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Your ref:  
Our ref: 12.04.09.04/168c

19 February 2013

Dear Ms Dunn

**PLANNING ACT 2008  
APPLICATION FOR THE PROPOSED KENTISH FLATS EXTENSION  
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 the report of the Examining Authority, Glyn Roberts BA Hons, DTCP, MRTPI, MCIM, FRSA, who conducted an examination into the application (the "Application") made on 14 October 2010 by Vattenfall Wind Power Ltd ("VWP") for a Development Consent Order ("the Order") under sections 114, 115, 120, and 149A of the Planning Act 2008 ("the 2008 Act") for an extension to the existing Kentish Flats Offshore Wind Farm.

2. The examination of the Application began on 22 February 2012 and was completed on 20 August 2012. The examination was conducted on the basis of written evidence submitted to the Examining Authority and discussed at hearings held in Whitstable on 30 and 31 May 2012.

3. The Order, if made, would grant development consent for the construction and operation of an extension ("the KFE") to the existing Kentish Flats Offshore Wind Farm in the Thames Estuary off Whitstable, Kent comprising of between 10 and 17 additional wind turbines with an installed capacity of up to 51MW. The KFE is situated immediately adjacent to southern and western boundaries of the existing Kentish Flats Offshore Wind Farm owned by VWP.

4. Enclosed with this letter is a copy of the Examining Authority's report. His findings and conclusions are set out in sections 4-6 of the report, and his overall conclusions and recommendation are at section 7.

### **Summary of the Examining Authority's recommendation**

5. The Examining Authority recommended that the Order be made, on the basis of the provisions set out in the draft Order at Appendix F of his report, subject to the Secretary of State's appropriate assessment as part of a Habitats Regulation Assessment concluding that the in-combination effects of the KFE will not have an adverse effect on the integrity of the Outer Thames Estuary (OTE) Special Protection Area (SPA).

### **Summary of 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 the statement of reasons for the Secretary of State's decision for the purposes of section 116 of the 2008 Act and regulation 23(2)(d) of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009.

### **Secretary of State's consideration**

7. The Secretary of State's consideration of the Examining Authority's report is set out in the following paragraphs. All paragraph references, unless otherwise stated, are to the Examining Authority's report ("ER") and references to Requirements and Deemed Marine Licence (DML) conditions are to those in Part 3 of Schedule 1 and Schedule 2 to the Order, as set out in the draft Order at Appendix F of the ER.

8. Following the closure of the examination, on 24 October 2012 London Array Ltd submitted a proposal to the Secretary of State for a 240MW Phase 2 development to the London Array Offshore Wind Farm, also located in the OTE SPA. The effects of that proposal, therefore, fall to the Secretary of State to consider as part of the in-combination Habitats Regulation Assessment for the KFE Application. To this end, in its letter of 5 December 2012, DECC sought comments from interested parties on the environmental information submitted for London Array Phase 2 in so far as it relates to the KFE. Copies of all written responses were published on the Planning Inspector's website by 2 January 2013 and further comments on those responses were published on 10 January 2013. In the light of the additional comments received the Secretary of State considers that he does not require further information on which to take a decision with respect to the Application.

## **The case for development**

### Need and relevant policy for the proposed development

9. The Secretary of State agrees with the Examining Authority that the proposed KFE is in compliance with energy National Policy Statements EN-1 and EN-3 and the relevant provisions of the Government's Marine Policy Statement (ER 7.5). The Secretary of State also notes in this regard that, subject to appropriate mitigation being in place, local impacts would not be so adverse as to justify refusal of the Application (ER 7.6).

10. The Secretary of State agrees with the Examining Authority that the need for the KFE has been demonstrated (ER 7.5). He therefore accepts that the planning case for the KFE should be considered on its merits.

11. The Examining Authority also considered relevant and important policies in respect of the UK's international obligations as set out in of the Habitats and Species Regulations 2010 (as amended) and in this context the Secretary of State has taken these policies into account in assessing a potential adverse impact on over wintering Red-throated Diver (*Gavia Stellata*) in the OTE SPA.

12. Subject to the qualifications explained in paragraphs 31 below about minor drafting modifications to the DCO, the Secretary of State agrees with the Examining Authority's overall conclusions on the matters discussed in the report (ER 7.5-50).

### Habitats Directive and Regulations: Protection of Species and Habitats - Outer Thames Estuary Special Protection Area

13. The Secretary of State agrees with the Examining Authority that an appropriate assessment ("AA") is required under the Conservation of Habitats and Species Regulations 2010 (as amended) ("the Habitat Regulations") to consider the "alone" and "in-combination" effects of the KFE alongside other operational and planned developments offshore, including the London Array Offshore Wind Farm Phase 1 and Phase 2, as regards the displacement and disturbance effects on Red-throated Diver.

14. A copy of the Habitats Regulation Assessment containing the Secretary of State's AA is attached to this decision letter and has been prepared on the basis of the Examining Authority's report. This included a Report on the Implications for European Sites (see ER Appendix E) and further representations made in respect of the additional environmental information submitted by London Array Ltd in respect of a Phase 2 of the development for the London Array Offshore Wind Farm. As regards the assessment of displacement effects on the integrity of the OTE SPA, the Secretary of State agrees with the Examining Authority that the 2km buffer density model is the appropriate model to use in the AA and that the existing Kentish Flats Offshore

Wind Farm should have been excluded from the 'in-combination' assessment (ER 7.24-25).

15. Having carefully reviewed the Examining Authority's report, the additional information provided by London Array Ltd in respect of Phase 2 of the development for the London Array Offshore Wind Farm (LAL Phase 2), and the written representations received on that additional information, the Secretary of State agrees with the Examining Authority that the disturbance and displacement effects of the KFE on Red-throated Diver would be very small when considered in isolation ("alone") (ER 7.12) and, when so considered, its economic and social benefits in terms of the contribution of the KFE project to renewable energy generation would outweigh the very small adverse disturbance and displacement effects on Red-throated Diver (ER 7.13).

16. As regards the 'in combination' assessment, the Secretary of State agrees with the Examining Authority that an adverse 'in combination' effect on Red-throated Diver within the OTE SPA cannot be ruled out (ER 7.22). Without prejudice to any decision on the likely impact of the LAL Phase 2 proposal, the Secretary of State also notes that the majority of the assessed effects arise from London Array Phase 1 and the full extent of the proposed LAL Phase 2 development (ER 7.23).

17. The Examining Authority considers in his report (ER 7.26-50) the uncertainties introduced by the lack of information about LAL Phase 2. The Secretary of State agrees, that when the KFE project is considered in-combination with other potential offshore wind farm development in the OTE SPA, including a 'worst case' scenario for the scale, extent and impact of LAL Phase 2, it is not possible to conclude a no adverse 'in-combination' effect on Red-throated Diver and the integrity of the OTE SPA (ER 7.52). However, the Examining Authority acknowledged that the impact of the KFE project alone is minimal and that the majority of the cumulative displacement impacts are as a result of taking into account the London Array development on the assumption that it is built out to its full extent. Based on the information available to him at the close of the examination, the Examining Authority considered it unlikely that an application for LAL Phase 2 would be made unless it was thought the scale and extent applied for would not give rise to an adverse impact on the integrity of the OTE SPA. However, acknowledging that he was not in a position to make assumptions about the outcome of the AA which the Secretary of State is required to make before deciding whether or not to grant consent (ER 7.53), the Examining Authority recommended that, subject to the outcome of his AA (ER 7.43-45), the Secretary of State grants a development consent for the KFE project. In this context it should be noted that the LAL Phase 2 proposals will be subject of a separate Habitats Regulation Assessment in due course.

#### Biological Environment and Ecology

18. The Secretary of State agrees with the Examining Authority's conclusion that in recognition of potential impacts on marine species (marine mammals,

elasmobranchs, fish and shellfish) that adequate mitigation measures (e.g. Marine Mammal Mitigation Protocol, restriction on piling during the herring spawning season and minimum cable burial depth) should be imposed by way of the DML. He considers that, with the mitigation proposed in DML (conditions 9(1)(h), 9(1)(i)) in place, none of the potential and likely effects of the KFE on the biological environment and ecology are so significant and adverse as to warrant rejection of the application (ER 5.30).

#### Fisheries and fishing

19. As regards potential adverse effects on commercial fishing activities during construction, the Secretary of State notes the DML mitigation measures as regards cable installation (DML condition 9(1)(i)), notices to mariners (DML condition 4(6)(7) and (8)) and fisheries liaison (DML condition 4(10)) aimed at minimising disruption and providing effective communication. Taking into account these measures and agreements reached between VWP and the fishermen whose commercial operations appear most likely to be affected the Examining Authority concluded that whilst there could be a significant localised adverse impact upon fishing interests in the North Kent ports (especially Whitstable), particularly during construction of the KFE, the impact would not be so great as to justify refusal of the Application. The Secretary of State agrees with the Examining Authority's conclusion on this issue (ER 5.49).

#### Radar, Navigation and Search and Rescue Operations

20. As regards impacts on navigation safety, the Secretary of State notes that Requirement 8 of the DCO requires the approval by him, in consultation with the Marine and Coastguard Agency, of an active safety management plan. (ER 5.55). The Secretary of State agrees with the Examining Authority that inadequate cable protection works could have an adverse impact on navigation safety but that there is adequate provision in the DML conditions 9(1)(i) (iii) and (iv) (ER 5.109) to ensure any potential risk can be managed. As regards potential air navigation safety risks, the Secretary of State agrees with the Examining Authority that a radar effect mitigation measure is necessary and that Requirement 10 in the DCO will provide an adequate safeguard in this respect (ER 5.118).

#### Socio-Economic Effects

21. The Secretary of State agrees with the Examining Authority that, in the absence of any likely significant effects on tourism and in the light of agreements between VWP and fishing interests, there are no grounds to suggest that any adverse socio-economic effects would be of such severity as to justify refusal of the application (ER 5.124).

### Noise and Vibration

22. The Secretary of State agrees with the Examining Authority that there are sufficient provisions in the DML mitigation conditions 9 and 13 (ER 5.176) to safeguard against any noise and vibration arising from the construction of the KFE adversely impacting on marine mammals.

### Visual Effects

23. The Secretary of State agrees with the Examining Authority's assessment that whilst there are likely to be adverse visual effects upon some heritage assets, particularly those at Whitstable and Herne Bay seafronts and Red Sands Fort, none of these visual impacts, including effects upon designated or undesignated heritage assets, would be so detrimental as to warrant refusal of the application (ER 5.206).

### Marine Archaeology

24. The Secretary of State agrees with the Examining Authority that there are sufficient provisions in the DML condition 9(1)(j) (ER 5.216) to provide adequate mitigation of potential effects upon marine archaeology.

### Damage around Landfall Points

25. The Secretary of State agrees with the Examining Authority that the revised plan and Order Area boundary provided by VWP (ER 5.223) appears to address concerns about the extent of its original Order Area boundary proposals. He also agrees that Requirement 14 of the DCO providing for a Code of Construction Practice is appropriate (ER 5.224).

### Other issues

26. In relation to amendments to the draft DCO, the Secretary of State agrees with the Examining Authority that it is not necessary to include the word 'decommission' in the definition of 'maintain' in Article 1, noting that Requirement 16 expressly covers decommissioning (ER 5.245). The Secretary of State also agrees with the Examining Authority that the word 'refurbish' should be included in the definition of 'maintain' in Article 1 (ER 5.246). The Secretary of State also agrees with the Examining Authority that the unilateral undertaking submitted by VWP with the Application in relation to the provision of notice boards and a community fund is not necessary to make the Application acceptable in planning terms and is therefore not a relevant planning consideration in this case (ER 5.257) and he also agrees with the decision of the Examining Authority to give it negligible weight in his assessment of the KFE Application (ER 5.263).

## **Overall conclusion on the case for development**

27. The Secretary of State has considered the cases for and against the KFE as set out in ER Section 6 and the Examining Authority's overall conclusions and recommendation in ER Section 7 and agrees with the Examining Authority that, in respect of the planning case for the KFE, development consent should be granted.

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

28. For the reasons given in this letter, the Secretary of State considers that there is a compelling case for authorising the KFE project, given the added contribution that it would make to the production of renewable energy.

29. Having carried out a Habitats Regulation Assessment, which is attached to this letter, the Secretary of State considers that:

(i) there will be no adverse effects on the integrity of the OTE SPA as a result of the KFE project alone. This is based on an assessment of the number of Red-throated Diver displaced by the KFE project which can be considered to be very small or negligible; and

(ii) there will be no adverse effects on the integrity of the OTE SPA as a result of the KFE project in-combination with existing wind farms as there is no set threshold at which effects can be considered to be adverse and the population is subject to wide spatial and temporal variations. The Secretary of State is satisfied that this level of displacement could be accommodated within the OTE SPA. The Secretary of State is mindful of the fact that displacement is not the same thing as mortality although he acknowledges that there will be some level of density dependent mortality; and

(iii) without prejudice to any decision on the LAL Phase 2 proposal, as regards any effects of the KFE project in-combination with possible future phases of the London Array Offshore Wind Farm development, the Secretary of State considers that there would not be an adverse effect on the integrity of the OTE SPA in practice because under the terms of the planning consent granted in respect of London Array, no further development can be permitted unless he is satisfied that it would not adversely affect the integrity of the OTE SPA.

30. The Secretary of State has therefore decided to accept the Examining Authority's recommendation at ER 7.58 to make the Order granting development consent on the basis of the provisions set out in the draft Order proposed by the Examining Authority (Appendix F to the ER), but subject to the modifications described in paragraph 31 below. He confirms that, in reaching this decision, he has had regard to the local impact report 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 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.

### **Modifications to the Order**

31. The Secretary of State has decided to make various minor drafting changes to the form of the draft Order set out in Appendix F of the ER which 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.

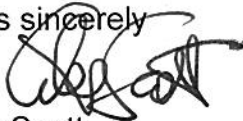
### **Challenge to decision**

32. 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**

33. 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



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 from the date when the Order is published. The Kentish Flats Extension 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/south-east/kentish-flats-extension/>**

**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)**

