

**RAMPION 2 OFFSHORE WINDFARM DEVELOPMENT CONSENT ORDER**  
**RESPONSE TO FURTHER INFORMATION REQUEST**

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Response to Secretary of State Request for Information dated 25 November 2024, made on behalf  
of Susie and David Fischel of Sweethill Farm

PINS Reference Number	EN010117
Interested Party Reference Number	RAM2 – AFP698
Document Ref.	SHF 7
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Date	Friday 6 December 2024

## 1. Introduction

1.1. This is a written submission made on behalf of Susie and David Fischel (**Fischels**) in respect of the letter issued by the Secretary of State on 25 November 2024 seeking further information from particular parties (**Information Request Letter**).

1.2. The Secretary of State has requested an update on the progress of the Heads of Terms in relation to the compulsory acquisition of land. Paragraph 15 of the Information Request Letter states:

15. *The **Applicant** should provide an update on the progression of Heads of Terms with Affected Persons in relation to the compulsory acquisition of land by voluntary means, and to submit an updated Land Rights Tracker.*

1.3. While this item is directed at the Applicant, as Affected Persons the Fischels provide this response to assist the Secretary of State with understanding the Applicant's approach to progressing Heads of Terms, and the experience of Affected Persons in doing so. The primary reason for doing so is to ensure that the Fischels' experience of engagement with the Applicant is on the record, and that a balanced view of such engagement is provided.

## 2. Progression on Heads of Terms

### *Engagement with the Applicant*

2.1. The main point that the Fischels wish to highlight is that for the past four months (since the close of the Examination on 6 August 2024) they have been requesting an updated draft Option and Easement agreement from the Applicant that takes into account feedback provided by the Fischels' lawyers on 31 July 2024.

2.2. While the Fischels have received emails promising updates since the close of the Examination, no such documents had been received until the week of this deadline, with the Applicant's lawyers finally providing the documents to the Fischels' lawyers on Monday 2 December 2024. The documents were therefore provided by the Applicant exactly one week after the Secretary of State issued the request for the Applicant to provide an update on the progression of Heads of Terms with Affected Persons and to submit an updated Land Rights Tracker. We expect the

Applicant's response due by 6 December 2024 will now include an update to the effect that the documents have been provided.

- 2.3. This sudden activity following a formal request from the Secretary of State reflects the Fischels' experience throughout the examination process: months of waiting for meaningful engagement, an undertaking, or documents from the Applicant, and then action from the Applicant shortly after being specifically requested to do so by the Examining Authority, then using that to update the Lands Rights Tracker and suggest that progress has been made.<sup>1</sup>
- 2.4. The Land Rights Tracker, however, does not require the Applicant to explain what substantive progress has actually been made. Engagement is carried out by the Applicant, largely as a reaction to specific requests from the relevant authority (a fuller summary of correspondence since the close of the Examination is included at paragraph 2.13). This approach does not reflect an Applicant who is genuinely trying to efficiently and meaningfully engage with Affected Persons. The Fischels have been active and willing in their engagement to progress matters, even engaging lawyers right at the beginning of the Examination in February 2024 to facilitate discussion of the legal agreements, however this has not been reciprocated by the Applicant.
- 2.5. The significance of this approach to engagement is clear: paragraph 8 of the Department for Communities and Local Government "Guidance related to procedures for the compulsory acquisition of land under the Planning Act 2008" states "*Applicants 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*" (**CAH Guidance**).
- 2.6. One such reasonable alternative to compulsory acquisition would be to try to reach agreement. As has been outlined in each of their submissions, the Fischels do not consider that a genuine attempt to reach agreement has been made by the Applicant, and the Applicant has shown no interest in preparing a legal agreement that actually takes the Fischels' concerns into account.
- 2.7. 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 before, during

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<sup>1</sup> See for example the Fischels Deadline 6 submission, [REP6-318] at paragraph 4.8.

and after an Examination neglected to make meaningful efforts to acquire land and rights over land by agreement. Compulsory acquisition is an option of last resort: the Applicant must have engaged constructively throughout all stages of the application. That simply has not occurred here.

- 2.8.** The core of the Fischels' issue is that the Applicant is seeking wide powers of compulsory acquisition over their land having made no genuine or meaningful attempt to try to reach agreement with them.
- 2.9.** The matter which is for serious consideration, therefore, is whether an Applicant is able to effectively avoid having to carry out meaningful engagement and override the requirements of the CAH Guidance purely on the basis that the country has overall need for such projects. The Fischels' experience of the Applicant's engagement is not unique, and it will be clear to the Secretary of State from the submissions made throughout the Examination that their experience is reflected by Interested Parties who have also struggled to make any progress towards voluntary agreements. The updates on the Land Rights Tracker throughout the Examination process further highlighted this. The Secretary of State will need to be satisfied in these circumstances that any decision to grant compulsory acquisition powers is reasonable, particularly given that the decision affects the Fischels' right to peaceful enjoyment of their property.
- 2.10.** If the Applicant has not satisfied the requirements in order to grant compulsory acquisition powers over the Fischels' land, then the Secretary of State could:
- (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) make the amendments to the dDCO set out in paragraph 4.4 of the Fischels' Deadline 6 submission, to remove the Fischels' land from the compulsory acquisition powers [REP6-318]
- in either case, leaving the Applicant with all the necessary powers under the dDCO to proceed with the authorised project, subject to obtaining the required land and rights by agreement with the relevant landowners (under option (a)) or the Fischels (under option (b)).

**2.11.** We appreciate that this would be an unusual approach. However, it is an approach which is envisaged by the CAH Guidance at paragraph 16:

*“There may be circumstances where the Secretary of State could reasonably justify granting development consent for a project but decide against including in an order the provisions authorising the compulsory acquisition of the land”.*

**2.12.** The approach requested would recognise the need for the scheme while also giving due weight to the requirement to consult and avoid setting a precedent which risks de facto removing the requirement to engage those parties whose land is subject to compulsory acquisition under a Development Consent Order. If the dDCO is made in that form, the Applicant would have all the necessary powers to proceed with the authorised project, save that it would be obliged to do what it could and should have done at any point before the Secretary’s of State’s consideration of the DCO application, namely make genuine efforts to reach agreement with the relevant landowner(s).

### ***Summary of correspondence since the close of the Examination***

**2.13.** The Fischels’ Deadline 6 submission<sup>2</sup> sets out the correspondence between the parties until Deadline 6. The following is a summary of the correspondence that has occurred since then:

- a) **31 July 2024:** the Fischels’ lawyers provided the Applicant’s lawyers with a table of their comments on the draft HoT document that was provided by the Applicant on 19 July 2024. Given the tight timeframe, and the fact that the document was generic and lacked detail, and that there remained significant areas of uncertainty, the Fischels’ lawyers made clear in the cover email that the comments on the draft HoT were preliminary, and that the comments should be incorporated into the revised draft Option and Easement Agreement for the parties to discuss.
  
- b) **1 August 2024:** the Applicant’s lawyers replied to the Fischels’ lawyers email of 31 July 2024 stating that they would discuss [the Fischels’ table] with the Applicant, but that *“The draft agreements will be sent across today as we had prepared these but we can update once we have discussed your comments with our client.”*

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<sup>2</sup> See [REP6-318].

- c) **2 August 2024:** the Applicant's lawyers emailed the Fischels' lawyers attaching the draft Option and Easement Agreement, noting in the cover email they were "*subject to further instruction from our client once we have reviewed your comments*". These documents did not incorporate any of the feedback provided by the Fischels' lawyers on 31 July 2024, however the comment set out here indicated to the Fischels and their lawyers that the documents would be updated shortly to incorporate the feedback provided by the Fischels.
  
- d) **7 August 2024:** the Fischels' lawyers emailed the Applicant's lawyers thanking them for the draft Option and Easement documents, and stating "*We look forward to receiving revised drafts once you have taken instructions on our comments.*"
  
- e) **25 September 2024:** the Applicant's lawyers emailed the Fischels' lawyers with a copy of the table of comments on the HoT that the Fischels had prepared. The Fischels had raised 19 points in their table: the Applicant provided a short comment on 10 of those points. Despite all the correspondence and submissions from the Fischels stating that they wished to progress to discussion of the draft Option and Easement agreement (rather than focus time and money on the Heads of Terms, which had not progressed at all since the beginning of the Examination), the Applicant's lawyers asked "*we assume we are now agreeing the HoTs with you directly?*".
  
- f) **14 October 2024:** Applicant's lawyers emailed Fischels' lawyers for an update on the above.
  
- g) **14 October 2024:** the Fischels' lawyers responded to the above advising that they were awaiting instructions.
  
- h) **16 October 2024:** the Fischels' lawyers emailed the Applicant's lawyers to reiterate the point from earlier correspondence that they would like to see updated draft Option and Easement Agreements, stating "*In lieu of further exchanges on the Heads of Terms, our client would like to see updated draft Option and Easement Agreements before we provide any further input, as per earlier correspondence.*" The Fischels requested that the Applicant's lawyers provide an update on when they could expect to receive them

(noting that the Applicant's lawyers email of 2 August 2024 had suggested that updated draft Option and Easement documents would be provided).

- i) **7 November 2024:** the Fischels' lawyers emailed the Applicant's lawyers requesting an update on when they would be in a position to provide updated draft Option and Easement Agreements, for the Fischels to review.
- j) **2 December 2024:** the Applicant's lawyers emailed the Fischels' lawyers with updated draft Option and Easement agreement documents.

**2.14.** As outlined above, the draft documents have once again been provided to the Fischels just days before the deadline for the Applicant to provide an update to the Secretary of State on its negotiations with Affected Persons.

**2.15.** The Fischels intend to review and comment on the draft Option and Easement agreement, however it remains unclear why it has taken four months since the close of the Examination (or 10 months since the beginning of the Examination) for the Applicant to provide these documents.

### **3. New CPO Guidance**

**3.1.** The Secretary of State will be aware that the guidance on Compulsory Purchase was updated in October 2024 (**2024 CPO Guidance**). While we appreciate the 2024 CPO Guidance is not strictly applicable to the DCO process, it is relevant to the extent that it demonstrates the importance of engagement when seeking compulsory acquisition powers and the fact that it is increasingly necessary to draw the attention of the body seeking those powers to the importance of proper engagement as part of the planning process.

**3.2.** Notably, the CPO Guidance sets out in section 17 the requirement for negotiations and engagement prior to, and in parallel with, preparing and making a compulsory purchase order: the new guidance is clear that engagement must be sustained throughout the compulsory purchase process, using a variety of different engagement methods. We highlight this here where there has clearly been an issue with engagement, and we refer to paragraphs 2.5, 2.9, and 2.11 above where we set out the applicable DCO guidance in this case.

### **4. Conclusion**

- 4.1. 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 DCO and the use of those powers over the Fischels' land. If the Secretary of State is not satisfied that the Applicant has discharged its responsibilities in relation to engagement with Affected Persons, we would ask the amendments set out at paragraph 2.10 above are made.
- 4.2. 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 at all stages" (emphasis added).<sup>3</sup> We set out at the Compulsory Acquisition Hearing and in our Deadline 4, 5 and 6 submissions<sup>4</sup> the unusually low and last minute effort made by the Applicant to reach a legal agreement and how it has failed to meet the requirements of the 2008 Planning Act and accompanying guidance to justify compulsory acquisition powers. On the basis of engagement following the close of the Examination, we continue to stand by that position here.

**Winckworth Sherwood LLP**

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<sup>3</sup> Paragraph 30 of the Department for Communities and Local Government's Guidance on "Awards of costs: examinations of applications for development consent orders" (2013).

<sup>4</sup> [REP4-128], [REP5-180], [REP6-318].