



National Infrastructure
Planning
Temple Quay House
2 The Square
Bristol, BS1 6PN

Customer
Services: 0303 444 5000
e-mail: ThanetExtension@planninginspectorate.gov.uk

By email

Mr Daniel Bates
Development Consent Manager
Thanet Extension Offshore Wind Farm
Vattenfall Wind Power Ltd

Your Ref:

Our Ref: EN010084

Date: 11 June 2019

Dear Mr Bates

The Infrastructure Planning (Examination Procedure) Rules 2010 – Rule 9

Application by Vattenfall Wind Power Limited for an Order Granting Development Consent for the Thanet Extension Offshore Wind Farm

Declined Request for Procedural Decision or Recommendation on Pilotage Simulation

In the covering letter to its Deadline 6 submissions [REP6-001], Vattenfall Wind Power Ltd (the Applicant) indicated that a Pilotage Simulation Study (as detailed in D6 Appendix 38 [REP6-058]) might be carried out and made the following proposal: *'[S]hould the Examining Authority be of the view that a pilotage simulation could still be necessary to inform the SoS' decision ... a procedural decision is made before close of Examination recommending that the Applicant undertakes such a simulation voluntarily and in particular that all associated parties and stakeholders continue to engage with the Applicant in order to facilitate and discuss any pilotage simulation and its results.'*

In Questions under Rule 17 of the National Infrastructure (Examination Procedure) Rules 2010 (EPR) (R17Qs) published on 3 June 2019 at question 4.12.1, the Examining Authority (ExA) observed that it could not make a procedural decision that binds the Applicant, IPs and OPs after the closure of the Examination. This was because EPR Rule 2 defines the term "procedural decision", in relation to an application and under those rules as meaning *'a decision about how the application is to be examined...'*. It followed from this that the ExA's procedural decisions cannot regulate the conduct of the Applicant, IPs or OPs once the Examination is complete and closed. However, the ExA then sought views from the Applicant and IPs about the possibility that it might recommend that work be carried out after the closure of the Examination on a voluntary basis.

Having considered responses to that question up to and including Deadline 8 with care, the ExA notes that these include submissions expressing a view that such work might need to move beyond the scope of what is presently before the ExA¹ and disquiet about the proposition that the ExA might do anything resulting in an externally facing effect after the closure of the Examination². In summary, this latter concern proceeds from an understanding that the powers of an ExA after closure are strictly limited to the formulation of its recommendation to the Secretary of State and that (amongst other procedural provisions) the ExA is prevented from considering even late documents submitted after the closure of the Examination. Its focus is and must remain upon the formulation of a recommendation based upon the material that it has to hand, provided to it prior to the closure of the Examination.

Having reflected fully on these points, the ExA observes that it must operate strictly within the remit and powers provided for it under the Planning Act 2008, related statutory instruments, guidance and advice. For this reason, it confirms that it will not make either a procedural decision or a recommendation relating to work beyond the closure of the Examination. The conduct of any such work must be a voluntary matter for the Applicant and for any Interested Parties, Other Persons or stakeholders more broadly who might participate in it.

It will be for the SoS to determine whether to accept any such work in due course and if so on what basis to consider it as part of the decision-making process. The ExA must not do anything that might be taken to limit the exercise of the SoS' discretion.

I trust that this provides a clear and concluded response to the Applicant's request.

This letter has been copied to Interested Parties, Other Persons, Statutory Parties and to the Examination Library.

Yours faithfully

Rynd Smith

Lead Member of the Examining Authority

This communication does not constitute legal advice.

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¹ See eg REP6A-010 (Port of London Authority, Estuary Services Ltd) and REP6A-013 (Trinity House Lighthouse Service).

² REP6A-011 (Port of Tilbury London Ltd, London Gateway Port Ltd at 4.12.1)