

East Anglia THREE  
Offshore Windfarm

East Anglia THREE

# DECC Guidance of June 2014

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Department  
of Energy &  
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# Oil and gas clause in Crown Estate leases

Guidance on procedures for independent valuation  
where necessary

June 2014

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# Background to the Guidance

A. Under the terms of Crown Estate offshore renewable leases and agreements for lease, The Crown Estate may determine the lease or agreement for lease in whole or in part, following a request from the Secretary of State, for the purposes of allowing an oil or gas development to proceed. This is known as the “*oil and gas clause*”.

B. In a written statement made to Parliament by the Secretary of State on 12 July 2011, entitled “*Crown Estate Leases for Offshore Renewable Projects: Oil & Gas Clause*”<sup>1</sup> (the “Ministerial Statement”), he set out his policy that a necessary condition to be met before he would be prepared to make such a request is that appropriate compensation had been paid by an oil or gas developer to the affected offshore renewable energy developer, or that a binding agreement had been entered into with the oil or gas developer to pay such compensation.

C. The Secretary of State also said “*My officials will discuss with the interested parties suitable practical arrangements to give effect to this policy, including a process for appointing a suitable person or body to undertake the independent third party valuation where that might be necessary. Suitable guidance will be developed in consultation with leaseholders or prospective leaseholders and the oil and gas industry*”.

D. This document sets out that guidance.

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<sup>1</sup> Hansard, Written Ministerial Statements, 12 June 2011, <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110712/wmstext/110712m0001.htm>

# Guidance on procedures for independent valuation

## Introduction

1. There may be situations where development interests of oil or gas developers and offshore renewables developers come into conflict as they seek to develop the same or adjoining areas of the seabed. In the majority of cases the Secretary of State expects that the parties will be able to come to a private, commercial agreement which will allow the parties to accommodate their respective development aims.
2. Under the terms of leases and agreements for lease The Crown Estate may determine a lease or agreement for lease, in whole or in part, following a request from the Secretary of State, for the purposes of allowing an oil or gas development to proceed.
3. As set out in the Ministerial Statement to Parliament, the Secretary of State will only request that The Crown Estate determine a lease or agreement for lease after appropriate compensation has been paid by an oil or gas developer to the affected offshore renewable developer, or after a binding agreement has been entered into with an oil or gas developer to pay such compensation. This applies to all leases or agreements for lease irrespective of the date they were signed and irrespective of whether or not there is a physical overlap between the lease or agreement for lease area and the oil or gas development area.

## Applications to the Secretary of State

4. Where it emerges that the plans of an oil or gas developer and those of an offshore renewables developer may be in conflict, the Secretary of State expects the parties to make every reasonable effort to reach a commercial agreement at the earliest stage.
5. The oil or gas developer may make an application to the Secretary of State if:
  - a) determination of an offshore renewable lease or agreement for lease is necessary in order for the oil or gas development to go ahead; **and**
  - b) the parties are unable to reach a commercial agreement on compensation.
6. This guidance sets out the process and indicates how the Secretary of State would generally expect to approach any application. However, in all such cases, the Secretary of State will take due account of the specific circumstances which may apply.
7. In the application the oil or gas developer should set out the following information:
  - a) details of the lease and/or agreement for lease area for which determination is sought, including maps;

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- b) evidence of why the oil or gas development cannot go ahead without the determination of the lease and/or agreement for lease. This should include information on alternative locations, options for co-existence and technical solutions which have been assessed and the reasons for ruling these out;
  - c) confirmation that the determination sought is for the smallest area reasonably necessary for the oil or gas development to proceed; and
  - d) evidence of discussions (bilateral or mediated) which have taken place between the parties in order to reach a commercial agreement.
8. The application should also include details on how the costs of the independent valuer's work will be met by the oil and gas developer. Arrangements for the oil or gas developer paying the agreed fees of the independent valuer, and/or for meeting any additional costs which the Department may incur in the appointment of the independent valuer, and for resolving any disputes relating to the process, must be agreed between the oil or gas developer and the Department before the appointment of the independent valuer is made.
9. The parties will, in the absence of an agreement between the parties to the contrary, bear their own costs.
10. The oil or gas developer should notify the relevant offshore renewable developer and The Crown Estate that he is making an application to the Secretary of State. He should do this before he submits his application to the Secretary of State. The oil and gas developer should provide a copy of the application to the relevant offshore renewable developer and The Crown Estate at the same time as he submits his application to the Secretary of State.
11. The Secretary of State may seek any relevant further information from the oil or gas developer.
12. When considering each application, the Secretary of State will seek a view from the relevant offshore renewable developer and The Crown Estate.
13. The Secretary of State will consider each application on a case by case basis and it should not be assumed that he will agree to appoint an independent valuer or request that The Crown Estate determine a lease or agreement for lease. In weighing these considerations the Secretary of State will take account of any matters which he deems to be relevant. These will include, but are not limited to, consideration of the potential impacts of determining the lease and/or agreement for lease upon:
  - a) the UK's legally binding 2020 renewable energy target;
  - b) any relevant longer term decarbonisation goals or targets;
  - c) maximising the economic recovery of the United Kingdom Continental Shelf's indigenous oil and gas resources;
  - d) the Government's energy policies;
  - e) the Government's wider objectives;
  - f) consumer bills;
  - g) third parties;
  - h) The Crown Estate;
  - i) investor confidence; and
  - j) the offshore renewable supply chain.
14. If the oil or gas developer cannot demonstrate that determination is necessary for the oil or gas development to proceed, the application will be rejected.

15. If the Secretary of State considers that there has been insufficient effort to reach a commercial agreement, he may ask the parties to resume negotiations before considering the application.

## Appointment of an independent valuer

16. Before taking any decision to appoint an independent valuer the Secretary of State will notify the parties and The Crown Estate if he considers that the oil or gas development seems a technically viable development based upon the information which has been submitted by the oil or gas developer. Any decision by the Secretary of State to appoint an independent valuer will not be made without some consideration of the significance of the matters set out in section 47A of the Petroleum Act 1998. Any such appointment may therefore be taken as an indication that he does not object in principle to the exercise of the oil and gas clause and a possible reduction in the generation capacity of the offshore renewables project.
17. If the Secretary of State agrees to the application he will, subject to agreement of the matters set out in paragraph 8, notify the parties and The Crown Estate and invite the parties to propose appropriate persons to act as the independent valuer. If the parties can agree upon an independent valuer that is acceptable to the Secretary of State, that person will be appointed to undertake the valuation. Any proposals submitted to the Secretary of State should demonstrate that the parties have followed transparent and non-discriminatory procedures in reaching the preferred nomination.
18. If the parties cannot agree, the Secretary of State will, following a transparent and non-discriminatory process, appoint an independent valuer of his choice. The independent valuer will submit his or her report to the Secretary of State.
19. For the avoidance of doubt the agreement of the Secretary of State to appoint an independent valuer and his preliminary view on technical viability will be without prejudice to any later decision on the technical assessment of the Field Development Plan.

## Principles in assessing the level of compensation

20. As set out in the Ministerial Statement, the Secretary of State will expect the independent valuer to assess compensation for the relevant categories of loss on the basis of the principle of equivalence as applied in circumstances of compulsory purchase, which aims to put the claimant in the same position, so far as financial compensation can do so, as if the lease or agreement for lease had not in fact been determined.
21. The level of compensation payable should take into account the maturity of the affected offshore renewable development. So, for example, determining an agreement for lease that has only recently been granted may result in a smaller payment compared to an agreement for lease that has been held for longer and where the relevant offshore renewable development may be further advanced.



## Valuation

22. The independent valuer is expected to:
- a) consider the estimated change in the market value of the offshore renewable development represented by the lease and/or agreement for lease, due to the effects of the determination;
  - b) disregard the existence of the oil and gas clause but may take into account other restrictions in the lease and/or agreement for lease which might be present;
  - c) consider actions in mitigation of the effects of the determination which may reasonably be expected of the holder of the lease and/or agreement for lease;
  - d) consider any costs likely to be incurred in re-planning the offshore renewables development;
  - e) consider if the determination makes the offshore renewables development no longer economically viable; and
  - f) consider any other factors which he regards to be relevant.
23. In estimating the change in the market value of the offshore renewable development, the independent valuer will be expected to take account all material factors, which may include, but are not limited to:
- a) losses incurred on the remainder of the lease and/or agreement for lease area including costs of any remedial works such as removal of cables or turbines;
  - b) any loss in efficiency in the remainder of the lease and/or agreement for lease area;
  - c) whether the change in the lease and/or agreement for lease area makes the offshore renewables development not economically viable;
  - d) costs for disturbance and removal of any equipment and decommissioning costs (this should include consideration of any uncertainties around decommissioning costs);
  - e) costs which may be recouped by re-sale or re-use of any equipment;
  - f) penalties or costs incurred due of cancellation of contracts or arising from other liabilities;
  - g) loss of revenue or profits; and
  - h) any other factors he considers relevant under the principles of compulsory purchase.
24. The independent valuer is expected to take into account the degree of uncertainty which may attach to any estimate of costs or revenues.
25. Once the Secretary of State has agreed to appoint an independent valuer and has notified the parties of this, the offshore renewables developer will be expected to take reasonable steps to mitigate his losses from that point onwards, consistent with normal practice in cases of compulsory purchase. There is no expectation that the offshore renewables developer needs to take any steps to mitigate losses before this point.

## Process after appointment of the independent valuer

26. The independent valuer will write to the parties requesting them to send him a written submission and supporting evidence within 30 working days. The independent valuer will specify the date so that there is no ambiguity. The written submissions will be shared by the independent valuer with the other party.
27. The parties may agree a statement of common ground to bind the independent valuer's work. Where the parties are able to reach agreement on issues, the independent valuer will

exclude these from his considerations. If necessary, the independent valuer may extend the 30 working days submission deadline to accommodate this statement of common ground.

28. The independent valuer will hold an oral hearing if this is requested by either party. The other party will be invited to any such hearing. At the oral hearing, both parties will have the opportunity to put their case and to respond to the other party.
29. The independent valuer will have discretion to request further information from the parties and to seek advice to inform his valuation from other sources (for example, technical or engineering advice) if he considers this necessary. The independent valuer will confirm which information has been provided from other sources and who provided the information.
30. The independent valuer will have three calendar months from the receipt of the written submissions OR the close of the oral hearing (whichever is the later) to complete a draft valuation. If the independent valuer requires more time, he will inform the Secretary of State, in writing, of the reasons why and with a revised deadline. The Department will notify the parties of any change of date.

## Process after the independent valuer's assessment

31. When the draft valuation is complete, the independent valuer will send a copy simultaneously to the parties who will have ten working days, from receipt, to notify the independent valuer of any factual corrections or apparent errors.
32. The independent valuer will then have ten working days to finalise the valuation. He will send the final valuation to the Secretary of State and the parties simultaneously.
33. The parties will have fifteen working days from receipt of the final valuation to notify the Secretary of State in writing if they are not satisfied that the procedure in reaching the valuation has been followed correctly or if they consider there has been a manifest error. This should be supported by evidence.
34. If the Secretary of State agrees the procedure has not been followed correctly or that there has been a manifest error, he will ask the independent valuer to repeat the process or part of the process as he deems necessary or appoint another independent valuer to do so. Any costs associated with repeating any part of the process or undertaking another valuation should be met by the oil and gas developer as set out under paragraph 8.
35. When the Secretary of State is satisfied that the procedure has been followed correctly and there has been no manifest error on the part of the independent valuer, he will notify the parties of this and ask the oil or gas developer to confirm if he intends to pay the compensation. The oil or gas developer will have twenty working days, from receipt of the Secretary of State's letter, to confirm whether or not he intends to pay the compensation.
36. The Secretary of State may provide a letter of assurance to the oil and gas developer stating that, at the point in time when compensation is paid, he is not aware of any reason why consent to the Field Development Plan (FDP) should be refused, subject to a satisfactory technical assessment by the Department of the FDP when it is submitted; and that in particular, he is not, at that point in time, aware of any reason why he may refuse consent to the FDP for wider policy reasons, such as increasing or securing renewable energy supply.

37. If the oil or gas developer confirms that he does not intend to pay the compensation, or does not respond within the twenty working days, the independent valuer's assessment will lapse and the Secretary of State will notify the parties and The Crown Estate that he will not request that The Crown Estate determine the lease and/or agreement for lease.
38. If the oil or gas developer confirms that he intends to pay the compensation, he must confirm this in writing to the Department. The Secretary of State will then ask The Crown Estate to determine the relevant parts of the lease and/or agreement for lease.
39. The parties should agree the arrangements for when compensation will be paid and executing the arrangements. This could involve the compensation payment being made simultaneously with the effecting of the determination. Alternatively, if the oil or gas developer proposes deferred payment, the principle of deferral and the form of security must be acceptable to the offshore renewables developer.
40. Compensation should be paid (or other binding legal agreements should be in place) within three calendar months of the oil or gas developer notifying the Secretary of State that he intends to pay the compensation or the independent valuer's assessment will lapse. In these circumstances, the Secretary of State will notify the parties and The Crown Estate that he will not request that The Crown Estate determine the lease and/or agreement for lease.
41. If, after this process has been completed and compensation has been paid, the oil or gas development does not proceed (for example, because it does not receive development consent or for commercial or other reasons), the offshore renewables developer is not required to pay back the compensation because part of the lease and/or agreement for lease will have been determined.

# Interpretation of the terms used in the guidance

**“Application to the Secretary of State”** means an application made by an oil or gas developer asking the Secretary of State to appoint an independent valuer and request that The Crown Estate determine a lease or agreement for lease. An offshore renewables developer may not make an application.

**“Compensation”** means the sum of money to be paid by an oil or gas developer to an offshore renewables developer for determination of a lease or agreement for lease. It is a sum of money and not a requirement to carry out an action or to give any undertakings.

**“Department”** means Department of Energy and Climate Change.

**“Determination”** means termination in whole or in part of a lease or agreement for lease. References to “determine”, “determining” and “determined” in this guidance should be construed accordingly as meaning in whole or in part.

**“Independent valuer”** means a person (independent of an oil or gas developer or offshore renewables developer) appointed by the Secretary of State to assess the amount of compensation.

**“Lease and/or Agreement for Lease”** means a lease and/or agreement for lease relating to property or sovereign rights forming part of The Crown Estate, for the purpose of exploitation of water or winds for the purpose of energy generation or purposes connected to such exploitation.

**“Notify”** means notification in writing which can be by hard copy letter or in electronic form.

**“Offshore renewables developer”** means the developer and/or owner and operator of offshore transmission assets and/or offshore renewables generation assets.

**“Offshore renewables development”** means an offshore renewable energy electricity generating project and/or an offshore transmission project.

**“Oil or gas developer”** means the petroleum licence holder and/or operator of an oil and gas development.

**“Oil or gas development”** includes the drilling of an exploration well.

**“Parties”** means the oil or gas developer and the offshore renewables developer.

**“Secretary of State”** means the Secretary of State for Energy and Climate Change.

**“Working day”** means a day (other than a Saturday or a Sunday) on which banks are open for general business in England.

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