RAMPION 2 OFFSHORE WINDFARM DEVELOPMENT CONSENT ORDER

DEADLINE 6

Deadline 6 submissions made on behalf of Susie and David Fischel of Sweethill Farm

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1. Introduction

1.1. This is a written submission made on behalf of Susie and David Fischel (**Fischels**) in respect of:

a) the Applicant's submissions at Deadline 5; and

b) an update on engagement between the Applicant and the Fischels;

1.2. Given that this is the final deadline in the examination, we also set out a summary of the Fischels' position at the close of the examination.

2. Comments on the Applicant's submissions at Deadline 5

***Deadline 5 Submission - 8.84 Applicant's - Comments on Deadline 4 Submissions* [REP5-122]*:* Table 2-29**

2.1. The Applicant's response to the Fischels' Deadline 4 submission is set out in Table 2-29. Given the stage of the examination, we set out in the last section of these submissions the Fischels' position at this stage of the examination, and respond here to the matters that require factual correction in REP5-122.

2.2. Firstly, in this document and a number of the other documents submitted by the Applicant at Deadline 5, there is a criticism directed at the Fischels' land agent, suggesting that no meaningful written response has been received in over 16 months. This is factually incorrect, as the Fischels' agent, in conjunction with a number of other agents, provided the Applicant with written comments on the generic template Heads of Term (**HoT**) on behalf of his clients in April 2023, noting that at that stage that was all that they had been provided with. The response received from the Applicant's agents on this feedback did not encourage further engagement on the HoT. Comments such as those in Table 2-29 by the Applicant ignore the agents' pooled response submitted in April last year and the various meetings since.

2.3. In making this point, the Applicant appears to take issue with the fact that the Fischels' agent had not provided comments specific to the Fischels on the generic template HoT: the issue that this position overlooks is that all that the Fischels had been provided with by the Applicant was a generic template HoT document. The only matter specific to them appeared to be the compensation figure (which is discussed further below). The comments that the Fischels' agent

provided to the Applicant were therefore as specific as they could be when given a generic template document, which was not at all tailored to take into account the matters that the Fischels had concerns about.

2.4. The Applicant appears to suggest that it has done everything it could have in order to meaningfully engage with the Fischels. The Fischels do not consider that issuing the generic template HoT, and continuing to assert that it should be signed before matters could progress was a genuine attempt by the Applicant to reach agreement in relation to the compulsory acquisition powers that it has included in the draft Development Consent Order (**dDCO**). For example, the "updated" HoT that the Applicant eventually provided to the Fischels on 19 July 2024 is still the generic template document, with a couple of lines changed in it. There are now a number of principles proposed to be attached to the back, though it is unclear the legal weight these principles are intended to have. Any criticism that is directed at the Fischels for not providing comments on the Applicant's HoT is therefore without merit, and further demonstrates the Applicant's unwillingness to genuinely try to reach agreement with Affected Parties.

2.5. It is worth highlighting that at the stage the Applicant first issued the HoT, Affected Parties' legal fees were only available upon signing of the document, leaving Affected Parties exposed to costs. The Applicant's position throughout the examination has been that parties must accept its commercial offer before matters can progress (i.e. before lawyers can be engaged to discuss the Option and Easement agreement). This is simply not how a dDCO is meant to work: as we have previously highlighted, on the recent Lower Thames Crossing Order, the Examining Authority emphasised that it is not up to affected parties to be pushed into accepting a low level of compensation as the hurdle to clear before the Applicant will enter into negotiations – and we consider that approach must apply to all DCO processes. If the Applicant cannot agree compensation, they must still try at all stages to reach agreement, and if compensation cannot be agreed, that can be left to be decided by the Lands Tribunal. To this extent, the Applicant has not truly been seeking to negotiate on the HoT, because if it genuinely wanted to reach agreement with the Fischels then it would have adopted an approach that addressed their concerns, rather than insisting until a few weeks ago that a HoT must be signed before matters can progress.

2.6. Further, if the Applicant genuinely wished to reach agreement with the Fischels, then an offer to cover their legal fees for the negotiation might have come earlier than just over four weeks before the close of the examination. The Fischels have been clear throughout the examination

that they hold a number of concerns in relation to the HoT, and that they therefore consider the most efficient approach would be for the parties to negotiate the draft Option and Easement Agreement, rather than spending time and money on a HoT that is not fit for purpose.

2.7. In terms of the "offer" that the Applicant made before Deadline 5, the following dates are relevant:

a) On 5 July 2024, the Applicant's lawyers emailed the Fischels' lawyers, stating that they had been instructed to give an undertaking in relation to this matter – and that when an estimate of costs had been provided, they would take instructions to give an undertaking. This email offered an undertaking, but did not actually provide one.

b) On 12 July, the Fischels' lawyers responded, asking for a confirmation of the scope of the undertaking, and the timetable in which they anticipated completing the agreements, given the tight deadline with the end of the examination.

c) On 16 July 2024, the Applicant's lawyers replied that his clients "*would like to get in place as soon as possible a form of letter undertaking to cover off the principles in the attached document that would then be attached to the heads of terms,* and that if an estimate could be provided then he would take instructions on an undertaking.

d) On 16 July 2024, the Fischels' lawyers replied, seeking clarification as to what the undertaking would cover, providing an estimate for the negotiation of a HoT, and requesting an updated draft Option and Easement Agreement that took into account the comments the Fischels' land agent had provided in 2023.

e) On 16 July 2024, the Applicant's lawyers responded advising they would take instructions on the HoT, and clarifying that the principle of the Applicant paying the Fischels' lawyers' fees in relation to the option agreement was agreed.

f) On 17 July 2024, the Fischels' lawyers replied, requesting the undertaking, and a revised draft Option Agreement.

g) On 19 July 2024, updated HoT were provided to the Fischels.

h) On 19 July 2024, the Applicant's lawyers called the Fischels' lawyers regarding the undertaking and the various documents. The Applicant's lawyers advised they were drafting the option agreement and they would send that to the Fischels' lawyers as soon as possible the following week. The Fischels' lawyers advised that they would consider the HoT which had been provided that morning and provide any preliminary comments to be fed into the draft Option and Easement Agreement as soon as possible. The draft option agreement has not yet been received (see paragraph 4.8 below).

i) On 29 July 2024, the Applicant's lawyers emailed the Fischels' lawyers with an undertaking in relation to an option agreement for a deed of easement. No such undertaking has been provided for the HoT, or the easement agreement itself, although see 2.8 below.

j) On 31 July 2024, the Fischels' lawyers emailed the Applicant's lawyers with their preliminary comments on the updated HoT document that was provided on 19 July 2024. Given the tight timeframe, and the fact that the document is generic and lacks detail, the comments were preliminary, and the Fischels would expect that the Applicant will incorporate the comments into the draft Option and Easement Agreement.

2.8. As set out above, while the Applicant has now, on 5 July, offered to provide an undertaking in relation to the HoT and draft Option and Easement Agreement, not until 29 July was an undertaking provided but only in relation to the draft Option Agreement. An email from the Applicant's lawyers on the morning of 1 August appears to extend the undertaking, but it is not entirely clear if it is subject to client instructions. Revised HoT have been received, but no draft Option and Easement Agreement. The Fischels are therefore still awaiting clarity on an undertaking in relation to the HoT and Easement Agreement, and to receive the draft Option and Easement documents so that matters can progress.

Deadline 5 Submission - 8.81 Applicant's Responses to Examining Authority's Second Written Questions (ExQ2) **[REP5-119]**

2.9. In respect of LR 2.1, the Applicant has responded "…*These documents show that the Applicant has been making every effort to engage meaningfully with Affected Parties and that in the absence of concluded agreements there is clearly a need and a compelling case for the authorisation of the compulsory acquisition powers sought*."

2.10. With respect, this is quite a surprising response to the question, and appears to suggest that because the Applicant's approach to negotiations has been largely unsuccessful, the compulsory acquisition powers should be granted. This completely misconstrues the legal requirements that must be satisfied before compulsory acquisition powers can be granted; the Department for Communities and Local Government "Guidance related to procedures for the compulsory acquisition of land under the Planning Act 2008" (**CAH Guidance**) states (paragraph 8) "*The applicant should be able to demonstrate to the satisfaction of the Secretary of State that all reasonable alternatives to compulsory acquisition (including modifications to the scheme) have been explored*".

2.11. One alternative to compulsory acquisition would be to try to reach agreement. As has been outlined in every submission, the Fischels do not consider that a genuine attempt to reach agreement has been made by the Applicant: only in the last few weeks have we experienced any indication by the Applicant that it is willing to prepare a legal agreement that actually takes the Fischels' concerns into account. The dates of this correspondence, and its contents, are set out at 2.7 above. The latest email from the Applicant's lawyers dated 29 July 2024 states again that they are working on draft documents, but no date for anticipated receipt of them has been provided.

2.12. In its response to LR 2.1 the Applicant appears eager to emphasise other precedents where compulsory acquisition powers were granted despite low numbers of agreements having been reached: it is not merely the low number of agreements that have been reached in this case that demonstrates that the case for compulsory acquisition has not been made, but rather the numerous submissions from Affected Parties that they do not consider the Applicant has made a genuine attempt to negotiate with them, not only during the examination, but during the past four years..

Deadline 5 Submission - 4.6.7 Compulsory Acquisition Land Engagement Reports – Fischel **[REP5-019]**

2.13. This document states that constructive discussions have occurred since the CAH: while the Fischels acknowledge that several site visits have been conducted since the CAH, and numerous emails have gone back and forth, real progress has not actually been made. The Fischels are still awaiting an updated draft of the Option and Easement Agreement, which they

hope will record the matters that have been discussed into a form that legally binds the Applicant. The mere existence of communications does not amount to progress.

2.14. Under the heading "Impact on land interest", the Applicant states that the land is "*not actively in agricultural use*" and "*temporary severance of pastureland that is not occupied or in actively agricultural use*". This is particularly dismissive wording, so as to suggest impacts are minor because there's no farming occurring. To the contrary, Sweethill Farm is almost unique along the route in its biodiversity interest, which is at risk of severe compromise by the scheme. Thus, in terms of the National Interest, it could be argued that the impact is far greater than if there were farming or some other commercial activity on the site, which explains the Fischels' active involvement in the examination.

2.15. The Applicant notes in this document, submitted on 9 July 2024, that it will issue a legal undertaking for the Fischels' legal fees, acknowledging that the key terms may not be agreed by the end of the examination. As noted above, a limited undertaking was only received on 29 July, and no such undertaking has been provided in relation to the HoT. The Applicant provided the Fischels with updated key terms on Friday 19 July 2024, just over two weeks before the close of the examination. While it is appreciated that the Applicant acknowledges that the key terms are unlikely to be agreed, this is entirely due to the Applicant's failure to meaningfully engage with the Fischels' concerns throughout the examination process. A draft Option and Easement agreement containing provisions specific to the Fischels could have been provided well before the end of the examination, however at the time of drafting these submissions the Fischels have still not received updated draft agreements to consider. We have been promised these documents for several months and have still not received them.

Deadline 5 Submission - 8.92 Land Acquisition Strategy Rev A **[REP5-130]**

2.16. We note that paragraph 4.1 of this document indicates that the Applicant intends to continue to seek and complete voluntary agreements, and we hope that its intention in this regard will continue once the examination closes, and not only once a decision is made.

3. Update on engagement

3.1. As set out in the Fischels Deadline 5 submissions, the Applicant's lawyers first contacted the Fischels' lawyer on Friday 5 July, little over four weeks before the end of the examination. Very

little progress has been made since then: the Applicant's lawyers have said that they will provide an undertaking for the Fischels' legal fees in relation to negotiating the agreements, however an undertaking to pay the legal fees in relation to the draft option agreement was only received on 29 July 2024, and no such undertaking in relation to the HoT or the Easement Agreement has been received (see comments above about Applicant's lawyers email on 1 August 2024). The Applicant's lawyers have said they will provide an updated draft Option and Easement agreement, but no such documents have been received. Progress has been slow.

3.2. As noted above, the Applicant provided an updated HoT to the Fischels on Friday 19 July 2024, in respect of which there remain significant areas of uncertainty or requiring greater clarification. This reiterates not only why the Fischels have maintained throughout this examination that efforts would better be spent on the draft Option and Easement Agreement, but also that there remains little hope for progress to be made before the close of the examination.

3.3. We set out at the Compulsory Acquisition Hearing (**CAH**) that compulsory acquisition is an option of last resort and that, for compulsory acquisition powers over the Fischels' land to be included within the DCO as made, the Applicant has to demonstrate that the land is required for the development and that there is a compelling case in the public interest (see section 122 of the Planning Act 2008). There can be no compelling case in the public interest where the Applicant has both before and throughout an Examination neglected to make efforts to acquire land and rights over land *by agreement*. An offer to accept the start of legal negotiations at this stage, while welcome, does not meet the requirements of the 2008 Act. Furthermore, an Applicant that wishes to minimise risk of an award of costs should make sure there is "*constructive co-operation and dialogue between the parties <u>at all stages</u>*" (emphasis added).[1] We have set out at the CAH and in our Deadline 4 and 5 submissions the unusually low and late effort made by the Applicant to reach a legal agreement and how it has failed to meet the requirements of the 2008 Act and accompanying guidance to justify compulsory acquisition powers. We continue to stand by that position here.

3.4. The situation is therefore not fundamentally different to the position explained at the CAH. The Fischels remain of the view that the Applicant has not satisfied the tests for compulsory acquisition due to the almost complete lack of meaningful engagement. Even at this very late stage in the examination, while it appears on the surface that progress has been made, the

[1] Paragraph 30 of the Department for Communities and Local Government's Guidance on "Awards of costs: examinations of applications for development consent orders" (2013)

Fischels are not actually in any better position or with any more certainty than they were at the beginning of the examination. A reading of the Applicant's Deadline 5 submissions suggests that the Applicant is doing a lot – but nothing of substance is actually being achieved.

4. Fischels' position at the close of the examination

4.1. After Deadline 4, the Applicant, through its change request, has ensured that the Ancient Woodlands on Sweethill Farm have a 25 metre buffer for cable construction activity. This is a matter that the Fischels raised at the initial hearings and at Deadline 1, and which was only addressed by the Applicant after Deadline 4, and notably was a matter that the Applicant should have been committed to doing in any case as per its own Commitments Register and other documents. Nonetheless, the Fischels are in support of this change which will ensure that the Ancient Woodlands on Sweethill Farm are afforded the same protection as Ancient Woodlands elsewhere in the scheme.

4.2. In terms of the other matters that the Fischels have raised, the Applicant has said "*the cable route construction corridor will be located as far to the south and east as practicable taking into consideration engineering and environmental requirements*" – however it is not clear how this will be legally binding or committed to.

4.3. In terms of compulsory acquisition, the Fischels' view remains that the Applicant has not done enough to justify the inclusion of compulsory acquisition powers within the dDCO and the use of those powers over the Fischels' land.

4.4. If the Examining Authority considers that the Applicant has not satisfied the requirements in order to grant compulsory acquisition powers over the Fischels' land, then the Examining Authority could either:

a) generally remove the compulsory acquisition powers from the dDCO (of particular concern to the Fischels are article 25 (*compulsory acquisition of rights and imposition of restrictive covenants*) and article 33 (*temporary use of land for carrying out the authorised project*)); or

b) the following amendments could be made to the dDCO to remove Sweethill Farm specifically from the compulsory acquisition powers:[2]

Schedule 7

Page 83, in column (1), leave out "25/13,"
Page 83, in column (1), leave out "26/3, 26/11,"
Page 86, in column (1), leave out "25/13,"
Page 86, in column (1), leave out "26/3, 26/11,"
Page 88, in column (1), leave out "26/4,"
Page 89, in column (1), leave out "26/6,"
Page 89, in column (1), leave out "26/5,"

Schedule 9

Page 97, in column (2), leave out "26/9, 26/10,"

4.5. It is worth emphasising that since the Fischels were notified of the dDCO, at every opportunity they have sought to engage with the Applicant to try to seek an agreement. They have been clear right from the start that their two requests were for (a) an undertaking for legal fees and (b) an updated Option and Easement Agreement which took into account the concerns that they have discussed with the Applicant.

4.6. At this final deadline, we are *still* waiting to receive an updated Option and Easement Agreement. As noted above, on Monday 29 July the Applicant's lawyer provided an email to the effect of a limited undertaking, but it is not clear why this was provided only the week before the close of the examination. We have been told that the Agreement is being drafted and will be provided "as soon as possible", and note that we have been told that for several weeks now.

4.7. In its response to the Examining Authority's last written questions, the Applicant itself acknowledges that progress has not been made, and that is backed up by the Fischels' experience. The lack of progress speaks for itself: it is not a problem that is unique to the

[2] Based on the most recent version of the dDCO submitted by the Applicant, being the clean version of the dDCO submitted on 12 July 2024 (Deadline 5) [REP5-005].

Fischels, and it is clear that other parties are struggling to make any progress towards voluntary agreements too.

4.8. It is also worth noting that up until the last month, engagement with the Fischels has not been with the Fischels' lawyers, who were instructed right at the beginning of the examination with the hope that legal agreements could be negotiated for both parties' benefit. In early July the Fischels were pleased to have the Applicant's lawyers finally contact their lawyers, but this optimism has dissipated as it has become clear how slow progress is. The Applicant's lawyers have been promising to provide the draft Option and Easement Agreement for a number of weeks, and on the morning of the final deadline (1 August 2024) emailed the Fischels' lawyers to say that the document would be provided today, and also appears to extend the undertaking (but at the time of submission no such documents have been received). This aligns with the Applicant's conduct over the past few months that immediately before an examination deadline there is a flurry of email correspondence, but then nothing of substance achieved. Yet again we have received promises on or near a deadline day, but no updated documents have been received.

4.9. Finally, we refer to the Department for Communities and Local Government Guidance titled "*Awards of costs: examinations of applications for development consent orders*" dated July 2013 (**Costs Guidance**). The Fischels fall within the ambit of a party that could apply for costs, as set out in paragraph 2 of the Costs Guidance.

4.10. Paragraph 11 of the Costs Guidance sets out the conditions that should be met for a costs award to be made. In this respect, we refer to the submissions above that outline that the Fischels engaged both a land agent and lawyers very early on, with the hope that the Applicant would be active and willing in its engagement to negotiate an Agreement. The offer to engage with the Fischels' lawyers on the legal agreements that the Fischels have been asking for since the beginning of the examination only came four weeks before the end of the examination. Further, the Applicant only ensured that the Ancient Woodlands on Sweethill Farm have a 25 metre buffer for cable construction activity after Deadline 4, despite the Fischels requesting this right from the beginning of the examination. The fact that the Applicant has now provided an undertaking (albeit limited, and on 29 July 2024, the same week as the final Examination deadline) to cover the Fischels' legal fees is an acknowledgment that engaging lawyers is necessary to negotiating an agreement, but it is not clear why it took until the end of the examination for this offer to be made, if it was always an inevitable and necessary step to reaching a voluntary agreement. In

the time available before the close of the examination, the Fischels' lawyers have provided comments on the revised HoT that was issued, but given that it is a generic HoT with very little changed specific to the Fischels, further clarification is required to address the uncertainty.

4.11. Significant costs could therefore have been avoided had the Applicant responded more efficiently and meaningfully with the concerns the Fischels raised, as the Fischels wouldn't have needed to prepare submissions at every deadline throughout the Examination, and be legally represented at the CAH to repeat the concerns they hold. In this respect, the Fischels have suffered wasted costs through the examination as a direct result of the Applicant's conduct. The Fischels are considering their position in relation to an application for costs.

Winckworth Sherwood LLP