Hornsea Offshore Wind Farm

Project Two

The Applicant's position with regards to E.ON E&P (Consent, Policy and Protective Provisions)

Appendix L to the Response submitted for Deadline VI

Application Reference: EN010053

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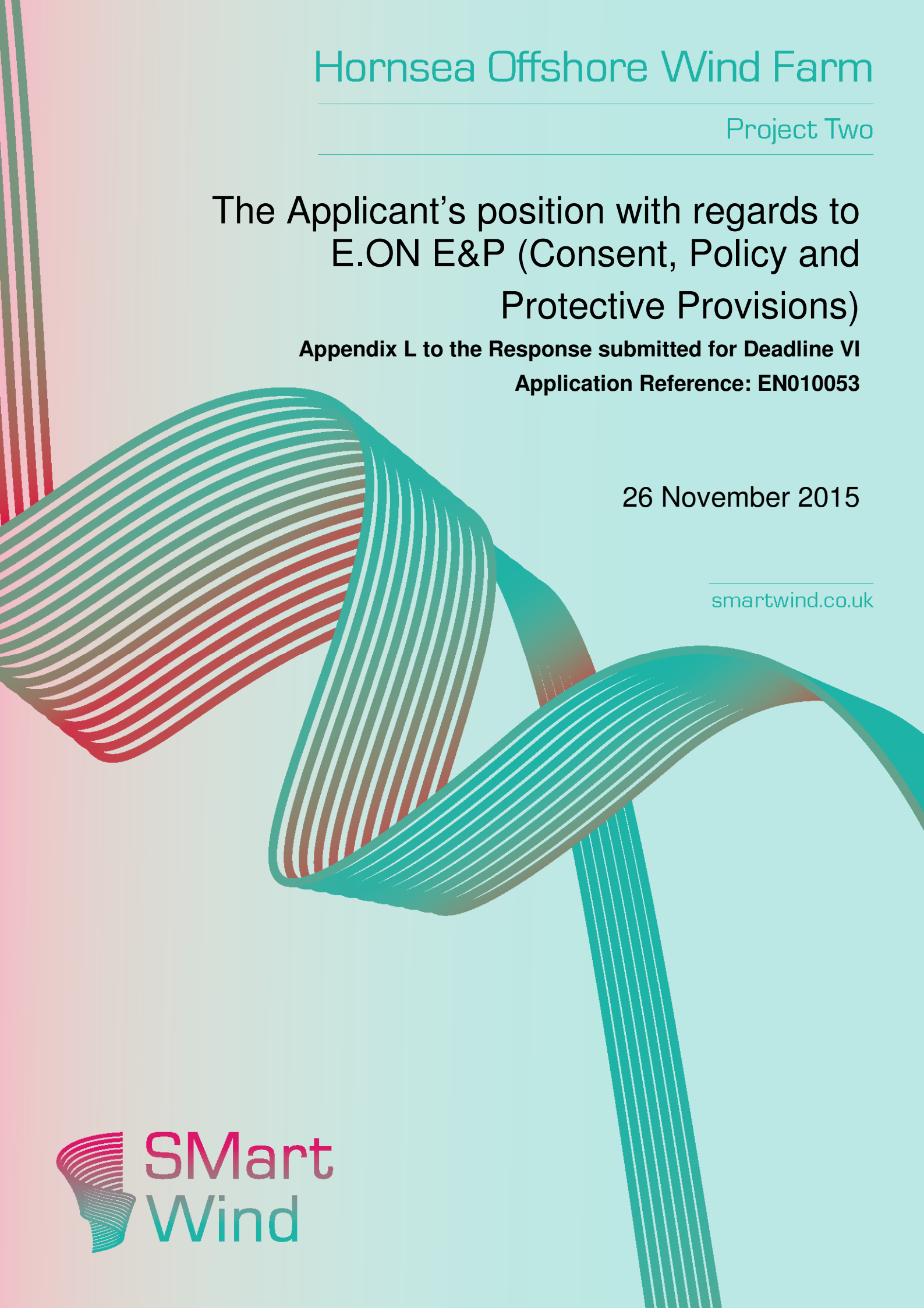

SMart Wind

1. CONSENT AND POLICY REGIMES

1.1 In its Deadline V submission E.ON E&P has set out its position on the proper application of policy to deal with possible interactions between it and the Applicant. The Applicant would refer to its Deadline V submission where it set out clearly its views on the proper application of the package of policy measures and consenting processes. There are however some issues arising from E.ON E&P's Deadline V submission which the Applicant believes it is necessary to address, which it does briefly below.

1.2 E.ON E&P, in its submission at Deadline V would appear to advance the proposition that the DCO regime should be the only mechanism applied to control the relationship between it and the Project, in effect facilitating the removal of the Project Companies' existing rights with the Crown Estate over a particular area without compensation and allowing E.ON E&P to avoid any debate on the appropriateness of its development proposals (as and when formulated) in its own consenting process.

1.3 Contrary to E.ON E&P's assertions at paragraph 1.27 of its executive summary of oral evidence of its Deadline V submission, E.ON E&P does not currently hold all of the consents it requires. It is clear that E.ON E&P has been awarded the rights under licence to search and bore for and get hydrocarbons in the block 48/3 area. That licence is, however, granted subject to specific conditions and the relevant model terms for the 28th round are set out in The Petroleum Licencing (Production)(Seaward Areas) Regulations 2008. Condition 19 of the model terms clearly requires that E.ON E&P obtains the consent of the Secretary of State to the drilling of any well and the Secretary of State may impose conditions when granting that consent.

1.4 E.ON E&P should not be allowed to use this DCO process to avoid its own obligations and the need to justify its own proposals in due course.

1.5 E.ON E&P would appear to argue that its suggested approach is justified on the basis that:

1.5.1 This is the first time that the potential conflict has come back before Government. In particular E.ON E&P argue at paragraph 1.19 of its executive summary of oral evidence of its Deadline V submission that "The Government grants rights to one party and rights to another; it therefore makes sense that when the decision comes back to Government, the Government should make a decision on where any required compromise should lie". The Applicant agrees with E.ON E&P that it is for the Government to determine ultimately where an appropriate compromise should lie. The Applicant does not however agree that this compromise can most appropriately be achieved by imposing obligations and restrictions on the first party to seek a consent and by automatically releasing the other party from the policy obligations and protections it would otherwise be subject to. There is no reason why the package of policy and consenting regimes cannot be applied to achieve appropriate co-existence, indeed, that is clearly the policy intent behind them;

1.5.2 The Ministerial Statement[1] is unfair and they would argue unlawful. The Applicant disagrees with this legal interpretation as set out at paragraph 1.20 below and in any case the Applicant submits that these arguments are irrelevant for the purposes of the consideration of this Application. E.ON E&P point to a brief excerpt from an opinion by Martin Kingston QC. The Applicant submits that Mr Kingston's opinion, at most, provides an argument in support of a position that the Ministerial Statement if applied within the E.ON E&P consenting regime would be unlawful. Contrary to E.ON E&P's statement at paragraph 1.20 of Section 1 of its Deadline V submission, the Applicant submits that there is no reason why the existence of the Ministerial Statement would, in any way, undermine or be relevant to a decision on this DCO Application;

[1] The written statement given by the then Secretary of State for Energy and Climate Change to the UK Parliament regarding Crown Estate Leases for Offshore Renewables Project on 12 July 2011.

1.5.3 E.ON E&P's development is not sufficiently advanced to allow them to invoke the other processes (in particular the oil and gas clause) at present. In particular at paragraphs 1.11 and 1.12 of Section 1 of its Deadline V submission that:

"1.11 The Guidance (paragraph 7) makes it clear that for the clause to be operated, evidence must be provided of why the oil and gas development cannot go ahead without the determination, including options on alternative locations, options for co-existence and technical solutions which have been assessed, and why those have been ruled out. It also requires confirmation that the determination is for the smallest possible area.

1.12 Both of these aspects therefore require that a good deal of diligence has been done on the prospects before the clause can be invoked. This therefore points to it only being possible to invoke the clause much later in the exploration, appraisal and development cycle than the stage at which E.ON E&P currently finds itself, potentially 5-7 years from now."

1.6 E.ON E&P argue that the Ministerial Statement only applies and the oil and gas clause can only be invoked at a later stage in their development process and that it cannot apply to the drilling of exploration and appraisal wells. They cite para 7 of the Guidance[2] in support of this. Para 7 of the Guidance simply requires the oil and gas developer to seek to fully explore alternatives by commercial negotiation before seeking an independent valuation.

1.7 The need for the Ministerial Statement and the Guidance was triggered by the existence of the oil and gas clause in the offshore wind agreement for lease and lease. That clause allows The Crown Estate Commissioners to determine all or part of the development site on the request of the Secretary of State in order to enable "Oil and Gas Works". Oil and Gas Works are explicitly defined in the Agreement for lease and lease as including both the exploration for and the exploitation of oil and gas. The terms of the Guidance are also explicit and clear – the Guidance applies where it is necessary to determine all or part of a lease or agreement for lease in order for an oil and gas development to go ahead. Oil and gas development is specifically and deliberately defined in the Guidance as including the drilling of an exploration well.

1.8 The oil and gas clause process is therefore available to E.ON E&P as a part of its own consenting process for exploratory works as well as for any later development. The Applicant would argue that rather than being a reason to ignore or disapply the other consenting regimes and policies in place, the very high degree of uncertainty which E.ON E&P has in its proposals at present (and what development it could objectively justify under the relevant policy regimes in due course) militates decisively in favour of preserving the integrity of these other consent processes. This is the only way to allow decisions to be taken on the basis of proper information when available and to ensure that any restriction on the operation of the renewable energy project is justified on the basis of deliverable oil and gas proposals.

THE NPS

The Applicant accepts that the National Policy Statement on Renewables EN-3 (NPS) places certain obligations on the Applicant. Contrary to E.ON E&P's assertions (including at paragraphs 1.29 to 1.54 of Section 1 of its Deadline V submission), the Applicant submits that the Application is fully compliant with and capable of consent taking account of the NPS.

1.9 As set out in paragraphs 3.2 to 3.5 of Appendix H of the Applicant's response to Deadline VI, the Applicant has taken account of E.ON E&P's operations and proposals to the extent possible given the information available. As set out previously some of what E.ON E&P could seek to do is so speculative that it cannot be considered in any environmental assessment and cannot be given any real weight in this decision making process. The Applicant does not understand the relevance of E.ON E&P's submissions (at paragraph 1.36 of Section 1 of its Deadline V submission) that the block had been previously licensed. At the time of the DCO Application the block was not licensed. Despite this the Applicant did consult with E.ON E&P and took into

[2] 'Oil and gas clause in Crown Estate leases, Guidance on procedures for independent valuation where necessary' published by the Department of Energy and Climate Change in June 2014

account information publically available on the potential future development of Block 48/3. It could not take account of information provided on a confidential basis. At the time of E.ON E&P's application for a licence around April 2014 E.ON E&P was aware of the Agreements for Lease with the Crown Estate held in respect of the Hornsea Zone and had been consulted on the proposals for the Project.

1.10 As set out in paragraphs 4.1 to 4.2 of the Applicant's Response to E.ON E&P's Deadline V submission (submitted at Appendix H of the Applicant's response to Deadline VI) the Applicant has engaged extensively with E.ON E&P both pre-application (before E.ON E&P had any interest in Block 48/3) and post application. The Applicant has made a number of commercial proposals to E.ON E&P which in its view would fully achieve co-existence and address all of E.ON E&P's issues which are relevant to this DCO process. DONG Energy has a long history of engaging constructively with oil and gas operators and is confident that a commercial solution can be reached between the parties outside of the DCO process. In lieu of a commercial agreement at this stage however, the Applicant has also proposed protective provisions which secures co-existence and again addresses E.ON E&P's legitimate issues.

1.11 With the application of the protective provisions proposed by the Applicant below, the Applicant submits that any potential negative impacts have been minimised and risks have been reduced to as low as reasonably practicable.

1.12 The grant of the DCO does not create a "likelihood of sterilisation of the Block for the purposes of oil and gas activity". E.ON E&P appear to be concerned that the Secretary of State will operate the oil and gas consenting regime (and address any conflict with the Hornsea agreements for lease) in a way which is unpalatable to E.ON E&P and it is that which, in effect, would make the development of the Block unattractive to them. That is not an impact which flows from the DCO and any concerns which E.ON E&P have with these other regimes should be addressed within the confines of those other consent processes and not this Application process.

1.13 Any construction overlap issues are appropriately addressed in the protective provisions and in other mitigation already secured in the DCO (as explained at paragraphs 4.22.1 and 4.22.2, 4.25.1 to 4.25.11, 4.30, 4.38.1 to 4.38.2 and 4.52 of Appendix H of the Applicant's response to Deadline VI).

1.14 The proposed offshore wind farm has taken E.ON E&P's proposals into account to the extent possible. There is limited overlap with E.ON E&P's more likely development scenarios based on 'known' prospects and the Applicant has introduced mitigations and protections to avoid or minimise disruption, economic loss or any adverse effect on safety. There is no unacceptable risk to safety caused by the Project.

1.15 The grant of this DCO does not threaten the viability of E.ON E&P's proposals. Assuming E.ON E&P achieve the relevant consents to do so, there is no reason why it could not develop out its interests at the same time as the Project and for both developments to coexist.

1.16 Where, under E.ON E&P's consent regime, there is a need to determine part of a Project company's Agreement for Lease there is a mechanism for doing so. That mechanism is separate from this DCO process. Whether such a determination is required cannot be known until E.ON E&P's plans are further advanced.

1.17 In any respect any "development interaction" which does materialise can be appropriately controlled by the set of protective provisions offered by the Applicant.

THE OIL AND GAS CLAUSE AND MINISTERIAL STATEMENT

1.18 E.ON E&P does not appear to take issue with the oil and gas clause (which operates in the oil and gas operators favour and is used to deprive a wind farm operator of rights already granted by the Crown Estate). Indeed E.ON E&P does not suggest that the oil and gas clause should not apply - that mechanism remains to allow the Project Companies' Agreement for Lease interests to be trumped. Instead E.ON E&P seek to avoid the protections (in the form of the Ministerial Statement and related Guidance) which are afforded to a renewables developer before the oil gas clause is invoked.

1.19 The Applicant does not consider the lawfulness or otherwise of the Ministerial Statement to be in any way relevant or material to this DCO process. As noted above the Applicant considers that the interactions between E.ON E&P and the Applicant should be managed by the package of relevant consenting processes informed by the suite of applicable policy and information at the relevant time. For that reason the Applicant considers E.ON E&P's attempts to utilise this DCO process to subvert (i) the balancing exercise to be carried out in its own consenting regime and (ii) the policy protections built in to the oil and gas clause process, to be inappropriate. As explained below the Applicant therefore submits that certain aspects of the protective provisions proposed by E.ON E&P aim to achieve an improper purpose and should not be imposed. The Applicant has instead proposed a set of protective provisions which retains the integrity of the oil and gas consenting process and the oil and gas clause process, allowing the Government to apply these processes in the normal course and in a manner considered appropriate at that time. All of that said, it will still be open to E.ON E&P to argue as a part of these other processes that the policy protections in the form of the Ministerial Statement are unlawful and should not be applied. That is clearly more properly a debate for these other processes and, in the Applicant's submission, has no relevance to this DCO process. The Applicant has not sought to secure the positive application of any particular policy in the protective provisions proposed - it has simply sought recognition that E.ON E&P still has a consenting process to complete before any conflict requiring protection under the protective provisions could lawfully arise and that the protections in these other processes which are currently applied should not be removed or restricted by the operation of DCO protective provisions.

1.20 In case, notwithstanding the above, the ExA or Secretary of State views E.ON E&P's arguments on the lawfulness of the Ministerial Statement as, in some way, relevant to the DCO decision making process, the Applicant has set out its consideration of these points below:-

1.20.1 E.ON E&P seeks to rely on the line of English judicial authority which establishes that the Secretary of State may not use her prerogative (Laker) or common law (West Berkshire) powers in a manner which is incompatible with a statutory scheme which would otherwise restrict his freedom of manoeuvre in the subject area concerned. In essence, the English courts have found that these residual powers cannot be used to circumvent the will of Parliament as expressed in the relevant statutory scheme.

1.20.2 In our view, this line of authority is of no assistance in the situation with which we are concerned in these proceedings. Unlike the cases cited by E.ON E&P, we are not concerned with the limitations imposed by a statutory scheme on the exercise of the Secretary of State's prerogative or common law powers. Instead, we are concerned with the operation of two statutory schemes, one for the exploitation of hydrocarbons and the other for the exploitation of renewables, which have the potential to come into conflict. Moreover, as we discuss below, the statement of policy impugned by E.ON E&P is a reflection of the express statutory authority given to the Secretary of State to manage that conflict.

1.20.3 A comprehensive statutory scheme for the exploitation of renewables at designated offshore sites is established by virtue of Chapter 2 of Part 2 the Energy Act 2004, which inter alia provides for (a) the awarding of generating rights (via licences granted) under the Electricity Act 1989 in respect of such sites (s.89), (b) the granting of consents under the 1989 Act for the construction or operation of installations at such sites (s.93), (c) the prohibition of activities in designated safety zones in the vicinity of such sites (s.96) and (d) the restricting or extinguishing of navigation rights in relation to such sites (s.99).

1.20.4 In addition, the scheme introduced by the 2004 Act inserted provision in the Petroleum Act 1998 (s.47A) expressly entitling the Secretary of State to have regard to the exploitation of renewables when exercising her discretionary functions under that Act. It is well understood and accepted that the exercise of such functions may legitimately be guided by policies developed by the relevant decision maker, provided such policies do not unduly fetter the exercise of that discretion in particular cases (R (WL (Congo)) v Secretary of State for the Home Department [2010] EWCA Civ 111). The statement of policy issued by the Secretary of State in July 2011 was published precisely for that purpose, i.e., to clarify her approach to, "giving consent under the Petroleum Act 1998 for any oil and gas development (that is, for the drilling of any

well, for the installation of production facilities, or for the construction of a pipeline)", where the provisions of s.47A of the 1998 Act are engaged.

1.20.5 E.ON E&P's rights, conferred by the licence granted to them under the 1998 Act, are expressly subject to the consenting regime under that Act which is referred to in the July 2011 Ministerial Statement of policy. Thus, those rights are subject for instance to Model Clause 19 in the Model Clauses for Seaward Area Production Licences prescribed by the Schedule to the Petroleum Licencing (Production)(Seaward Areas) Regulations 2008. This requires the licensee to obtain the consent of the Secretary of State to development and production activities within its licensed area. It is therefore disingenuous of E.ON E&P to seek to characterise those rights as absolute in nature (subject only to a statutory amendment process). The reality is that the 1998 Act on the one hand expressly requires E.ON E&P to obtain the Secretary of State's consent to various activities and, on the other, expressly entitles the Secretary of State to take account of the impact on renewables exploitation in choosing whether or not to give such consent.

2. PROTECTIVE PROVISIONS

2.1 The Applicant has proposed a set of protective provisions for the protection of E.ON E&P at Appendix I of this response. As explained in its submission at Deadline V the Applicant had proposed a set of protective provisions to E.ON E&P and awaited E.ON E&P's view on that proposal. That response was never received however the Applicant notes that E.ON E&P, in its Deadline V submission, confirmed that the Applicant's protective provisions were not acceptable and instead proposed its own draft set of protective provisions. In proposing these protective provisions E.ON E&P notes "It is apparent, then, that the application is not in accordance with the NPS as required by s104(3) of the Planning Act 2008. However E.ON E&P does not seek refusal of the application on this basis. That is because in E.ON E&P's submission it is possible to bring the application into compliance by the grant of protective provisions in favour of E.ON E&P and its successors. A proposed draft of these provisions is included in Appendix 2 along with a plan setting out the proposed area to which it refers" (at paragraph 1.55 of Section 1 of E.ON E&P's Deadline V response).

2.2 As set out above the Applicant refutes any suggestion that the Application does not accord with the NPS. The Applicant has, however, reviewed E.ON E&P's set of draft protective provisions and has used these as the basis for its attached draft protective provisions. The main differences between the E.ON E&P proposed set and the Applicant's proposed set being:

2.2.1 the Applicant has inserted (at paragraph 3(1)) a duty on E.ON E&P (and its partner) to act reasonably in considering any request for approval of works within the protected area. It may well be that some activities are entirely appropriate within the protected area and do not interfere with E.ON E&P's apparatus in any way. In those circumstances it would be inequitable if E.ON E&P were allowed at their absolute discretion to refuse consent.

2.2.2 the Applicant has included a definition of Protected Area and has applied the protections under the protective provisions to the Protected Area if E.ON E&P or its development partner has obtained the consents it requires for apparatus in that Protected Area. This has been achieved through the definition of Protected Area and its insertion into paragraph 3(1), and through the definition of apparatus. The purpose of these protective provisions is to achieve co-existence and to deal appropriately with any potential interactions. There is no prospect of interaction unless and until E.ON E&P have the consents they require to operate within the Protected Area. Without this "trigger" the protective provisions would act to negate the checks, balances and protections which are open to the Secretary of State to apply to E.ON E&P's consenting regime. The inclusion of this provision is therefore important to keep open the Government's ability to balance interests and take into account material considerations and facts in all consent applications that come before them.

2.2.3 for the same reasons as outlined in the paragraph above the Applicant has deleted E.ON E&P's proposed provisions at paragraph 3(4) which sought to exclude the Applicant's right to compensation (which may otherwise flow from the oil and gas

consent process if the oil and gas clause requires to be implemented and the Secretary of State applies the Ministerial Statement). E.ON E&P should not be allowed to subvert these other processes. The protections within these other processes flow from the Applicant's Agreements for Lease and not the DCO which is the subject of this Application. The Applicant has inserted drafting at paragraph 3(4), again to make clear that the protective provisions are not intended to affect these other processes. This drafting does not affect the Secretary of State's ability to decide what policy is relevant and appropriate at the point E.ON E&P applies for the consents it requires.

2.3 The Applicant is still considering the appropriateness of the Plan accompanying E.ON E&P's protective provisions. In particular the Applicant is having difficulty reconciling the percentages which E.ON E&P set out at paragraphs 1.57 to 1.60 (inclusive) of Section 1 of its Deadline V response with the Plan provided. The Applicant has requested a shape file of the Plan so that it can properly consider the acceptability of and justifications for the proposed protected area.

2.4 The Applicant notes E.ON E&P's arguments at paragraph 1.62 of Section 1 and at Section 4 of E.ON E&P's Deadline V response in relation to the Project's construction programme. The arguments advanced by E.ON E&P and it's consultants here are premised on an assumption that there will not be CfD rounds available for Hornsea Project Two to bid for in the next few years. In particular at paragraph 4.2 it is asserted that "If the delayed second round does occur, it is likely to be before Hornsea Subzone Two receives a DCO" and at paragraph 4.19 it is stated "The postponement of this year's auction, and this lack of clarity over future dates and budgets, leaves the industry uncertain about if or when companies will be able to bid for a contract for their power." Both of these issues have been subsequently addressed in the statement by the Secretary of State on 18 November 2015 where she stated that the next CfD auction would be by the end of 2016 (likely after the date of a DCO decision on the Project) and that, if cost reduction conditions are met, there would be a further two CfD auction rounds in the course of this Parliament (See excerpt transcript from that Statement at Appendix K of this Response).

2.5 The Applicant will seek to agree this set of protective provisions with E.ON E&P (or if possible a commercial agreement outside of the DCO in place of protective provisions). The Applicant will confirm at Deadline VII the status of any agreement reached with E.ON E&P and where relevant will include the protective provisions and protective provision plan the Applicant considers should be included in any DCO granted.

2.6 The protective provisions proposed by the Applicant provide substantial protection to E.ON E&P, fully addressing all relevant issues which they have raised, whilst also preserving the integrity of the other consenting and policy regimes - allowing the Secretary of State to make proper decisions in these processes when the relevant information is known.

2.7 That, it is submitted, is a more appropriate approach than that proposed by E.ON E&P as:

2.7.1 it is consistent with the NPS and affords E.ON E&P protection against any adverse effects which could be caused to its operations by the DCO.

2.7.2 it deals with interfaces as and when they lawfully arise - the Applicant and E.ON E&P each having gone through their consent processes and the Government having applied the policies, which it considers at the relevant time to be appropriate, to the known facts at the relevant time.