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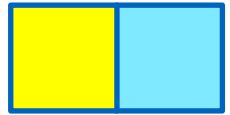
East Anglia ONE North and East Anglia TWO Offshore Windfarms

Applicants' Comments on SASES' Deadline 3 Submissions

Applicants: East Anglia ONE North Limited and East Anglia TWO Limited
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Applicable to **East Anglia ONE North** and **East Anglia TWO**



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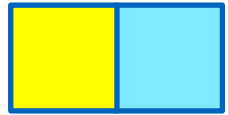
Glossary of Acronyms

CION	Connection and Infrastructure Options Note
DCO	Development Consent Order
EIA	Environmental Impact Assessment
ES	Environmental Statement
ExA	Examining Authority
NGET	National Grid Electricity Transmission
NPS	National Policy Statement
SASES	Substation Action Save East Suffolk



Glossary of Terminology

Applicants	East Anglia TWO Limited / East Anglia ONE North Limited
East Anglia ONE North project	The proposed project consisting of up to 67 wind turbines, up to four offshore electrical platforms, up to one construction, operation and maintenance platform, inter-array cables, platform link cables, up to one operational meteorological mast, up to two offshore export cables, fibre optic cables, landfall infrastructure, onshore cables and ducts, onshore substation, and National Grid infrastructure.
East Anglia TWO project	The proposed project consisting of up to 75 wind turbines, up to four offshore electrical platforms, up to one construction, operation and maintenance platform, inter-array cables, platform link cables, up to one operational meteorological mast, up to two offshore export cables, fibre optic cables, landfall infrastructure, onshore cables and ducts, onshore substation, and National Grid infrastructure.
National electricity grid	The high voltage electricity transmission network in England and Wales owned and maintained by National Grid Electricity Transmission plc



1 Introduction

1. In its Deadline 3 Written Summary of submissions on site selection (REP3-128) SASES made submissions on aspects of the Applicants' Regulatory Context Note (REP2-003) and Schedule 9 to the Electricity Act 1989. This document provides the Applicants' comments on those submissions.
2. This document is applicable to both the East Anglia ONE North and East Anglia TWO applications, and therefore is endorsed with the yellow and blue icon used to identify materially identical documentation in accordance with the Examining Authority's (ExA) procedural decisions on document management of 23rd December 2019. Whilst for completeness of the record this document has been submitted to both Examinations, if it is read for one project submission there is no need to read it again for the other project.

2 Schedule 9 of the Electricity Act and relevance to the Planning Act 2008

3. SASES have made submissions on aspects of Schedule 9 to the Electricity Act 1989. The relevance of Schedule 9 is considered later in this submission, but it is important at the outset to identify that Schedule 9 to the Electricity Act is not directly applicable to the determination of a DCO application. In terms of paragraph 1(2) of Schedule 9, the Secretary of State is obliged, when considering applications for Section 36 generating stations or Section 37 overhead lines, to have regard to the list of amenity and environmental issues listed in paragraph 1(1)(a) and also the extent to which a particular applicant has complied with their duty under paragraph 1(1)(b) to do what he reasonably can to mitigate any effects which the project would have on the particular resources. Section 33(1)(h) of the Planning Act 2008 (the "PA 2008") confirms that no consent under Section 36 or Section 37 of the Electricity Act is required in circumstances where a development consent order is needed. In effect the provisions of Sections 36 and 37 are dis-applied. The PA 2008 has its own regime as to decision making and Section 104 sets out the particular importance attached to national policy statements (NPSs).
4. SASES make reference to sections of NPS EN-5 which refer to Schedule 9 and it is important to make clear the context of these references. The relevant section of the NPSs regarding grid site selection is section 2.2 of EN-5. This provides guidance, but confirms in particular that the subsequent sections are not a statement of Government Policy (see paragraph 2.2.1). The references by



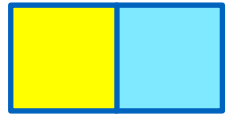
SASES to paragraphs 2.2.6 and 2.2.7 of EN-5 are to a summary of the provisions contained in Schedule 9 and not requirements of policy. In that context, the correct consideration of site selection should align with the principles contained in Part 4 of NPS EN-1. This is confirmed by paragraph 2.2.1 of EN-5.

5. Notwithstanding the above position, the Applicants have had regard to Schedule 9 and that is reflected in paragraph 17 of Chapter 4 of the Environmental Statement (APP-052). In formulating the relevant proposals, the Applicants have had full regard to each of the factors specifically mentioned in paragraph 1(1)(a) of Schedule 9 and this is reported in the Environmental Statement. In addition the Environmental Statement has sought to identify reasonable mitigation for the effects on those specified resources. At the time of the submission of the DCO, neither of the Applicants held generation licences and it was not until 3 December 2020 that the Applicants were granted such status. There is no requirement for the Applicants to have a generation or any other licence at the date of a DCO application. The SASES submissions seem to imply that incorporating works that may in the future be transferred to National Grid Electricity Transmission (NGET) was not appropriate. As has been illustrated in previous responses (REP 3-111) NGET have provided specifications and been involved in the formulation of proposals. There is no requirement for NGET to be an Applicant.
6. The whole question of the relationship between wider electricity regulation and Schedule 9 has been the subject of litigation. The leading case in the field is *The Trump Organisation v The Scottish Ministers*. The challenge brought by the Trump Organisation was that the applicant to an offshore windfarm in proximity to Aberdeen could not apply for a Section 36 consent under the Electricity Act on the grounds that it did not hold a generation licence. This required the Courts to consider the whole relationship between Electricity Act licencing and Schedule 9. The background to Schedule 9 is explained in the Opinion of Lord Malcolm who was one of the Judges who sat in the original appeal to the Inner House of the Court of Session (the Scottish equivalent of the Court of Appeal). At paragraphs 52 to 63 of his Opinion¹, he sets out the full background to the formulation of Schedule 9 and reaches firm conclusions. The matter was then subsequently appealed to the Supreme Court where Lord Hodge delivered the leading Opinion². At paragraph 16 he confirms that:

“the 1989 Act contains two separate regulatory regimes for the construction of electricity generating stations and overhead lines (sections 36 and 37) on the one hand, and for the licensing and other regulation of

¹ *Trump International Golf Club Scotland Ltd, The Trump Organization LLC v The Scottish Ministers* 2015 S.C. 673.

² *Trump International Golf Club Scotland Limited and another v The Scottish Ministers* [2016] 1 W.L.R. 85.



electricity supply, including generation and transmission (inter alia sections 4, 6, and 7) on the other”

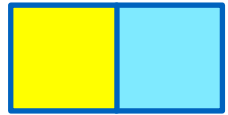
7. He went on to confirm that a party does not need to hold a licence in order to apply for a section 36 or 37 consent. The schedule 9 duties would only apply in circumstances where an applicant held the requisite licence. Lord Hodge also commented at paragraph 17 on the more limited role of Schedule 9 given the more extensive requirements provided for by the Environmental Impact Assessment process.
8. In the circumstances, SASES' position is not supported by a proper interpretation of the applicable NPS policy or the case law which has been established in relation to Schedule 9.

3 Section 9 of the Electricity Act

9. SASES suggest that the Applicants in their Regulatory Context Note have placed too great an importance on the regulatory framework. Section 2.3 of EN-5 sets out the general assessment principles for electricity networks. It supports a holistic approach to applications in paragraph 2.3.1. Of particular relevance to the matter raised by SASES is paragraph 2.3.5. This identifies that the requirements under Section 9 of the Electricity Act regarding the requirement to bring forward efficient and economical proposals is a matter which should be taken into account in decision making. The discharge of these Statutory requirements is delivered through the regulatory regime which is fully reported upon in the Regulatory Context Note (REP2-003). This includes processes which ensure that the procedures are applied in a fair and consistent manner. The structural and process implementation is overseen by OFGEM through licence conditions imposed on the various National Grid entities. The Applicants' approach is therefore supported by a proper interpretation of the policy contained in EN-5 and weight should be attached to the decisions made through that regulatory process.

4 Alternatives

10. Regulation 14(2)(d) of the Infrastructure Planning (EIA) Regulations 2017 requires the Environmental Statement to provide a description of the reasonable alternatives studied by the applicant. It goes on to suggest that these require to be relevant to the proposed development and its specific characteristics. In that context, the Applicants have fully set out their approach to site selection. The process is transparent and there was extensive engagement throughout the process both with consultees and members of the public. This is reflected in the



various consultation rounds. Furthermore, the alternatives studied by the Applicants require to be relevant. In terms of alternatives that are relevant to the proposed development, in the Applicants' submission, this is restricted to considering those options which were available for the specific developments which were proposed and which reflected the regulatory requirements of the Electricity Act and the CION process. Chapter 4 of the Environmental Statement and the Consultation Report illustrate the extent of the environmental factors taken into account (see Chapter 4 of the Environmental Statement and Appendices 4.1 to 4.6 and the Consultation Report and supporting Appendices 5 to 9). Collectively they illustrate the extensive consultation process undertaken during site selection. Appendix 8 even included visualisations of the comparison sites at that stage. The approach of the Applicants was fully compliant with Section 4.4 of EN-1. This was reflected in Natural England's comments describing the overall process as being robust.