



Department
of Energy &
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Your ref:
Our ref:

10 December 2014

Dear Mr Jenner

**PLANNING ACT 2008
APPLICATION FOR THE HORNSEA ONE OFFSHORE WIND FARM ORDER**

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:

- a) the report dated 10 September 2014 of the Examining Authority, a panel of three Commissioners led by Robert Upton ("the ExA"), which conducted an examination into the application (the "Application") dated 30 July 2013 by Smart Wind Limited ("the Applicant") for a Development Consent Order ("the Order") under section 37 of the Planning Act 2008 ("the 2008 Act") for the Hornsea One Offshore Wind Farm ("the Development");
- b) representations received by the Secretary of State and not withdrawn in respect of the Application; and,
- c) further consultation engaged in by the Secretary of State in respect of discrete issues raised in the planning process and by the draft Order as submitted to the Secretary of State.

2. The examination of the Application began on 10 December 2013 and was completed on 10 June 2014. The examination was conducted on the basis of written evidence submitted to the ExA and discussed at hearings held in

Grimsby on 11 and 13 February 2014, 11, 12 and 24 March 2014, 29 and 30 April 2014.

3. The application is for development consent for the construction and operation of either two offshore wind turbine generating stations of 600MW or three generating stations of 400MW, located in the North Sea approximately 103km off the coast of the East Riding of Yorkshire. The Development would comprise the following:

- up to 240 wind turbines with a gross electrical generating capacity of up to 1200MW;
- between two and five offshore collector/converter substations, up to two offshore accommodation platforms;
- inter-array cables between the turbines and substations,
- export cables to take the electricity generated to a landfall point at Horseshoe point in Lincolnshire;
- underground cabling for 40km to an onshore converter or substation in North Killingholme and underground connection to an existing National Grid substation at North Killingholme in North Lincolnshire.

4. Enclosed at Annex A to this letter is a copy of the ExA's report ("the Report"). The ExA's findings and conclusions are set out in chapters 4 and 5 of the Report, and the ExA's recommendation is at chapter 9.

Summary of the ExA's Recommendation

5. The ExA recommended that the Order be made, on the basis of the provisions set out in Appendix E to the Report.

Summary of the Secretary of State's Decision

6. The Secretary of State has decided under section 114 of the 2008 Act to make, with modifications, an Order granting development consent for the proposals in the Application. This letter is a statement of reasons for the Secretary of State's decision for the purposes of section 116 of the 2008 Act and the notice and statement required by regulation 23(2)(c) and (d) of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 ("2009 Regulations").

Secretary of State's consideration

7. The Secretary of State has carefully considered the Report, responses from later consultations, and all other material considerations. Except as indicated otherwise in the paragraphs below, the Secretary of State agrees with the findings, conclusions and recommendations of the ExA as set out in the Report, and, in such cases, the reasons for the Secretary of State's decision are to be taken as those given by the ExA in support of their conclusions and

recommendations. All numbered references, unless otherwise stated, are to paragraphs of the Report.

Need and Relevant Policy for the Proposed Development

9. After having regard to the comments of the ExA set out in Chapter 9 of the Report, and in particular the conclusion in paragraphs 9.4, the Secretary of State is satisfied that in the absence of any adverse effects which are unacceptable in planning terms, making the Order is consistent with energy National Policy Statements EN-1 (Overarching NPS for Energy), EN-3 (NPS for Renewable Energy) and EN-5 (NPS Electricity Networks Infrastructure), which set out a national need for development of new nationally significant electricity network infrastructure of the type proposed by the Applicant. The Secretary of State therefore agrees that the Development is needed.

Modifications to the Order by the Secretary of State

10. In considering the draft Order submitted with the Report, the Secretary of State identified a number of issues which he determined required modifications to be made, relating to the following matters:

- the extent to which the project described in the Order was within the “envelope” assessed during the course of the Planning Act process;
- the clarity of provisions describing which parties are responsible for discharging the provisions of the draft Order (including in the definition of “undertaker”);
- protective provisions within the Order in relation to particular parties affected by the order;
- the possible effect of the Order on the safe operation of an airfield (operated by North Coates Flying Club) proximate to works permitted by the Order; and
- more generally, changes to clarify the effect of the Order.

11. These are considered individually below.

The extent to which the consented project is within the “envelope” applied for

12. The Application, to allow flexibility between two or three wind farms, though with the same assessed maximum potential environmental impacts and geographical extent, relies significantly on the “Rochdale envelope” which allows for the maximum extents of a project, and the consequent significant effects, to be established. The detailed design of the project can then vary within this ‘envelope’ without rendering the Environmental Statement submitted with the application inadequate. The envelope forms an acceptable way of making an application, as reflected in NPS EN-1 and NPS EN-3.

13. During the ExA process, and subsequently when the Secretary of State consulted on changes to the Order in relation to “undertaker”, certain parties questioned whether the development as authorised by the Order would be within the scope of the maximum impacts identified by the Environmental Statement (and consequently the legally permitted ‘envelope’). In particular, the issue was raised by the Marine Management Organisation (“MMO”) in its letter in response to consultation of 17 November 2014 in relation to the number of offshore accommodation platforms which can be constructed under the Order.

14. Having reviewed the Report, and considered the Order alongside the Environmental Statement, the Secretary of State considers that in this case the approach adopted is legally acceptable. In a subsequent letter to the Secretary of State of 21 November 2014, the MMO also reached the conclusion that the most recent version of the draft Order that had been put forward during the Examination was sufficiently clear on this issue.

15. However, some minor drafting amendments have been made to the Order to make the scope of the envelope for the development clearer on its face, notably by providing in article 3(3) that the grant of development consent for Work No.3 is subject to the limitation that that cannot be built if more than 80 wind turbines are constructed as part of Work Nos. 1 and 2.

Benefit and enforceability of the Order

16. The Secretary of State was concerned about the clarity as to who is intended to benefit from particular provisions of the draft Order; and, conversely, who can be held responsible for failure to comply with obligations in the draft Order. Clarity as to who benefits from, and is responsible for, which provisions is of course important in view of the nature of the powers that can be granted in a Development Consent Order (“DCO”) (for example compulsory acquisition powers), and the fact that obligations imposed by a DCO are enforced by way of criminal penalty. Given his concerns, he found it necessary to reconsult on 10 November 2014 on this issue, proposing a set of amendments to the Order as submitted.

17. As a result of the consultation, the Secretary of State has:

- amended articles 2 and 3 of the Order, to clarify which person is to be the undertaker in respect of the different works for which development consent is granted;
- to avoid confusion with the somewhat different use of the term ‘undertaker’ proposed in the Deemed Marine Licences contained in the Schedules to the Order, those licences have also been amended to refer instead to the ‘licence-holder’.

18. In addition, the Secretary of State has amended the transfer of benefit provision in article 34 of the Order so that the requirement to give notice of any transfer or grant extends to transfers to other undertakers, or persons licenced

under the Electricity Act 1989 (notwithstanding the fact that the Secretary of State's consent is not required for such transfers). Given that development consent and consent to ancillary works is granted to three different people, this change is considered desirable to maintain clarity following the grant of the Order as to who is responsible for discharging the obligations it imposes. Finally, the Secretary of State considers it desirable that provision for cooperation between the undertakers should be enforceable if required by the MMO. He has accordingly made provision to that effect in condition 13 of each licence.

Protective provisions within the Order in relation to particular parties affected

19. Following receipt of the Report, the Secretary of State received a submission from the Applicant suggesting changes reducing the scope of the protective provisions for C.Gen Killingholme, who have recently been granted a DCO for a CCGT generating station close to the end of the transmission cable for Hornsea One. The suggested changes would have reduced significantly the protective provisions for the C.Gen asset. The Secretary of State consulted on the Applicant's submission on this point.

20. The Secretary of State, having considered consultation responses, has amended the protective provisions in the draft Order submitted to the Secretary of State to reflect the fact that C.Gen was not granted all of the compulsory acquisition powers it had sought in its DCO, while ensuring that those provisions continue to fulfil their purpose of protecting the asset in the North Killingholme DCO.

21. In addition, the Secretary of State has made modifications proposed and agreed between the applicant and Phillips 66 Limited and ConocoPhillips (UK) Limited following the close of the examination (see paragraph 30).

The possible effect of the Order on the safe operation of an airfield

22. Also following receipt of the ExA's Report, the Secretary of State received a representation from the operator of an airfield alleging that the project would affect the safe operation of an airfield for which they are the operator. The Secretary of State consulted on this issue.

23. Having carefully considered the matter, and taking into account that the Civil Aviation Authority has not objected to the application, he considered that given the magnitude of the potential risk, the draft Order as submitted should include a requirement to submit a plan for the safe operation of the airfield to the Secretary of State for his consent (see requirement 20 of Part 3 of Schedule 1 to the Order granted).

Other drafting changes

24. In addition to the above, the Secretary of State has decided to make various changes to the form of the draft Order as set out in Appendix E to the Report produced by the ExA which, while altering the way in which specific issues are dealt with, do not materially alter its effect, including changes to conform with the current practice for Statutory Instruments (e.g. modernisation of language), changes in the interests of clarity and consistency, and changes to ensure that the Order has the intended effect.

Environmental Assessment Report including Habitats Regulation Assessment

25. In chapter 5 the ExA also considered 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 etc) Regulations 2007 (as amended) ("the Offshore Habitats Regulations") which transpose Council Directive 92/43/EC on the conservation of habitats and species and of wild flora and fauna ("the Habitats Directive") into UK law as far as the 12 nautical mile limit of territorial waters and beyond respectively. The Habitats Directive provides for the designation of sites for the protection of habitats and species of European importance and the Birds Directive for the protection of rare and vulnerable birds and for regularly occurring migratory species, called Special Protection Areas ("SPAs") – those sites designated in the United Kingdom are collectively referred to in this letter as "European sites". The Convention on Wetlands of International Importance 1972 ("the Ramsar Convention") provides for listing of wetlands of international importance – Ramsar sites. The UK Government policy is to afford Ramsar sites in the United Kingdom the same protection as European sites and in this context, the Secretary of State has taken policies into account in assessing potential adverse impacts.

European Sites and Protected Species Impacts

26. The Secretary of State agrees with the ExA's conclusion in relation to identified habitats and species that a likely significant effect arising from the proposed Development when considered alone cannot be excluded in relation to all European Sites. Furthermore the Secretary of State agrees with the ExA that an appropriate assessment (AA) is required under the Habitats Regulations and the Offshore Habitats Regulations to consider the in-combination effects of this Development alongside other plans and projects (please refer to the AA for further information about which other projects were included within this assessment). The turbine array has the potential to increase collision risk and displace seabirds (kittiwake, gannet, guillemot, razorbill and puffin) of the Flamborough and Filey Coast potential Special Protection Area (pSPA), and of the Flamborough Head and Bempton Cliffs SPA. As the export cable comes onshore, potentially significant impacts upon coastal habitats and species which are part of the Humber Estuary Special Area

of Conservation (SAC) and the Humber Estuary SPA and Ramsar site were also identified.

27. A copy of the Environmental Assessment Report, containing the Secretary of State's Habitats Regulation Assessment is attached to this decision letter and has been prepared on the basis of the Report. This included a Report on the Implications for European Sites. As regards the assessment the Secretary of State agrees with the ExA that the in-combination assessment should consider Tier 1-4 projects (i.e. those subject to a planning application up to and including the Dogger Bank Creyke Beck project) and that the avoidance rate used in assessing likely bird mortality in respect of kittiwake and gannet should be 98% and 99% respectively. A range of displacement and mortality scenarios was considered to assess the potential impacts upon species of auks (guillemot, razorbill and puffin). The assessment concludes that the Development, when considered both alone and in-combination with other plans or projects, will not have an adverse effect upon the integrity of the European sites listed in paragraph 26.

Transboundary Considerations

28. The proposed Development has the potential to affect species of marine mammals from transboundary sites (in Denmark, Netherlands, Germany, France and Belgium). Those marine mammal species (harbour porpoises, grey seals and harbour seals) are at increased risk of injury, disturbance and displacement as a result of the piling works. After careful consideration, the Secretary of State is satisfied that the Development will not have adverse impacts upon these transboundary sites. A description and evaluation of these impacts are detailed within the Environmental Assessment Report.

Impacts upon Species of Gulls

29. The proposed Development has the potential to have a significant cumulative impact upon species of gulls (greater black-backed gull, lesser black-backed gull and herring gulls) when considered alongside other offshore wind farms. The cumulative effect is an increase in mortality rates through the increased risk of collision with the turbines. Using analysis undertaken by the Applicant, the Secretary of State is satisfied that the additional mortality would not affect the gull populations in the long term. Further detail is provided within the Environmental Assessment Report.

Other Matters

Other representations received after the close of the ExA's examination of the Application

30. Since the close of the examination the Secretary of State has received a number of representations which included correspondence from the

Applicant, Phillips 66 Limited and ConoccoPhillips (UK) Limited about protective provisions to be included in the Order which have been accepted by the parties concerned and have therefore been included in the final Order. The Secretary of State is satisfied that the protective provisions in the Order protect adequately interests that may be affected by the Order's operation.

Crown Land

31. Section 135(2) of the 2008 Act requires consent from a relevant Crown Authority for inclusion of any provision applying in relation to "Crown Land". In the case of the current application the Crown Land provisions apply to The Crown Estate, and to land held by The Crown Estate on behalf of the Highways Agency, Ministry of Defence and the Oil and Pipeline Agency. In all cases approval was given subject to protection provisions in the Order. As protective provisions were included in the Order and no changes have been recommended to them, the Secretary of State therefore considers there are no reasons that would preclude him from granting consent.

General considerations

Equality Act 2010

32. The Equality Act 2010 introduced a new 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 partnerships¹; pregnancy and maternity; religion and belief; and race. This was considered by the ExA who concluded that there was no evidence of any harm, lack of respect for equalities, or disregard to equality issues. The Secretary of State agrees with this conclusion.

Human Rights Act 1998

33. The ExA considered sufficiently, in our opinion, the possible effects of the development and compulsory purchase powers on the convention rights of those potentially affected by the Development. The Secretary of State is of the opinion, therefore, that the grant of development consent would not be unlawful under section 6(1) of the Human Rights Act 1998.

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

34. 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

¹ In respect of the first statutory objective (eliminating unlawful discrimination etc) only

granting development consent. The Secretary of State considers that the Report considers biodiversity sufficiently to accord with this duty.

Secretary of State's conclusions and decision

35. For the reasons given in this letter, the Secretary of State considers that there is a compelling case for authorising the Application, given the added contribution that it would make to the production of renewable energy and that the case is not outweighed by the potential adverse local impacts of the Development as mitigated by the proposed terms of the Order.

36. The Secretary of State has therefore decided to accept the ExA's recommendation in chapter 9.40 of the Report to make the Order granting development consent and imposing the Requirements as proposed by the ExA, but subject to the modifications described in paragraphs 10-24 above. He confirms that, in reaching this decision, he has had regard to the Report, the Local Impact Reports submitted by the relevant Local Authorities and to all other matters which he considers important and relevant to his decision as required by section 105 of the 2008 Act. The Secretary of State also confirms for the purposes of regulation 3(2) of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 that he has taken into consideration the environmental information as defined in regulation 2(1) of those Regulations.

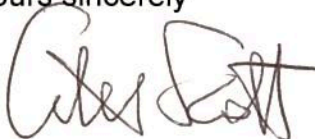
Challenge to decision

37. 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

38. The Secretary of State's decision on this application is being publicised as required by section 116 of the 2008 Act and regulation 23 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Giles Scott', written in a cursive style.

Giles Scott
Head of National Infrastructure Consents

ANNEX

LEGAL CHALLENGES RELATING TO APPLICATIONS FOR DEVELOPMENT CONSENT ORDERS

Under section 118 of the Planning Act 2008, an Order granting development consent, or anything done, or omitted to be done, by the former Infrastructure Planning Commission or the Secretary of State in relation to an application for such an Order, can be challenged only by means of a claim for judicial review. A claim for judicial review must be made to the High Court during the period of 6 weeks beginning with the date when the Order is published. The Hornsea One Offshore Wind Farm Order as made is being published on the date of this letter on the Planning Inspectorate website at the following address:

<http://infrastructure.planningportal.gov.uk/projects/eastern/hornsea-project/>

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)