



Triton Knoll Offshore Wind Farm Limited Triton Knoll Electrical System

**Appendix 32: Response to
Environment Agency
representations on form of
Restrictive Covenant**

Date: 5th January 2016

**Appendix 32 of the Applicant's
response to Deadline 4**

Triton Knoll Offshore Wind Farm Limited

Triton Knoll Electrical System

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1. Introduction

- 1.1 This note sets out Triton Knoll Offshore Wind Farm Limited's ("the Applicant's") response to the concerns raised by the Environment Agency ("EA") regarding the Applicant's proposed imposition of restrictive covenants along the Triton Knoll Electrical System ("TKES") cable route.

2. The proposed restrictions

- 2.1 The Applicant is seeking rights which will restrict the way in which parties with an interest in the land required for the TKES can use it or carry out certain activities. The proposed restrictions will bind anyone with an interest in the land at the date that they are imposed (including freehold owners and lessees) and will 'run with the land', i.e. will bind successors in title to those owners.
- 2.2 The restrictions sought are set out in Schedule 5 of the Development Consent Order ("the Order"), and if the necessary powers are granted in the Order would allow the Applicant to acquire these rights over parcels of land which are listed in the corresponding column of that table (please see the first rows of the tables on pages 50 and 58 to 59 of the latest draft Order submitted as Appendix 15 of the Applicant's response to Deadline 4) if it is unable to secure a private treaty agreement with the relevant landowner. The same rights are being sought by the Applicant in the private treaty agreements it is seeking with the landowners.

3. Identification of Land interests

- 3.1 The EA has land interests in the following plots which will be bound by the restrictive covenant: 18/16, 18/17, 18/18, 29/06, 29/07, 29/08, 30/02, 30/04, 30/05, 30/06, 30/07, 30/08, 30/09, 30/10, 30/12, 37/22, 42/02, 42/03, 42/04, 42/05, 42/06, 43/13, 43/14, 43/15, 45/18, 45/19, 45/20 and 45/22. The EA also has rights of access over plots 43/10 and 43/11.
- 3.2 It is important to note that restrictive covenants can only bind interests in land. If the EA does not in fact have any interest in the land proposed to be the subject of the restrictions, there is nothing to be bound. It is also important to note that the restrictive covenant will only bind land once the Order is made and the powers of compulsory acquisition included in it are exercised.

4. EA statutory powers and duties

4.1 The introduction to the EA Written Representation [REP1-040] (“EA WR”) explains that the EA is an executive non-departmental public body established under the Environment Act and sets out its statutory duties.

4.2 Paragraph 8.2 of the EA WR explains that section 165 of the Water Resources Act 1991 (as amended) (“the 1991 Act”), sets out the EA’s powers to carry out flood defence and drainage works. Section 165 provides a general power to carry out “flood risk management work” subject to certain conditions being satisfied. “Flood risk management work” is defined in sub-section (1D) of the 1991 Act as follows:

“(1D) In this section “flood risk management work” means anything done-

(a) to maintain existing works (including buildings or structures) including cleansing, repairing or otherwise maintaining the efficiency of an existing watercourse or drainage work;

(b) to operate existing works (such as sluiceways or pumps);

(c) to improve existing works (including buildings or structures) including anything done to deepen, widen, straighten or otherwise improve an existing watercourse, to remove or alter mills dams, weirs or other obstructions to watercourses, or to raise, widen or otherwise improve a drainage work;

(d) to construct or repair new works (including buildings, structures, watercourses, drainage works and machinery);

(e) for the purpose of maintaining or restoring natural processes;

(f) to monitor, investigate or survey a location or a natural process;

(g) to reduce or increase the level of water in a place;

(h) to alter or remove works.”

4.3 Sub-section (6) of section 165 provides that nothing in subsections (1) to (3) of section 165 (General powers to carry out works) authorises any person to enter on the land of any person except for the purpose of maintaining existing works. The Applicant notes therefore that for the majority of the land along the proposed TKES cable corridor, in which the EA does not have a land interest, the EA does not have an automatic right of access for carrying out these works. Rather, the EA would need to request that a landowner gives access to it to carry out its functions/exercise its powers. The

proposed restrictions sought by the Applicant in the Order will not alter that basic premise as they will not bind the EA where it does not have a land interest. Nor does the restrictive covenant operate to dis-apply or vary the EA's' statutory powers in any way. Notwithstanding, the Applicant proposes to amend the wording of the restrictive covenant to state this expressly.

- 4.4 It is important to note that the EA's statutory powers in the 1991 Act are not unrestricted. Notably, they are restricted by section 178 and paragraphs 1 and 2 of Schedule 22, which sets out protective provisions for particular undertakings in connection with the carrying out of works and other activities by the EA under the 1991 Act.
- 4.5 The undertakings which are afforded protection from works that are carried out by the EA, are those listed in paragraph 1(4) of Schedule 22. Paragraph 1(4)(f) of Schedule 22 expressly refers to: *“the undertaking of any person authorised by a licence under Part I of the Electricity Act 1989 to generate, [supply or participate in the transmission of] electricity”*.
- 4.6 As the holder of an electricity generation licence, the Applicant (and subsequently the OFTO as the holder of an electricity transmission licence) will be protected by the provisions of Schedule 22 once the TKES is installed.
- 4.7 The nature of the protections which will be afforded to the Applicant and other undertakings are set out in paragraphs 1 and 2 of Schedule 22, and include:
- 1.a.1 (Paragraph 1): a restriction on the EA's ability to do any work, without the consent of the undertaker, which interferes with:
- a) the works or any property which is vested in, or under the control of, the persons carrying on that undertaking, in their capacity as such; or
 - b) the use of any such works or property, in such a manner as to affect injuriously those works or that property or the carrying on of that undertaking; and
- 1.a.2 (Paragraph 2): a restriction on the EA's ability to do anything which prejudices the exercise of any statutory power, authority or jurisdiction from time to time vested in or exercisable by other undertakers.
- 4.8 Consent can be given by the Applicant (and other undertakings) to the EA to any of those matters in paragraph 1 above, subject to reasonable conditions, but shall not be unreasonably withheld (see paragraph 1(2) of Schedule 22 to the 1991 Act).
- 4.9 The 1991 Act therefore acknowledges the need for protection for the assets of undertakings such as the Applicant. The principle of protecting nationally significant infrastructure assets such as TKES from interference/damage by the EA carrying out its statutory duties is therefore firmly established in the 1991 Act.
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5. How the relationship between the Applicant and the EA is proposed to be governed

- 5.1 The EA will have the benefit of protective provisions in Part 1 of Schedule 8 to the draft Order, which will control how the Applicant carries out the proposed authorised works pursuant to the Order that have the potential to interfere with the exercise of the EA's assets or maintained works. These protective provisions apply regardless of whether or not the EA has a land interest.
- 5.2 Where the EA needs to exercise its own statutory functions/powers, as explained above, Schedule 22 to the 1991 Act contains statutory restrictions on the EA's ability to exercise functions/powers that could injuriously affect TKES. Those restrictions are not dissimilar in approach to the protective provisions to be provided to the EA in Schedule 8 to the draft Order, however, they are less detailed and potentially wide in scope.
- 5.3 Where the EA is a landowner, the EA's ability to carry out works to the land is, as landowner, unlimited, and there is nothing to prevent that land from being used for any purpose, by either the EA or its tenants, and for purposes which would engage the protections in Schedule 22 to the 1991 Act. It is possible therefore, that the EA or its tenants could carry out works which could damage/interfere with TKES. For this reason, the Applicant needs to ensure that such works are only carried out with its consent, hence the imposition of the restrictive covenant. It is also important that the activities of any occupiers, and future owners and occupiers are similarly controlled.
- 5.4 The proposed terms of the restrictive covenant, are more detailed but narrower in scope than the statutory restrictions in Schedule 22 to the 1991 Act. Furthermore, following consultation with the EA, and in acknowledgement of their concerns, the Applicant proposes to make amendments to the current form of restrictive covenant so as to provide additional comfort that (1) it does not restrict the exercise of statutory powers, and (2) to clarify a number of activities which can be carried out without requiring the Applicant's consent. These are set out in section 6 below.

6. Proposed modifications to the form of restrictive covenant

Paragraph (a)

Concern raised	Proposed Modification
The EA raised concerns that paragraph (a) would appear to prohibit any works	Covenant re-worded to prohibit activities <i>unless</i> specified The

upon its land

Applicant's consent is obtained

As above

Prohibition on "works of any kind" limited to intrusive works such as the construction of foundations and footings

Paragraph (b)

Concern raised

Proposed Modification

Concern raised by farmers that this paragraph would prevent the repair of existing farm access tracks, and the laying or re-laying of hard core surfaces, without the Applicant's consent

Covenant amended to make it clear that it does not relate to existing hard surfacing or works consisting of the laying or re-laying of hard core surfaces/tracks that do not involve manholes, access chambers or other access points on the surface of the land

Inclusion of reference to expense is not appropriate.

Reference to expense removed- "*materially more difficult or expensive to maintain the authorised project*" changed to "*materially more difficult to access or maintain the authorised project*"

Paragraph (c)

Concern raised

Proposed Modification

The EA raised concerns that paragraph (c) would prevent it from carrying out its statutory functions

Works reasonably required to be carried out by a body exercising its statutory functions or statutory rights are specifically excluded

Concerns raised by farmers that paragraph (c) would prevent them from draining their land and carrying out day-to-day agricultural activities without obtaining the Applicant's prior consent

Activities specified, which will not jeopardise the physical integrity of the proposed development, which may be undertaken without the need to obtain the Applicant's prior consent

Paragraph (d)

Concern raised	Proposed Modification
Paragraph (d) would appear to prohibit cutting vegetation within watercourses and along the bank tops	Covenant amended to make it clear that it does not relate to existing planting but prohibits new planting or growing without consent (including permitting such growth)
Inclusion of reference to expense is not appropriate	Reference to expense removed- <i>“materially more difficult or expensive to maintain the authorised project”</i> changed to <i>“materially more difficult to access or maintain the authorised project”</i>

6.1 The consolidated modified form of restrictive covenant, which has been provided to the EA for comment, is as follows (no changes are proposed to paragraph (e) of the covenant as it is essential that the Applicant can at all times comply with the relevant regulatory framework):

A restrictive covenant over the land for the benefit of the remainder of the Order land to-

(a) prevent anything being done in or upon the land or any part thereof for the purpose of:

(i) the erection of any buildings; or

(ii) the construction, erection or works of any kind requiring foundations, footings or other supporting structures;

without the consent in writing of the undertaker (such consent not to be unreasonably withheld or delayed if the proposed building, erection, construction or works would not cause damage to the relevant part of the authorised project nor make it materially more difficult to access or maintain the authorised project);

(b) prevent anything to be done by way of hard surfacing of the land with concrete of any kind or with any other material or surface whatsoever without the consent in writing

of the undertaker (such consent not to be unreasonably withheld or delayed if the proposed surfacing would not cause damage to the relevant part of the authorised project nor make it materially more difficult to access or maintain the authorised project) provided that the undertaker acknowledges that:

(i) the laying of new hard core access tracks will not require the consent of the undertaker where no manhole(s), access chamber(s) or other access points serving the authorised project are located on the surface of the land; and

(ii) the maintenance or repair of pre-existing hard surfacing, hard core surfaces or tracks with the same or equivalent surface or material will not require the consent of the undertaker where no manhole(s), access chamber(s) or other access points serving the authorised project are located on the surface of the land;

(c) prevent mole draining or the mudding out of dykes (i.e. the removal of silt sediment) or anything to be done by way of excavation of any kind or agricultural practices exceeding 0.6 metres in depth from the surface of the land or watercourse, land drain, ditch or agricultural field drain or river bed (a “Watercourse”) (as applicable) or any activities which increase or decrease ground cover or soil levels in any manner whatsoever without the consent in writing of the undertaker (such consent not to be unreasonably withheld or delayed if the proposed activity would not cause damage to the relevant part of the authorised project nor make it materially more difficult to access or maintain the authorised project, with such consent being subject to such reasonable conditions as the undertaker may require) PROVIDED THAT:

(i) the preceding restrictions in this paragraph (c) shall not apply to National Grid or any other body exercising statutory functions or statutory rights within the land;

(ii) ploughing and sub-soiling not exceeding 0.6 metres in depth from the surface of the land shall not require the consent of the undertaker;

(iii) flushing of land drainage systems, maintenance of outfalls and culverts of land drainage systems, clearance of vegetation (by use of machinery or by hand), and the operation of existing land drainage systems shall not require the consent of the undertaker;

(d) prevent the planting or growing (including permitting growth) within the land of any trees, shrubs or underwood without the consent in writing of the undertaker (such consent not to be unreasonably withheld or delayed provided that the proposed trees, shrubs or underwood would not cause damage to the relevant part of the authorised project nor make it materially more difficult to maintain or to access the relevant part of the authorised project) provided that the growing within the land of any pre-existing trees, shrubs or underwood will not require the consent of the undertaker;

(e) prevent anything being done in or upon the land or any part thereof which shall or may interfere with the exercise of the other rights set out in this Schedule 5 or the use

of the authorised project or in any way render the authorised project or any part thereof in breach of any statute or regulation for the time being in force and applicable thereto.

- 6.2 The amendment to paragraph (c) (i) of the restrictive covenant will enable the EA to carry out all activities reasonably required to enable it to exercise its statutory duties and statutory rights, and will enable third party landowners to grant any necessary rights for those purposes. The amendment to paragraph (d) makes it clear that it does not prohibit cutting existing vegetation within watercourses and along bank tops, but prohibits new planting or growing without consent (including permitting such growth).