

Advice provided to the Smart Wind in relation to draft application documents

General Drafting of the Development Consent Order

The applicant should avoid use of the words "shall" or "will" (because of ambiguity over whether they are an imperative or a statement of future intention) and avoid archaisms (for example "therewith", "aforesaid")

The Statutory Instrument (SI) template does not permit numbers to be shown as [not used]. The current Development Consent Order (DCO) has this in several places, for example, Requirement 3 and Condition 2 of each of the Deemed Marine Licence's (DML's). The applicant may wish to amend these prior to submission. If the applicant does not do so they must ensure that these are removed in the final DCO that that is submitted to the examination. This version must be in the correct SI template.

The SI template requires each DML to be in its own schedule. The applicant has one schedule H for all DML's. The applicant may wish to amend this prior to submission for ease of reference and consistency throughout the examination. There are other references in the Order to DML's in Schedule H which will consequently also need to be amended.

Compensation Compounds

Explanatory Memorandum (EM) 1.18 and 45.37, DCO Article 2, Article 26, Requirement 22, Schedule G Part 1(b) Statement of Reasons (SoR), 6.5-6.11

A compensation compound is defined in Article 2 as a construction working site shown red on the Compensation Compounds Plan for the purpose of compensating Hornsea One (H1) in the event that Hornsea Two (H2) construction restricts H1 construction.

At present the Compensation Compounds Plan does not reflect the DCO. An example of this is that it does not identify compensation compounds in red as stated in Article 2 and Requirement 22, and it does not identify the affected H1 construction compounds, which are also within the H2 order limits, in blue as stated in Requirement 22. The applicant will need to rectify this. It is fundamentally important to the workings of Requirement 22, which limits the exercise of the powers of the undertakers, for the plan to correctly identify the land in question. It would also be helpful if the plans could identify which project areas identified in the key such as the "temporary working area" belong to. The applicant might also like to consider whether it would be helpful to show the order limits for H2 in this plan.

Schedule G Part 1(b) lists several compensation compounds as land over which temporary possession may be taken. It would be helpful if the applicant could clarify whether the "red land" that will be identified on the Compensation Compounds Plan is the same as the land listed in Schedule G part 1(b). If there is any other "red land" that is not in Schedule G part 1(b) it would be helpful for the applicant to identify this.

Requirement 22 limits the undertakers' exercise of any powers granted by the DCO over the compensation compounds (red land on Compensations

Compounds Plan) to situations where the undertaker exercises its powers over land shown blue on the Compensation Compounds Plan at the same time that H1 is being constructed, where the works authorised by H2 are or carried out and completed before H1 is constructed. The SoR explains that the land shown blue is land which is within H2 order limits and also within H1 order limits as land intended for H1 to use as temporary construction compounds. It would be helpful if the applicant could confirm whether the blue land is also listed in Schedule G or, if not, to identify the relevant plot numbers that correspond to the Book of Reference (BoR) for the blue land.

The SoR contains a table listing the compensation compounds at 6.11, it would be helpful to clarify whether the plot number listed in this table will tie in with the BoR or if these are different numbering used only on the Compensation Compounds Plan. If different, the applicant might like to consider how these tie up and if it would be helpful to put corresponding BoR references in the table.

The EM states at 1.18 that the compensation compounds are "intended for temporary use by the Hornsea Project one undertaker" this is repeated at 6.5 in the SoR. It is not clear how this will be achieved. Requirement 22 provides that the powers over the compensation compounds intended for H1 may only be exercised for the benefit of H1, but the order, quite rightly, does not seek to give the H1 undertakers powers to temporarily possess the land, the order gives the H2 undertakers the power to possess the land in certain circumstances. It would be helpful for the applicant to explain how the powers granted in the Order will enable the H1 undertakers to temporarily use the compensation compounds identified within the H2 DCO to construct H1.

It is also unclear why the compensation compounds will be required if H2 is constructed and completed before work on H1 commences if the land is only required by H2 temporarily. In accordance with Article 25 (5) land used temporarily must be restored to the reasonable satisfaction of the owner after use. It is therefore difficult to see why H1 could not use the land as originally intended in its DCO if H2 have finished using the land. It would be helpful if the applicant could explain this in the SoR. In the table at 6.11 of the SoR some of the H1 affected construction compounds appear to also be for H2 construction compounds and if H2 completed its works, it would seem logical that H1 could then use the compounds for the same purpose afterwards.

In respect of the table in the SoR at 6.11, it would be helpful to clarify that the "affected construction compounds" are the H1 construction compounds which are also included within the H2 order to be used by H2 as identified in blue on the compensation compounds plan.

It would be helpful for the applicant to identify the relevant articles in Ipswich DCO referred to in EM 1.19 and 6.7 SoR as precedent for the inclusion of the compensation compounds.

SoR

The SoR does not contain plot by plot justification for all of the compulsory acquisition authorised by the DCO. This will be required during the examination. It is noted that the applicant has done this for land contained in Schedule E (creation of new rights) and land contained in Schedule G (temporary possession

of rights) and may wish to consider whether it would be helpful to include a table which explains the extent of the interest that is sought for all other plots within the order land.

At 5.3.10, in discussing Article 26, it is stated that "the undertaker would need to remove all temporary works and restore the land to its original condition or to the owners reasonable satisfaction". This would appear to not be an entirely accurate reflection of Article 26(5) which specifically states that the undertaker is not required to replace a building removed under the article or to restore land on which any works have been constructed under Paragraph 1(d), the works specified in Column 1 of Schedule G, or other mitigation works. The applicant may like to consider amending the SoR to reflect this.

DCO

Articles 11(7), 12(2), 14(3), 17(6)

These contain deemed consent provisions and the applicant is advised to discuss these with the appropriate consenting authorities.

Article 26

In the EM at 27.4, reference is made to Paragraph (9) of this article. The applicant should consider whether this reference should be made to Paragraph (13).

Article 26(12) provides that the undertaker is not authorised to take temporary possession of certain areas of land on the land plan. It would be helpful if the applicant could explain in the EM which land this refers to and why it is excluded from the temporary possession power.

Article 33

This article imports the Town and Country Planning Act (TCPA) appeal provisions. The applicant should ensure that the drafting of this article does not affect the application of the National Infrastructure (Environmental Impact Assessment) Regulations 2009. These regulations specifically include provisions for subsequent applications; i.e. an application for approval of a matter where the application is made in pursuance of a requirement imposed by an order granting development consent and the approval must be obtained before all or part of the development permitted by the consent may be begun. The applicant should take care to ensure that the DCO does not oust these regulations by purporting to import the Town and Country Planning (Environmental Impact Assessment) Regulations 2011.

Article 40

The wording "any other plans or documents referred to in this Order" is insufficiently clear and precise and should be removed. The applicant should specifically list all plans and documents which are required to be certified. This should also include the outline Code of Construction Practice, the outline Ecological Management Plan and the outline Landscape Scheme and Management Plan as these are defined in Article 2 as documents certified by the Secretary of State (SoS).

Requirement 3

The EM at 45.18 says that this requirement, restricted build area, places a restriction on the infrastructure that can be constructed within a specified area of the Order Limits. This appears to have been removed from the DCO. The applicant should ensure that the EM accurately reflects the DCO.

Requirement 9

This contains a tailpiece which allows variation from the certified outline landscape scheme and management plan. It is noted that Requirement 20(2) limits this tailpiece and the applicant might like to consider explaining this in the EM.

Requirement 21

21(1) requires each undertaker to provide a copy of the plans and documents to "the other undertaker". The applicant might like to consider whether this should instead refer to "any other undertakers" as Article 35 permits the partial transfer of the DCO and DML's so it is possible that there may be more than two undertakers with the benefit of the Order and the DML's.

DML

Tailpiece conditions

The DMLs all contain a number of tailpiece conditions, for example, 12(2) allows changes to be made to the plans approved by Condition 10. The applicant should be aware that the SoS has included wording in recently made Offshore Wind Farms (OWF) DCO's (e.g EAONE, Rampion and Burbo Bank) limiting similar tailpieces in DMLs by including the following wording:

"Where the words 'unless otherwise agreed' or 'unless otherwise stated' appear in the conditions in Part 2, any such agreement or statement may only be given in relation to immaterial changes where it has been demonstrated to the satisfaction of MMO that the subject matter of the approval or agreement sought is unlikely to give rise to any materially new or materially different environmental effects from those assessed in the environmental statement"

The applicant should consider inserting similar wording or provide an explanation why it is not considered necessary and justification for the inclusion of the tailpiece conditions by reference to relevant case law.

Maintain

The applicant might like to consider whether it is necessary to limit this definition in each of the DMLs to the specific works to which they relate.