

COMMENTS ON PROMOTER HEARING POINTS

POST 17/10/2024 COMPULSORY PURCHASE HEARING COMMENTS

1) WHETHER THE LAND IS REQUIRED

It is necessary to clarify the difference between "facilitate" as referred to in section 122 (2)(b) of the Planning Act 2008:

122(2)(b)"is required to facilitate or is incidental to that development,"

and "*convenience*" as is defined in the Sharkey case.

Facilitate

To facilitate involves removing obstacles or providing support to achieve something i.e. there is a proactive aspect.

A better understanding can be obtained by looking at related words "*facility*" and "*facilitator*"

For instance an operating theatre is a specialist *facility* (purpose built) for a specific proactive activity namely carrying out surgical procedures without another alternative function.

The procedure may be able to be achieved without the "*facility*" however the chances of success would be very limited or seriously reduced.

A *facilitator* is a specialist person specifically employed or engaged to proactively fulfil a specific role to assist others achieve a specific goal without an alternative objective. The intended objective or goal may, be able to be achieved without the *facilitator* however it is considerably less likely or prospects of success are also greatly reduced.

An example of a facilitator would be the project manager who has a specific task (and no other task) to conduct and coordinate the project and ensure its success.

A facility or facilitator has a specific utility to proactively and necessarily "facilitate" the accomplishment of an activity.

Lord Roche in Sharkey and Another v Secretary of State for the Environment and South Buckinghamshire Council (in the first instance)(11) stated:

"Because of the nature of the power given to [Promoters], namely, to deprive the owner of his land against that owner's will, I prefer and adopt the stricter meaning of the word "required" In my judgment the word means that the compulsory acquisition of the land is called for; it is a thing needed for the accomplishment of one of the activities or purposes set out in the section..... and without the use of compulsory purchase powers, the necessary purpose is unlikely to be achieved." (emphasis added)

Convenience

Whereas "convenience" and an item's desirability for its convenience is quite different ie the objective or function that the endeavouring party IS seeking to accomplish is entirely or wholly achievable regardless of whether the " convenient" item or object is made available to the endeavourer who would merely be able to accomplish the task e.g. faster or cheaper with it.

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Further, the item deemed to be "convenient" is neither a specialist purpose made item nor has it that proactive function.

By way of example - a convenience store is deemed convenient as general goods and services can be procured there more conveniently than seeking to obtain them from more remote markets - the trade off being perhaps a higher price of exchange

The Objectors land clearly fits into the latter category due to its primary existing function which is its temporary use for cropping and foraging purposes as it transitions into a leisure and tourism park

The excessive land sought by the Promoter is clearly merely convenient (but not in any way necessary in the circumstances, for instance to have soil stacks of only 60cm in height) for the accomplishment of the Promoter's scheme in and is simply not something that can in any way (specifically and proactively) facilitate its scheme - the Promoter should not seek to misinterpret the legislation and their lordships clarification in the Court of Appeal for its own purpose at the expense of affected parties.

A final example in clarification here is that if the affected land had, for instance, a rare mineral supply (that in itself was not engaged in, or required for any other purpose) and was particularly suitable for e.g. making thermocrete cement bound cable bedding which was a specific requirement of the scheme then arguably the land in which that mineral sits would have the potential to facilitate the scheme

Clearly so much of the land included in Limits of Deviation is merely for the promoters convenience to permit the Promoter to delay and string out its detailed design and proposals and works generally for its own convenience. This land clearly cannot carry out a (specific and proactive) "facilitating" role in the Promoter's endeavours as clearly defined above and is merely "*convenient*" rather than "*necessary*" for the "*accomplishment of the scheme*".

The objectors' contention remains that the land has been included merely for convenience contrary to Sharkey and will need to be removed from the limits if a lawful Order is to be confirmed.

2) COMPELLING CASE IN THE PUBLIC INTEREST OUTWEIGHING PRIVATE HARM

The Objectors have read the Promoters application especially the two documents put forward by the Promoter as its compelling case and cannot find that the Promoter has fulfilled its obligation to demonstrate a compelling case outweighing private harm

The Promoter's legal representative said it was down to the Secretary of State to make its own case and decide on whether there was a compelling case or not but what has the Minister got on which to base that decision? The representative went on to speak at length about national policy and urgency and said it was incumbent on the Secretary of State to make the case but the policy in this area suggests otherwise for instance, Welsh Government Circular, 003 /2019 Compulsory Purchase in Wales and 'The Crichel Down Rules Wales Version ,2020' states:

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"The purpose and justification for compulsory purchase

10. CPOs allow acquiring authorities who need to obtain land or property to do so without the consent of the owner. CPOs are granted to facilitate development which is in the public interest, for example when building motorways on land which the owner does not wish to sell. National planning policy on the use of compulsory purchase powers³ confirms the purchase of land to facilitate development, redevelopment or improvement should be done with the agreement of the landowner.

However, where such agreements cannot be reached, LPAs should consider use of their compulsory purchase powers to bring land and/or buildings forward for meeting development needs in their area and/or to secure better development outcomes **where a compelling case in the public interest can be demonstrated which outweighs the loss of private interests.**"

And

Matters influencing the use of a CPO

30. The following matters will influence whether or not it is appropriate to proceed with a CPO:

- Attempts has been made to acquire the land by agreement wherever possible.
- Taking the land is necessary to progress a development scheme.
- **A compelling case in the public interest can be demonstrated.**
- **There is clear evidence the public benefit in the development scheme will outweigh the private loss" (emphasis added)**

And

"Consideration by the Welsh Ministers of an acquiring authority's justification for a compulsory purchase order

54. The Welsh Ministers have to take a balanced view between the intentions of the acquiring authority and the concerns of those whose interest in land is proposed to be compulsorily acquired and the wider public interest. The more comprehensive the justification which the acquiring authority can present, the stronger its case is likely to be. Each case, however, will be considered on its own merits and this Circular is not intended to imply the Welsh Ministers will require any particular degree of justification for any specific CPO. It is not essential to show that land is required immediately to secure the purpose for which it is to be acquired. The Welsh Ministers will, however, need to understand, and **the acquiring authority must be able to demonstrate, that there are sufficiently compelling reasons in the public interest for the powers to be sought. Acquiring authorities should not exercise their compulsory purchase powers speculatively"**

It is clear that it is the Promoter's responsibility to make the case and this simply has not been done in the application in hand.

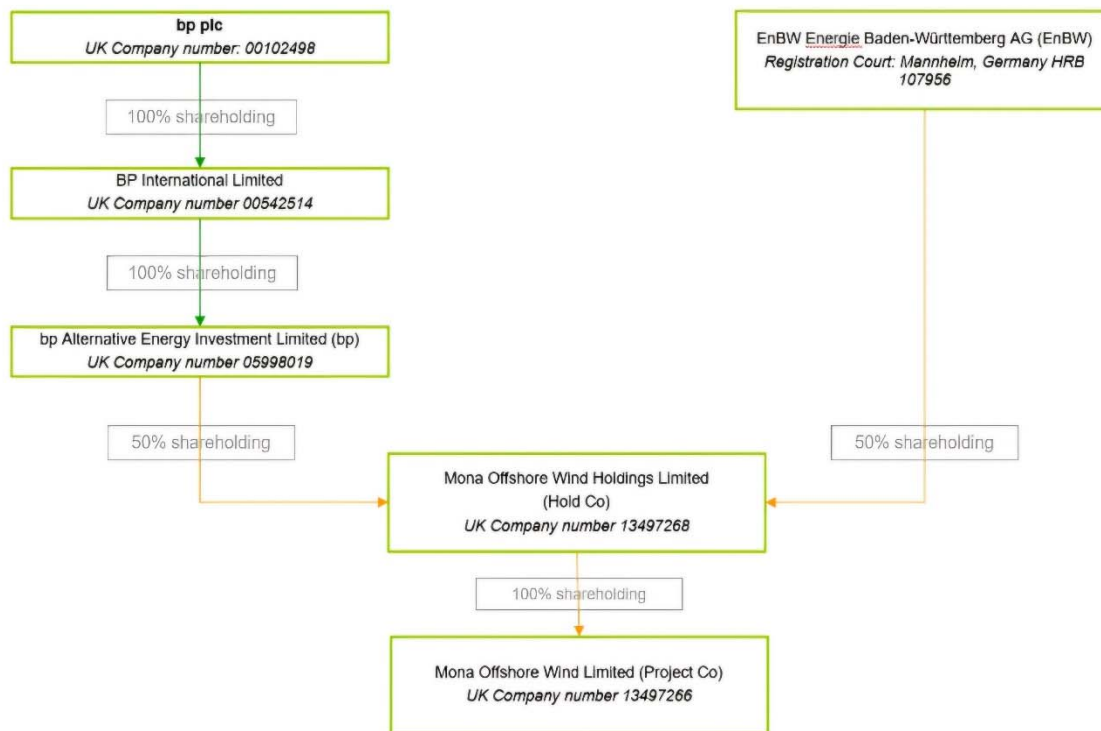
3) FUNDING

For reasons already stated in submissions the Objectors do not accept that the Promoter has adequately addressed how the scheme will be funded and that the funds will be available. This is still the case having read the applicants responses in REP2 08082 and in APP -025.

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The Promoter's responses incidentally ignore the new policy in BP against windfarms which in itself is a serious risk to the Scheme.

The organisational structure was put forward as if somehow that evidenced funding but having looked at this again the Objectors remain none the wiser about how Mona Offshore Wind Limited (Project Co) is entitled to any drawdown of funds from Mona Offshore Wind holdings Limited (Hold Co) merely because the superior company owns 100% of its shares. This goes up the ladder for each successive superior company.



To be able to have any claim between companies (regardless of superiority) requires consideration of the doctrine of "piercing the corporate veil" which is a complex legal doctrine in its own right and the leading case law is DHN Food Distributors Ltd v Tower Hamlets London Borough Council [1976] 1 WLR 852 which I have had occasion to look into in the past. The tests as to how two entirely separate companies can be bound so that a common liability or benefit is attributed to both is so difficult to achieve and certainly beyond merely ownership that I simply cannot see what the Promoter thinks the above organogram proves at all.

The Objectors sees the Promoter's position as similar to a child seeking to demonstrate its own creditworthiness to a lending institution by submitting a parental statement from the "Bank of Mum and Dad" as a basis or security for obtaining a loan and including a family tree document to show the relationship. In the same way that it would be surprising if that child got a loan then so it is that Mona seek to use this irrelevant information to evidence "funding".

If the viability (and therefore profitability) is not satisfactory then the Final Investment decision will not be favourable to the Scheme and there is nothing that Project Co can do to get Hold

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Co or any of the other superior companies to release the money without some kind of agreement or contractual obligation in place. Here there is none.

Given Murry Auchinloss' new policy against windfarms then the benchmark test for viability will be higher than was previously case making it even less likely. Finally, there are clearly issues with the viability because if they were favourable then the Promoter would be inclined to share them in one form or another

The Objectors also note that the new CEO of BP is doubling down on the change in policy against windfarms as evidenced in this new article in Money today.

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BP scales back green agenda with wind sale

- BP has lagged UK rival Shell and US giants Chevron and ExxonMobil

By [JESSICA CLARK](#)

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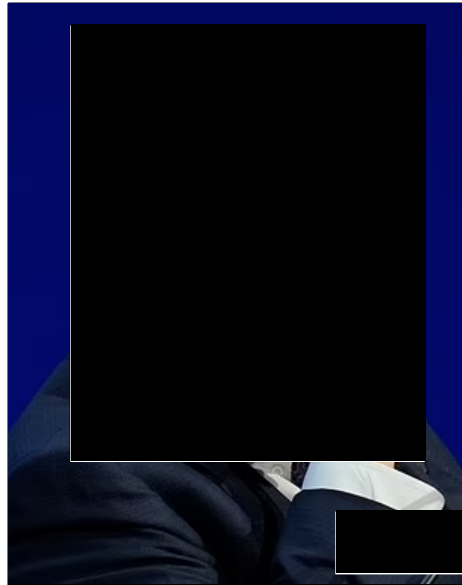
BP is considering selling a minority stake in its offshore wind unit as the British energy giant continues to scale back its green agenda.

The London-listed oil major is on the hunt for partners for the business in the latest sign that boss Murray Auchincloss is watering down its renewables strategy.

Auchincloss, who took over from disgraced Bernard Looney in January, has faced mounting shareholder pressure to refocus on fossil fuels.

BP has lagged UK rival Shell and US giants Chevron and ExxonMobil, which have doubled down on oil and gas.

The company has lined up Bank of America to find partners for its offshore wind business, Reuters reported, citing unnamed sources.



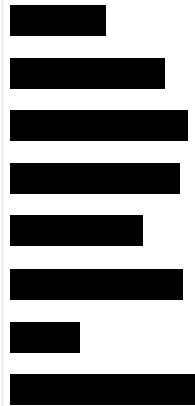
Pressure: Murray Auchincloss

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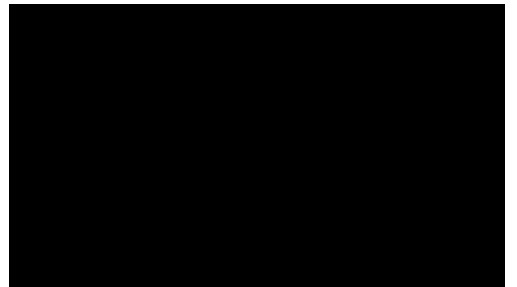
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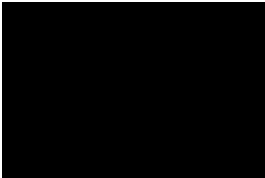
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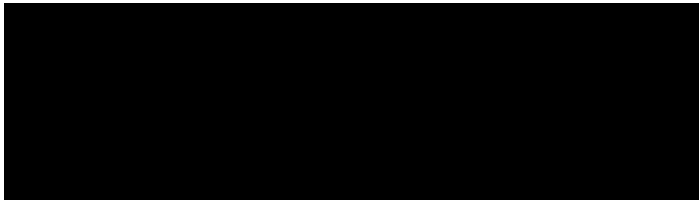


It is seeking to reduce its share of the huge investments needed to fund wind farm projects. BP is developing offshore wind farms in the UK, US, Germany, South Korea and Japan. A BP spokesman declined to comment.

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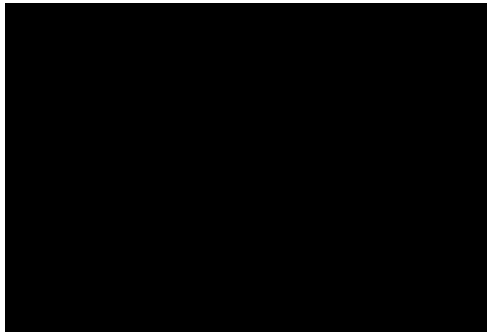


Despite the potential sale, BP remains committed to developing its major offshore wind projects, one source told Reuters.

The energy group has also recently invested in solar, biofuels and low-carbon hydrogen. This month Reuters reported that Auchincloss is planning to scrap a target brought in by Looney to cut fossil fuel output by 2030, again citing anonymous sources.

The Canadian is eyeing major investments in the Middle East and the Gulf of Mexico to boost BP's oil output.

At the time a BP spokesman said: 'As Murray said at the start of the year in our fourth quarter results, the direction is the same – but we are going to deliver as a simpler, more focused and higher value company.'



BP has previously said it plans to sell its US onshore wind business and this summer put plans for new offshore wind investment on ice.

The offshore wind sector has endured a tough few years as costs ballooned due to technical and supply chain problems as well as higher interest rates.

Shell is reportedly looking to exit several wind farm projects as the investments struggle to deliver returns.

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