State is satisfied that there is sufficient evidence to conclude that allowing the change set out in the Application to the Order will not have a likely significant effect upon any European sites; and a further Appropriate Assessment is therefore not required.

## **General Considerations**

### *Equality Act 2010*

21. The Equality Act 2010 introduced 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 partnerships<sup>2</sup>; pregnancy and maternity; religion and belief; and race. The 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.

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

*Human Rights Act 1998*

22. The Secretary of State has considered the potential infringement of human rights in relation to the European Convention on Human Rights, by the Development. The Secretary of State considers that the grant of consent to the non-material change would not violate any human rights as enacted into UK law by the Human Rights Act 1998.

*Section 40(1) of the Natural Environment and Rural Communities Act 2006*

23. The Secretary of State, in accordance with the duty in section 40(1) of the Natural Environment and Rural Communities Act 2006, has to have regard to the purpose of conserving biodiversity, and in particular to the United Nations Environmental Programme Convention on Biological Diversity of 1992, when granting development consent. The Secretary of State is of the view that the Application considers biodiversity sufficiently to accord with this duty.

**Secretary of State's conclusions and decision**

24. The Secretary of State noted that no person has disputed the acceptability of the proposed change to Article 5 in the Order. The Secretary of State notes that in order to enable the construction of the generation assets comprised in the Development, which include the wind turbine generators and inter-array cables, in two phases, which the Applicant is now proposing, the benefit, in part, of the Order and the DML contained in Schedule 9 of the Order, would need to be transferred to the undertaker(s) of each of the two phases. Therefore, amendments are required to Article 5 in the Order to enable the partial transfer of the benefit of the DML as well as the Order.
25. For the reasons given in this letter, the Secretary of State considers that there is a compelling case for authorising this administrative change to Article 5 in the Order, as set out in the Application, and notes that it does not in any way physically change the Development comprised in the Order. The Secretary of State is therefore today making the amending Order requested by the Applicant subject to a number of minor modifications which do not materially alter its effect.

**Challenge to decision**

26. 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**

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

Yours sincerely,

Giles Scott  
Head of Energy Infrastructure Planning 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 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:

<https://infrastructure.planninginspectorate.gov.uk/projects/north-west/walney-extension-offshore-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)**