

Offshore Windfarm Developers as S28G Bodies under the Wildlife and Countryside Act 1981 (as amended by CROW 2000)

Section 28G of the Wildlife and Countryside Act 1981 confers certain duties on 'section 28G authorities'. Section 28G(3) lists the entities which are section 28G authorities. This list includes 'statutory undertakers'. Section 28G(4) defines statutory undertakers as a person who is deemed to be a statutory undertaker for the purposes of any provision of Part 11 of the Town and Country Planning Act 1990.

Section 262 under Part 11 of the Town and Country Planning Act 1990 gives a lengthy definition of the term 'statutory undertaker'. One part of the definition includes:

- (6) Any holder of a licence under section 6 of the Electricity Act 1989 shall be deemed to be a statutory undertaker and his undertaking a statutory undertaking—
 - (a) for the purposes of the provisions mentioned in subsection (7)(a), if he holds a licence under subsection (1) of that section;
 - (b) for the purposes of the provisions mentioned in subsection (7)(b), if he is entitled to exercise any power conferred by Schedule 3 to that Act; and
 - (c) for the purposes of the provisions mentioned in subsection (7)(c), if he is entitled to exercise any power conferred by paragraph 1 of Schedule 4 to that Act.

- (7) The provisions referred to in subsection (6) are—
 - (a) sections 55, 108(3), . . . , 139 to 141, 143, 148, 236(2)(a), 237, 245, 253, 263(1) and (2), 264, 266 to 283, 288(10)(a), 306, 325(9) and 336(2) and (3), paragraph 18 of Schedule 1 and Schedule 13;
 - (b) sections 170(12)(b) and 238 to 241; and
 - (c) sections 247(4) and 257(2) and Schedule 14.

It is Natural England's view that Offshore Windfarm (OWF) developers are section 28G authorities if they are the holder of a licence under section 6 of the Electricity Act 1989 and are carrying out duties and functions pursuant to the powers conferred to it under that legislation. Therefore, if an OWF developer decides that it needs to carry out works which are likely to damage a Site of Special Scientific Interest (SSSI) for the purpose of conveying electricity, then this is an activity which flows from its functions as an electricity licence holder and therefore that OWF developer should be treated as a section 28G authority (with the duties which attach to it as a result of that) and the operations should be assessed in accordance with section 28H of the Wildlife and Countryside Act 1981.

Of course, if the OWF developer is an owner or occupier of an SSSI and is seeking to carry out operations which are not primarily related to its statutory functions it will be covered by the provisions applying to owners and occupiers of land under section 28E of the Wildlife and Countryside Act 1981. This includes the need to apply for consent for operations likely to damage the special interest, and to respond to management notices. For example, if the OWF developer decides to clear part of a SSSI to host a party for its employees (or play loud music at that party which may disturb SSSI birds) then this is not part of the exercise of its section 28G statutory undertaker functions and Natural England should approach the assessment of this activity under section 28E.

Accordingly, if the OWF developer believes that the work is not required as part of the exercise of its section 28G statutory undertaker functions and that it requires the permission of an owner occupier to carry out the works then the OWF developer can request that the owner/occupier of the SSSI land provides a notice to Natural England for consent under section S28E of the Wildlife and Countryside 1981.

It should be clear in most cases whether a section 28G authority is proposing to do works which flow from the exercise of its statutory functions. However, it is for the section 28G authority to seek its own legal advice on whether what it is proposing to do flows from the proper exercise of its statutory functions or not (it is not for Natural England to determine this in each case, although Natural England staff may want to raise the query with developers to ensure that proper thought has been given to it).

Natural England staff may also want to query whether a developer has yet received its section 28G authority status by way of becoming a statutory undertaker if those statutory powers are not conferred until after a Development Consent Order is granted (which may be the vehicle through which that developer gains various statutory consents/rights). However, pre-consent works such as site surveys to enable the completion of the application documents and discharge of marine licences are usually carried out by the parent company of the OWF company and this parent company (for example EDF, Centrica, DONG etc.) will normally be the holder of a licence under section 6 of the Electricity Act 1989 and therefore a statutory undertaker.

1. Timeframes for responding to notices

Under S28E Natural England has 4 months to consider any notice received. However, Natural England works on the basis that it will process notices in relation to sustainable developments from all SSSI owners and occupiers, which may include some developers, within our standard response time of 20 working days which is in line with the 28 day response time required under 28H of the Wildlife and Countryside act for Assents. Therefore there should be no difference in the processes for the developers in getting consent/assent for the works they wish to undertake within SSSI land. However, there are greater responsibilities and duties on the developer if they are consider themselves to be a Section 28G body – please see **point 3** below.

2. Activities requiring SSSI consent/assent

a) Round 1 & 2 OWFs

The Round 1 & 2 OWFs applications did not consider pre-construction works and operation and maintenance activities over the life time of the project. Therefore a separate Marine Licence under Marine and Coastal Access Act 2009 will be required for these activities and our advice under the Wildlife and Countryside Act 1981 will be incorporated in our advice to the Marine Management Organisation (MMO) as the regulator/competent authority for the work.

However, if site investigation works and surveys do not involve a vessel/ removal of sediment/ depositing material on the sea bed then they are exempt from a Marine Licence. Instead, should any works be likely to affect land or water included within a SSSI, SSSI consent/assent will be required from Natural England if the additional activity is listed as one of the operations likely to damage for that SSSI. A list of extracted operations likely to damage which are relevant to OWF cable installations is given at **Annex 1**.

NB: Consideration should also be given when permitting activities under both the Marine and Coastal Access Act and the Wildlife and Countryside Act to how the working corridor for the works will be accessed as this will often involve further impacts to notified features and may in some instances be of a greater concern than the actual proposed works

b) NSIPS

As with Round 1 & 2 OWFs any activity not included in the DCO would require either an additional marine licence or an assent from Natural England if the works are likely to damage the SSSI features of interest, whether within or close to the boundary of a SSSI.

However, any activity included/listed within the DCO should either: -

- i. be fully considered prior to planning consent being granted (including assessment of any impacts and agreed with the relevant parties); or
- ii. mechanisms included within the DCO to ensure that the relevant permissions will be sought post consent prior to the construction on the OWF.

NB: It is Natural England's view that if the project, and associated activities, could impact on the notified features of a SSSI over the life time of the project (not just during construction) then as part of the developers responsibilities/duties as a Section 28G body, these activities should all be considered as part of the planning and consenting process i.e. dealt with upfront.

If full details of proposals are not known, we should still agree clear heads of terms¹, and mechanisms should be put in place in the DCO to agree the details post consent, prior to construction. However, there are risks associated with deferring the assessment and resolution of impacts to subsequent permissions,

¹ Heads of terms are a set of agreed principles which precede the signing of a negotiated contract, and which the parties intend to be reflected in the written contract. They set out the basis of the consent in broad terms.

especially were Natural England also believes there will be a Likely Significant Effect (LSE) on European protected species and habitats. Therefore, the SoS would have to be comfortable with the robustness of such an approach as they cannot agree to a project if it could lead to LSE without being properly assessed.

Natural England would alert the SoS to the risk of this and advise the Applicant on the information necessary to complete an Appropriate Assessment.

Annex B includes a non-exhaustive list of the types of information that if provided, could enable a fuller consider the impacts.

3. S28G Responsibilities and Duties

As a S28G body the developer has specific duties under the Wildlife and Countryside Act (as set out below). Additionally as S28G bodies are considered to be competent authorities and therefore the developer would also have further duties which flow from the Habitats Directive and the Wild Birds Directive, as transposed into English law under the Conservation of Habitats and Species Regulations 2010. Public authorities (including statutory undertakers) also have general biodiversity duties under section 40 of the Natural Environment and Rural Communities (NERC) Act 2006.

Wildlife and Countryside Act:

- S28G (2) duty to take reasonable steps, consistent with the proper exercise of the authority's functions, to further the conservation and enhancement of the flora, fauna, or geological or physiological features by reason of which the site is of scientific interest;
- S28H (1) to give notice to Natural England to undertake works. Under section 28H(3) Natural England then has 28 days to respond either assenting, assenting with conditions or refusing assent;
- If the assent is refused or effectively refused (no response) then the developer must wait 28 days before undertaking the operations and then, under S28H (6)(a)(b), when it does undertake the operations it is required to undertake them in such a way as to give rise to as little damage as reasonably possible having shown due regard to written advice from Natural England and, if damage does occur, to restore the site to its former condition, so far as this is reasonably practicable.

Habitat Directive:

- Under Article 2 competent authorities have a duty to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.

The Conservation of Habitat and Species Regulations 2010 (as amended):

- As most coastal SSSI notified features are also interest features of Special Conservation Areas (SACs) and Special Protection Areas (SPAs) it is likely that operations likely to damage the SSSI feature will also equate to a Likely Significant Effect (LSE) on the SAC and/or SPA features. Therefore, as a statutory undertaker the developer would be required under Regulation 61 to

undertake an Appropriate Assessment (AA) and consult with (but not exclusively) the landowner, Natural England, Marine Management Organisation (MMO), Environment Agency, Inshore Fisheries and Conservation Authority (IFCA), Local Planning Authority and other relevant parties;

- If the developer, as the competent authority determines, that adverse effects on the site integrity cannot be avoided, beyond reasonable scientific doubt, then the application may only proceed if there are no alternatives and there is an imperative reason of overriding public interest. In that case suitable compensation would need to be secured before the activity proceeds; and
- Any risk of judicial review processes undertaken to allow activities to go ahead against advice will be the developers acting as the competent authority.
- A 'competent authority' also has a general duty to have regard to the requirements of the Habitats Directive and Wild Birds Directive (see regulation 9(3) of the Conservation of Habitat and Species 2010). So far as lies within their powers, a competent authority in exercising any function in or in relation to the United Kingdom must use all reasonable endeavours to avoid any pollution or deterioration of habitats of wild birds (see regulation 9A(8) of the Conservation of Habitat and Species 2010).

NERC Act 2006:

- Under Section 40 a Statutory Undertaker has a duty to conserve biodiversity.
 - (1) Every public authority must, in exercising its functions, have regard, so far as is consistent with the proper exercise of those functions, to the purpose of conserving biodiversity;
 - (2) In complying with subsection (1), a Minister of the Crown, government department or the National Assembly for Wales must in particular have regard to the United Nations Environmental Programme Convention on Biological Diversity of 1992; and
 - (3) Conserving biodiversity includes, in relation to a living organism or type of habitat, restoring or enhancing a population or habitat.

4. Management Agreements for access of the life time of the protect/ S28J Management Scheme

Many projects require activities, such as maintenance, over the life time of a project. Typically for something like an offshore wind farm this is likely to be in the region of 25-50 years. Natural England highlights that these activities may require access across SSSI notified features to reach the location of the cables. Therefore agreement between all relevant parties (including the land owner) on how access will be achieved for the lifetime of the project needs to be secured to ensure the least impact to the SSSI notified features. Given the length of time projects are operationally, and the dynamic nature of species and habitats this agreement needs to be reviewed at regular intervals.

Access would need to be considered in any Operation and Maintenance plan submitted to the MMO for activities in the intertidal area over the life time of the project, in order to discharge marine licence conditions. However, there may not be a mechanism within this document to review the access route on a

regular basis (e.g. every 5 years). NB: the MMO/Natural England would need to consult with the land owners on this document before discharging the condition.

However, Natural England believes the best mechanism to achieve landowner agreement would be through a bespoke management agreement. However, where SSSIs aren't being adequately conserved or managed (due to lack of agreement/consultation/assessment) it may also be appropriate to impose a Management Scheme under S28J on the owner/occupier of the SSSI land which forms the access route.

One document does not preclude the other from being agreed and can run in parallel as long as the purpose of the document/s are clear and don't conflict. But it would be more efficient if it could be included in just one document.

Additionally it should be recognised that some NSIPs include more than one project that might be split post consent, therefore there may be multiple Offshore Transmission Owners (OFTOs)/developers operating in the area and therefore separate documents and/or management agreements may be required.

Annex A: Operations likely to damage that relate to OWF cable installation, operation and maintenance works

- 1 Cultivation, including ploughing, rotovating, harrowing, and re-seeding.
- 7 Dumping, spreading or discharge of any materials.
- 10 The killing or removal of any wild animal*, including pest control.
- 11 The destruction, displacement, removal or cutting of any plant or plant remains.
- 13a Drainage, including moor-gripping and the use of mole, tile, tunnel or other artificial drains.
- 13b Modification of the structure of watercourses (eg rivers, streams, springs, ditches, dykes, drains), including their banks and beds, as by re-alignment, re-grading and dredging.
- 15 Infilling of ditches, dykes, drains, ponds, pools, marshes or pits.
- 20 Extraction of minerals, including shingle, sand and gravel, shells, topsoil and subsoil.
- 21 Construction, removal or destruction of roads, tracks, walls, fences, hardstands, banks, ditches or other earthworks, or the laying, maintenance or removal of pipelines and cables, above or below ground.
- 23 Erection of permanent or temporary structures, or the undertaking of engineering works, including drilling.
- 26 Use of vehicles or craft likely to damage or disturb features of interest.
- 27 Recreational or other activities likely to damage features of interest such as saltmarsh and mudflats physically or by disturbance to wildlife.

Annex B: Non –exhaustive list of the types of information required to fully consider the impacts of accessing and working within or close to the boundary of a SSSI for OWF activities

- The scope/aims and objectives of the proposed activities
- Methodology
- Details on preferred access route and any alternatives/contingency including via the sea
- Any mitigation measures that maybe required to reduce the impacts to a suitable level
- Consideration of in-combination with other marine users over the lifetime of the project including wildfowlers, coast guard, Environment agency for example Number of times access will be required (per year)
- Duration of the proposed work
- Timing of the proposed works. Will sensitive periods be avoided?
- Number of people, vehicles etc.
- Number of returns trips by people and vehicles per activity
- Specification of equipment/vehicles etc.
- Monitoring of works to ensure no impacts or that they are within parameters assessed i.e. the site conservation objectives will be met and recovery is happening
- Remedial works
- Define what is considered to be emergency works
- Any in-combination (sequential and in parallel) impacts with consented plans/projects, including if the project may be split (post consent) into more than one project that could be built and maintained in isolation