

Infrastructure Planning (Examination Procedure) Rules 2010

Application by Tidal Lagoon (Swansea Bay) Plc for on Order Granting Development Consent for the Tidal Lagoon Swansea Bay (the application)

Hearing Agendas: Open Floor and Issue Specific Hearings

This document sets out agendas for Open Floor Hearing on 29 July 2014 and the Issue Specific Hearing commencing on 31 July 2014.

Participation in hearings

- All interested parties are invited¹ to attend the hearings.
- Each interested party is entitled to make oral representations at the hearings² (subject to the Examining authority's power to control the hearings).
- Interested parties who have already indicated their wish to take part are listed in these agendas.

Conduct and management of hearings

- The Planning Act 2008 (PA2008) provides that the Examining authority (ExA) will probe, test and assess evidence through direct questioning of persons making oral representations at hearings. Except where identified in these agendas, questioning will be by the Examining authority, who will ensure participants have a fair chance to put their case and benefit from their entitlement to make oral representations³.
- These agendas are indicative and may be amended by the ExA. The ExA will identify the matters to be considered at the start of each hearing⁴.
- Oral representations (including those made in response to questions) must be based on the relevant or written representations made by the person by whom (or on whose behalf) the oral representations are made⁵. However, where an agenda item includes matters, such as new amendments to the draft Development Consent Order (DCO), which have not been the subject of any written representation to date and an interested party wishes to respond (including for example to provide an alternative wording), oral representations on new evidence may be

¹ Guidance for the examination of applications for development consent for Nationally Significant Infrastructure Projects, DCLG, 2010

² S91 & S93 Planning Act 2008 (PA2008)

³ S91 & 93 PA2008. Entitlement to participate is subject to the Examining authority's powers of control over the hearing.

⁴ Rule 14(2) The Infrastructure Planning (Examination Procedure) Rules 2010 (EPR)

⁵ Rule 14(3) EPR

made, but the interested party is requested⁶ to bring **six written copies of their intended representation**, for the benefit of the ExA and others taking part in the hearing.

- Where an agenda item refers to an amendment to the draft DCO, this is without prejudice to the Secretary of State's decision on whether or not an Order should be made.

⁶ Rule 17 EPR

OPEN FLOOR HEARING

Venue: Brangwyn Hall, The Guildhall, Swansea SA1 4PE

Date: Tuesday 29 July 2014

Time: Registration from 9.30am

Business commences at 10am on all hearing days. Breaks will be taken at convenient times during the hearing as directed from the Chair, including at approximately 1pm for an hour each day.

Interested Parties who have indicated their wish to make oral representations about the application at an Open Floor Hearing are listed in the agenda below.

AGENDA

Breaks will be taken at convenient times during the Hearing as directed from the Chair, including lunchtime each day.

1. WELCOME AND INTRODUCTION

2. INTRODUCTION AND EXPLANATION OF THE PROPOSED CONSTRUCTION OF THE PROJECT by the applicant

3. OTHER ORAL REPRESENTATIONS

- 3.1 Jane Lorimer – Sustrans Cymru
- 3.2 Chris Kelly – Active Supporters Group, Swansea Section
- 3.3 Alan Glass – Active Supporters Group, Gower, Wales and UK
- 3.4 Ian Isaac – Neath Port Talbot Section of the Active Supporters Group
- 3.5 Tony Cuff – Mumbles Active Supporters Group
- 3.6 Robert Lloyd Griffiths – Institute of Directors
- 3.7 Paul Whittaker – Mumbles Traders Association
- 3.8 Tony McGetrick – Tourism Swansea Bay
- 3.9 Nick Revell – Ledwood Mechanical Engineering Limited
- 3.10 Stephen Tindale – Centre for European Reform
- 3.11 Roger Evans – Tidal Lagoon Industry Advisory Body
- 3.12 John Childs – Swansea Friends of the Earth
- 3.13 Robert John
- 3.14 Malcolm Poole – Mumbles Development Trust
- 3.15 Brian Saunders – Porthcawl Environment Trust
- 3.16 Margaret Minhinnick – Sustainable Wales Cymru Gynhaliol
- 3.17 Jenny Edwards – Swansea Environmental Forum
- 3.18 Connor Whiteley – Swansea Environmental Forum
- 3.19 Pippa Bartolotti – Wales Green Party
- 3.20 Anthony Slaughter – Wales Green Party
- 3.21 Richard Jones – City and County of Swansea Council
- 3.22 Heather Stevens
- 3.23 Ross Evans – NPTC Group (formerly Neath Port Talbot College)

- 3.24 Dr Pamela J Muirhead
- 3.25 Peter Keith-Lucas
- 3.26 Alan Duthie – Pleasure Anglers and Kayakers Association
- 3.27 Ian Wisby – Swansea Fishermen’s Group
- 3.28 Tim MacIver – Monkstone Cruising and Sailing Club
- 3.29 Phil Jones – Pontardawe and Swansea Angling Society Ltd
- 3.30 Andrew Kelton – Fish Legal
- 3.31 Prof Michael Phillips – University of Wales Trinity St David (Swansea)
- 3.32 Jane Davidson – University of Wales Trinity St David
- 3.33 Prof David Slater – School of Engineering, Cardiff University
- 3.34 Dr Simon Boxall – Ocean and Earth Science, University of Southampton
- 3.35 David Buckland – Cape Farewell
- 3.36 Owain George – Dwr Cymru Welsh Water
- 3.37 Christian Silk – Swansea University, St Modwen Developments Ltd, St Modwen Properties Plc and St Modwen Properties VIII Sarl

Participants are provided with up to three minutes’ speaking time, unless more time is granted by the Chair. During and/or after representations the Examining authority may choose to ask questions.

HEARING ON THE DRAFT DEVELOPMENT CONSENT ORDER: INTRODUCTORY ISSUES

Venue: Brangwyn Hall, The Guildhall, Swansea SA1 4PE

Date: Thursday 31 July 2014

Time: Registration from 9.30am

Business commences at 10am on all hearing days. Breaks will be taken at convenient times during the hearing as directed from the Chair, including at approximately 1pm for an hour each day.

Interested parties involved

Interested parties or their representatives have indicated they wish to make oral representations about the specific issue of the draft DCO and related matters:

AGENDA

1. Welcome and Introduction
2. **DCO Issues Arising from Applicant's Responses to the Panel's Questions**

NB. A number of the DCO issues listed below under this agenda item are likely to be deferred to future Hearings; future Hearings may consider additional DCO issues.

General

2.1 Extents of the proposed principal development: legal test of whether the development proposed "is or forms part of" (s31) an NSIP (s14) PA2008 and relevance of other precedents, policy and/or guidance.

2.2 Future uses of proposed buildings and of land within the Order limits

i. The range of major events that the Order would permit, whether any use other than those specified on the Planning Drawings (eg. gallery in the proposed offshore building) would require an application to modify the order, and if not why not.

ii. Whether certain kinds of major events as are defined in and would be permitted by the draft DCO would have impacts that have not been assessed (eg. noise, vibration, traffic etc.) and whether the draft requirements would provide sufficient control.

2.3 Financial viability of project and its proper assessment by the applicant. [NPS EN-1 Para 4.1.9 & EAQ (Examining Authority's Question) 13.8b].

Financial viability of future revenues as security for project funding and progress towards a Contract for Difference with the UK Department for Energy and Climate Change [13.12].

Articles and Schedules

2.4 Interpretation A2

i. "authorised development" The definition includes "*any other development authorised by this Order*". What "other development" the draft is intended to authorise over and above the development set out in Part 1 of Schedule A. Potential deletion of this phrase given that only authorised development may be authorised in an Order.

ii. "commence" This definition refers to the start of material operations as defined in s56(4) of the Town and Country Planning Act 1990 (TCPA1990) but specifically excludes a number of operations which could potentially involve quite major works. Justification for the exclusion of these other operations from the meaning of material operations/potential amendment.

iii. "maintain" Need for a definition of maintain that does not extend to replacing the authorised works for example (eg. see Triton Knoll Order 2013 and East Anglia One Offshore Windfarm Order 2014).

iv. "statutory undertaker" This definition will need to be amended as s128 and s129 have been repealed by the Growth and Infrastructure Act 2013.

v. "tidal work" Whether tidal waters and tidal land should be defined.

vi. "waterfront public realm" Whether this term (occurring in Part 1 of Schedule 1) should be defined.

2.5 Development consent: Clarifying that authorised development is that which has been assessed A3

Notwithstanding the applicant's response to EAQ 14.13 the need to place beyond doubt the fact that no development would be permissible under the Order unless it has been the subject of environmental impact assessment by the addition of the following words at the end of Article 3(1) "*to the extent that it has been the subject of environmental impact assessment as recorded in the environmental information submitted with and in the course of the examination of the application for this Order*" or similar.

2.6 Development consent etc. granted by the Order A3(2)

This Article is wide ranging and grants development consent for additional works (listed within 3(2)) and deviates from the former model provisions in doing so. Whether these works described in 3(2) would be better identified and described in Schedule 1 Part 1 for clarity and certainty. They would then fall within the authorised development definition and 3(2) could be deleted.

2.7 Reference to authorised development A3(3) and (5)

If the descriptions of works were removed from this article (as above) to Schedule 1 Part 1 then these paragraphs should then refer to the "authorised development" (rather than referring both to "scheduled works" and to "development authorised by this Order" as at present) to achieve precision of drafting and enforceability.

2.8 Limits of deviation A3(4) & (5)

- i. Clarifying the interaction the limits in A3(5) and those set out in draft Schedule A, Part 2. Whether one set of limits of deviation would be clearer;
- ii. Whether the limits of deviation proposed are reasonable
- iii. Clarifying that no limits of deviation apply to any development carried out in accordance with the Planning Drawings.

2.9 Non-material changes: Appropriate authority A4

Whether draft Article 4 should be withdrawn given that the decision maker (SSECC) is established by primary legislation (s153 and Schedule 6 PA2008) as the appropriate authority to make decisions on non-material changes. To include the potential relevance of the Secretary of State for Transport's (SST) decision on Daventry International Rail Freight Terminal (DIRFT) that he does "not consider that it is appropriate for the Order to alter the provisions in the 2008 Act as to 'the appropriate authority' for agreeing to modify or discharge development consent obligations."

2.10 Maintenance of authorised development A5(2)

Why it is necessary to expand upon the former Model provision and refer to the maintenance of works, maintenance of which would already be empowered by paragraph (1). Whether any work here listed is not covered Schedule 1 Part 1. There is also some vagueness and repetition e.g. 5(2)(i) repeats the definition of maintain in A2. Whether all these works have been assessed.

2.11 Benefit of the Order A7(1)

Necessity of this paragraph given that any transferee undertaker would have the benefit of all articles and powers, not just those listed in this draft Article.

2.12 Defence to proceedings in respect of statutory nuisance A8

Given the applicant's response to EAQ 14.2, the conclusions of the Environmental Statement on noise/light/air emissions and the policy in NPS EN-1 (paragraph 4.14.3), whether the description of nuisance(s) in Article 8 to which the defence would be available are justified and should be specified and limited accordingly.

2.13 Local Authorities' Consent A10 for inclusion of powers under the Road Traffic Regulation Act 1984 [13.4].

2.14 Article 46 Certification of plans etc.

Whether certified copies of the Planning Drawings and the environmental statement, should be provided for under this Article, as they are in the former Model Provisions and in other Orders. How, without the certification of such plans and documents, it can be known which version of the environmental statement / information is relevant to any Order as made and why the following sentence which appears within the Explanatory Memoranda to all recent Orders does not appear in the applicant's wording: "*A copy of the book of reference, plans and other documents referred to in the Order, certified in accordance with article 43 of the Order (certification and construction of plans and documents) may be inspected free of charge at ...*".

2.15 Authorised Development – Schedule 1, Part 1

- i. **Underground cables** Need to insert the words "laid underground" / "all laid underground" in relation to any cable laying listed in the Part (cf. East Anglia ONE Offshore Wind Farm Order 2014).
- ii. **Turbine fabrication building/area** Clarification that this no longer forms part of the application and any implications for the development.

2.16 Requirement 5 Need for principal development to accord with the approved plans

The need to delete phrases in draft Requirement 5 which would allow for alternative Planning Drawings to be approved via discharge of a requirement, given that all the Planning Drawings describe aspects of the principal development for which development consent is sought and given that this would be contrary to the SST's decision on DIRFT (ibid) that it would be "inappropriate and unacceptable" for an "Order, as secondary legislation, to seek to circumvent the provisions set out in the 2008 Act for amending" the "development consent granted by this Order" (the latter phrase quoted from the application version of the DIRFT DCO as struck out by the ExA and the SST). Consequential redrafting of Requirement 4 etc.

2.17 Tailpiece "unless otherwise approved" etc. R6(2), R6(4), 12(3), 16(1), 19(2), 21(2), 22(2), 23(2), 24(3), 25(3), 26(3), 27(3), 28(3), 29(3) and 31(3)

It is provisionally accepted by the Panel that the planting of a tree or shrub or the carrying out of localised planting could be carried out otherwise than in accordance with the species specified without leading to different impacts from those assessed (as provided for in draft requirements 8(2) and 8(3)).

However, all the remaining Requirements above provide not simply for changes of detail but for the carrying out of the authorised development “otherwise” than in accordance with the CEMP, AEMP, the Piling Method Statement and other approved strategies. This would allow for “very different” impacts to arise from those assessed. Such requirements would therefore go to the heart of the development approved, would be unreasonable and imprecise and thus contrary both to the relevant judgement and to the test for requirements set out in paragraph 4.6.2 of Planning Policy Wales and in Welsh Office Circular 35/95 ‘The use of Conditions in Planning Permissions.’ Given that there is no restriction in the above draft requirements upon the submission and approval of revised CEMPs/AEMPs/Piling Method Statements etc. at any time, the tailpieces here are also unnecessary, in the Panel’s provisional view.

2.18 Accordance of plans with outlines R6(1), R22 & R23

Whether the final Construction Environmental Management, Adaptive Environmental Monitoring, Operational Phase Travel Management and Major Events Travel Management Plans should be “in accordance with” or only “substantially in accordance with” the Outlines submitted to this examination.

2.19 Definition of commencement R8(4)

2.20 Discharging of requirements and Draft Schedule 6

Whether the draft Schedule as derived from the Hinkley Point C Order or the provisions of the TCPA 1990 as used in all other Orders is appropriate.

2.21 New Requirement 35 Protected Canal Route

2.22 Decommissioning: Potential new Requirement

Whether a decommissioning Requirement is needed as in other Orders or whether, as in the Able Marine Energy Park report and recommendation in relation to the sea wall, no decommissioning requirement is necessary.

DCO Compulsory Acquisition Powers

2.23 Accuracy of assessment of acquisition liabilities

When an *independent assessment* of the total contingent compulsory acquisition liabilities (including allowance for blight, costs of a lease from the Crown Estate and contingency), which is of demonstrable robustness, is to be made available to the examination in order that any compulsory acquisition powers may be recommended/granted [13.10].

2.24 Funding of Compulsory Acquisition liabilities

- i. When *independent* evidence of a reasonable prospect of funding becoming available to meet the total assessed compulsory acquisition liabilities will be made available to the examination in

order that any compulsory acquisition powers may be recommended/granted [13.8a].

- ii. The new draft Article 7A, the enforceability of any such guarantee/article/requirement and the period of time after the exercise of any compulsory power for which the guarantee or form of security would be available.
- iii. Whether a s174 (TCPA 1990 s106) agreement would be more appropriate to properly secure the existence and availability of funds to meet compulsory acquisition liabilities before such powers were executed.
- iv. the meaning of "guarantee" and of "alternative form of security" in new draft Article 7A [13.8b].
- v. Whether in addition to the current provisions of draft new Article 7A, the necessary compulsory acquisition liability sum (estimated at £10.5 Million including costs of a lease from the Crown Estate) should be on deposit (such as with a "Security Trustee" as per the Preesall Saltfield Underground Gas Storage Report and recommendation) before powers of compulsory acquisition are exercised.

2.25 Open space land

Given that it is now part of the Panel's responsibility to examine and recommend whether the conditions of s131 and of s132 PA2008 (as amended by the Growth and Infrastructure Act 2013) as appropriate, have been met:

- i. Evidence that temporary possession of plots 02042 and 03027 would be "strongly in the public interest" by allowing works to be begun sooner [s131(4A)] and would be "temporary (although possibly long lived)" [s131(4B)] [13.26 & 13.27].
- ii. Evidence that compulsory acquisition of land at plots 03030, 03035, 030340, 04025, 04030, 04035 and 04040 would be "strongly in the public interest" by allowing works to be begun sooner [s132(4A)] and would be "temporary (although possibly long lived)" [s132(4B)] [13.26 & 13.27].
- iii. Whether, generally, there is any precedent for considering 120 years to be a "temporary (though possibly long lived purpose)".
- iv. **Requirement 35** Maintenance of public access over open space land to be acquired permanently/proposed new requirement.

2.26 Statutory Undertakers' land (s127) and apparatus (s138) A34

- i. Given that it is now part of the Panel's responsibility to examine and recommend whether the conditions of s127 and of s138 PA2008 (as amended by the Growth and Infrastructure Act 2013) as appropriate, have been met, whether the applicant proposes to present any evidence to the examination on the satisfaction of these tests in relation to relevant plots in the Book of Reference and in the applicant's appendix 13.33.1 to its Response to Written Questions [13.33 & 13.34].
- ii. Whether there would be need for subsequent second Order to be made under TCPA 1990 s271(6)(b) in addition to the

PA2008 Order now applied for, given that s138 in the PA 2008 now applies in this examination (as does s127) as opposed to applying as a separate process as in the case of Hinkley Point C, and whether, therefore draft Article 35 is necessary [13.32].

2.27 Temporary possession purposes A32 & Schedule 5

In respect of the distinction between powers in Article 32 and purposes of temporary possession in Schedule 5;

- i. Whether the purposes for which temporary possession may be taken listed in Column 3 of Schedule 5 should be distinguished as to whether they are permanent works to be left on the land, land uses only (cf. The Network Rail (Ipswich Chord) Order 2012 <http://www.legislation.gov.uk/uksi/2012/2284/contents/made>).
- ii. Whether works in A32(1)(d) that would not be required to be removed under A32(4) should be restricted to and described as the "permanent" works.
- iii. Whether the "relevant part" of works to be completed under A32(3) before the giving up of possession should be listed as a column 4 in Schedule 5 as per the former Model Provisions.

3. Oral Representations on the DCO by Other Interested Parties

Including for example:

- The Welsh Government;
- Natural Resources Wales;
- The Local Authorities, and
- Other interested parties.

4. Conduct at Future Hearings

Whether there is a case for any interested party (eg. the applicant) to question another interested party (eg. Natural Resources Wales) and/or vice versa, at any future hearing session, including whether there is a case for any such cross questioning to be permitted by the Panel at any Compulsory Acquisition Hearing.