



Department
of Energy &
Climate Change

Mr Clive Callister
Mynydd y Gwynt Limited
Ffynon Wen
Capel Bangor
Aberystwyth
Ceredigion
SY23 3NA

**Department of Energy & Climate
Change**

3 Whitehall Place,
London SW1A 2AW
T: +44 (0)300 068 5770
E: giles.scott@decc.gsi.gov.uk
www.gov.uk/decc

Our ref: EN010020

20 November 2015

Dear Mr Callister

**PLANNING ACT 2008: APPLICATION FOR THE MYNYDD Y GWYNT WINDFARM
ORDER**

Introduction

1. I am directed by the Secretary of State for Energy and Climate Change (the "Secretary of State") to advise you that consideration has been given to:
 - (a) the report dated 20 August 2015 of the Examining Authority, Philip Asquith ("the ExA"), who conducted an examination ("the Examination") into the application (the "Application") dated 30 July 2014 by Mynydd y Gwynt Limited ("the Applicant") for a Development Consent Order ("the Order") under section 37 of the Planning Act 2008 ("the 2008 Act") for the Mynydd y Gwynt Wind Farm ("the Development"); and
 - (b) representations received by the Secretary of State after the close of the Examination.
2. The Examination of the Application began on 20 November 2014 and was completed on 20 May 2015. The Examination was conducted on the basis of written evidence submitted to the ExA, two issue-specific hearings, an open floor hearing, two Development Consent Order hearings and a number of site inspections.
3. The Order, as applied for, sought development consent under the 2008 Act for the construction and operation of an onshore wind farm in Powys, west of

Aberystwyth, comprising up to 27 turbines each with a generating capacity of between 3 and 3.3 MW, providing a total generating capacity of up to 89.1 MW, underground electrical and communications cables, a substation, control building and satellite link, widening of 9.5km of existing tracks, approximately 6.9km of new tracks and installation of a meteorological monitoring mast up to 80m high. There is no application for compulsory purchase associated with the Application.

4. Published alongside this letter is a copy of the ExA's Report of Findings and Conclusions ("the Report") as amended by the Errata Sheet of corrections produced by the Planning Inspectorate and agreed by the ExA. The ExA's findings and conclusions are set out in sections 4, 5 and 6 of the Report, and the ExA's recommendations are at section 7.

Summary of the ExA's Recommendation

5. The Secretary of State notes that the ExA's report included findings and conclusions on the following principal issues:
 - Policy context;
 - Landscape and visual impact;
 - Cultural heritage impacts;
 - Impact on ecology, biodiversity and protected species;
 - Hydrology;
 - Public access and recreation;
 - Socio-economic impacts including impact on tourism;
 - Traffic and highway implications of the construction phase.
6. The ExA recommended that the Secretary of State grants development consent for the Development in the form set out in his Report.

Summary of the Secretary of State's Decision

7. The Secretary of State has carefully considered the ExA's Report and has decided, in accordance with section 114(1)(b) of the 2008 Act, to refuse development consent. This letter is the statement of reasons for the Secretary of State's decision for the purposes of section 116(1)(b) of the 2008 Act and regulation 23(2)(d) of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 ("2009 Regulations").
8. The Secretary of State has considered relevant and important policies in respect of the United Kingdom's international obligations as set out in the Conservation of Habitats and Species Regulations 2010 (as amended) and the Conservation of Habitats and Species (Amendment) Regulations 2012 ("the Habitats Regulations") which transpose obligations in both the Council Directive 92/43/EC on the Conservation of Habitats and Species and of Wild Flora and Fauna ("the Habitats Directive") and the Council Directive 2009/147/EC on the Conservation of Wild Birds (the Wild Birds Directive) into UK law. The Habitats Directive provides for the designation of sites for the protection of habitats and species of European importance called Special Areas of Conservation ("SACs")

and the Wild Birds Directive provides for the classification of sites for the protection of rare and vulnerable birds and for regularly occurring migratory species, called Special Protection Areas ("SPAs") – collectively known as "European sites". The Secretary of State has taken these into account when assessing potential adverse effects.

9. The Secretary of State has had regard to the Energy National Policy Statements ("NPS") EN-1 (Overarching NPS for Energy) and EN-3 (NPS for Renewable Energy Infrastructure). The Secretary of State has also had regard to Wales Energy Policy Statement 'A Low Carbon Revolution' (March 2010), The Wales Spatial Plan (2008), Planning Policy Wales (Fifth edition, November 2012) and Technical Advice Notes: 8 – Renewable Energy (2005), the Local Impact Reports submitted by Ceredigion County Council ("CCC") and Powys County Council ("PCC") and to relevant local plans as well as to the environmental information as defined in regulation 2(1) of the 2009 Regulations and to all other matters which she considers to be important and relevant to her decision as required by section 104 of the 2008 Act. In making her decision under the 2008 Act, the Secretary of State has complied with all applicable legal duties on her and has not taken account of any matters which are not relevant to her decision.

Secretary of State's Consideration of the Application

10. The Secretary of State has also considered the Report and representations received after the close of the Examination. The Secretary of State's consideration of the Report is set out in the following paragraphs. All numbered references, unless otherwise states, are to paragraphs of the Report ("ER").

Habitats Regulations Assessment

11. The process for assessment is set out in the Habitats Regulations, implementing for relevant purposes the Habitats and Wild Birds Directives. Under Regulation 61, the Secretary of State must conduct an "appropriate assessment" ("AA") if concluding that the proposed project is "likely to have a significant effect" on a European site or a European offshore marine site either alone or in combination with other plans or projects.
12. Where an AA is conducted then Regulation 61(5) of the Habitats Regulations applies, such that "the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be)". The only exception to this rule is if Regulation 62 applies. Regulation 62 allows a project to be consented for imperative reasons of overriding public interest even where there is a negative assessment of the implications for the European site or the European offshore marine site, provided that certain conditions are met.

Elenydd – Mallaen Special Protection Area (SPA)

13. During the Examination, Natural Resources Wales (NRW) expressed concern about the possible impacts of the Development on the red kite feature of the Elenydd – Mallaen Special Protection Area (SPA) from collision mortality as a result of the operation of the wind farm.
14. The Applicant argued that because the qualifying features of the SPA in respect of red kite found on the proposed site of the Development do not originate from within the SPA, there would be no likely significant effect on the SPA alone and in-combination with other plans or projects. According to NRW, the Applicant based this assumption on limited surveys which do not meet best practice guidelines. The data sets used and the survey methods employed by the Applicant to reach this conclusion have been criticised by NRW, who state that without assessing effectively where the birds on the proposed Development site originate from, the Applicant's conclusions are not sufficiently robust, and that the Applicant's environmental information does not prove beyond reasonable scientific doubt that the birds potentially affected by the Development are not from the SPA.
15. For the red kite feature, the Applicant's nesting surveys show that there are no red kite nests in the areas of the SPA and its buffer zone that lie within 6km of the proposed Development site. NRW advised the Applicant, however, that a greater foraging range of 10km should be used to take into consideration the winter foraging range of red kites from the SPA as they are found in the area throughout the year, and requested that the Applicant provide an in-combination assessment of mortality rates from developments within 10km of the SPA, which was not forthcoming. NRW, therefore, concluded that not enough evidence had been provided by the Applicant to ascertain that there would be no adverse effect on the integrity of this European site caused by the Development in combination with other plans or projects.
16. Mitigation was proposed by the Applicant to address the issue of collision risk through aiming to avoid making the area under and around turbines attractive to red kite. NRW advised that although this mitigation may reduce red kite numbers, there is no certainty that this will be the result, and that there was no quantification of the reduction in the likely collision numbers.
17. The Applicant has maintained the view that there is no connectivity between the wind farms and the SPA. It was NRW's view, conversely, that the Applicant has not demonstrated that there is unlikely to be a significant in-combination effect on red kite, as sufficiently robust collision risk figures, including consideration of all developments likely to have an effect, have not been provided and considered by the Applicant.
18. The ExA agreed with the Applicant that the Development will not have a likely significant effect on the red kite feature of this European site and accepted the Applicant's assertion that there was reasonable certainty that red kite found within the Development site do not originate from within the SPA, because their surveys did not find any nests within the areas of the SPA and its buffer that lie within 6km of the Development site.

19. In the light of concerns expressed by NRW, the ExA advised that the Secretary of State may decide that an AA may be necessary in order to determine whether there will be an adverse effect on the integrity of the SPA [5.2.55, p 107].
20. As the ExA has noted [5.0.2, p 93], EN-1 sets out the policy context to which the competent authority must have regard under the Habitats Regulations. It states that an Applicant should provide the competent authority with the information it shall reasonably require to determine whether an AA is required under the Habitats Regulations to consider the effects of this Development alone and in-combination alongside other operational, consented and reasonably foreseeable projects; and if one is required, the Applicant must provide such information as may reasonably be required to enable the competent authority to conduct the AA, including any information on mitigation measures proposed to minimise or avoid effects.
21. The Secretary of State, as the competent authority, has undertaken a Habitats Regulations Assessment of the likely significant effects of the Development and has concluded that an AA is required. The Secretary of State has concluded that likely significant effects on red kite from collision risk during the operation of the turbines, alone or in-combination with other plans and projects, cannot be ruled out. The Secretary of State has come to this conclusion having considered all available materials including the evidence and advice of NRW, as the statutory nature conservation adviser. The HRA undertaken included an AA for six European sites. She has undertaken this as far as she is able to in the light of the absence of the required information as referred to above. A copy of that assessment is issued alongside this decision letter and has been prepared on the basis of the ExA's report, representations from Interested Parties, including from NRW and the ExA's Report on the Implications for European Sites.
22. After considering the information made available to her, the Secretary of State agrees with NRW's conclusion that sufficient information has not been submitted by the Applicant to conclude whether or not there will be an adverse effect on the integrity of the Elenydd – Mallaen SPA, in respect of red kites as a qualifying feature, specifically:
- The Secretary of State accepts NRW's advice that it has not been proven beyond reasonable scientific doubt that the red kite using the Project site do not come from the SPA.
 - The Applicant has not provided information on the in-combination impact of the Project with other wind farms as they state that there is no connectivity between the wind farms and the SPA. The Secretary of State, however, considers that the Applicant has not demonstrated sufficiently that there is unlikely to be a significant in-combination effect on red kite, as the red kite collision risk figures for the other developments have not been provided and considered by the Applicant.
 - Mitigation has been proposed by the Applicant to address the issue of collision risk through aiming to avoid making the area under and around

turbines attractive to red kite. Although this mitigation may reduce red kite numbers, there is no certainty that this will be the result and there has been no quantification of the reduction in the likely collision numbers.

- The Secretary of State shares the concerns of NRW as to the age and methodology of the surveys that informed the Applicant's assessment, as they did not conform to recommended good practice guidance.
23. The Secretary of State further notes that the burden of proof is on the Applicant to demonstrate that their proposed Development will not adversely affect protected features of European sites, rather than on statutory advisers to demonstrate that harm will occur.
24. The Secretary of State consulted all Interested Parties including the Applicant and NRW on 14 September 2015 which included a request for further information which could be used to inform her AA. NRW responded on this point to confirm their position during and at the close of the Examination that it had advised that the Applicant should collate information to inform an in-combination assessment on the collision rates for red kite, and that there was insufficient information for NRW to advise on the maximum level of collision mortality rates for red kite. The Welsh Government responded that it has no comment on the in-combination mortality rates for red kites. The Applicant did not respond on this point in its response to the Secretary of State's consultation.

Other European Sites

25. The Secretary of State also undertook an AA of the likely significant effects of the Project on the Afon Gwy (River Wye) SAC and concludes that, with the mitigation measures secured in the DCO, if made, that there will be no adverse effect on the integrity of the site, from the Project alone or in-combination with other plans or projects.
26. The Secretary of State also undertook an AA of the likely significant effects of the Development in-combination at the following five European sites:
- Afon Gwy (River Wye) SAC
 - Elenydd SAC
 - Coedydd Llawr-y-glyn SAC
 - Rheidol Woods and Gorge SAC
 - Tanat and Vyrnwy SAC
27. Having assessed the information provided by the Applicant, NRW and the ExA, the Secretary of State concludes that insufficient information has been provided on the grid connection to enable her to assess potential in-combination effects on the Elenydd SAC, Coedydd a Cheunant Rheidol (Rheidol Woods and Gorge) SAC, Coedydd Llawr-y-glyn SAC and the Tanat and Vyrnwy Bat Sites SAC at this point, although she accepts that the grid will be subject to its own assessment in due course.

The Secretary of State's Conclusion

28. The Secretary of State can only grant consent for an application following a positive assessment that there will be no adverse effect on the integrity of a European site – as provided for in regulation 61(5) of the Conservation of Habitats and Species Regulations 2010, unless regulation 62 applies. In this instance, the Secretary of State does not have the information required to assess appropriately the impacts of the Development on the integrity of the Elenydd – Mallaen SPA, despite further questions having been issued by the Secretary of State after the close of the Examination. Consequently, the Secretary of State cannot grant development consent because she is not able to conclude that there is no adverse effect on the integrity of the red kite feature of the Elenydd – Mallaen SPA. Further, the Secretary of State is not able to consider the Application under the provisions set out in regulation 62 (overriding public interest) in the absence of sufficient information to consider the possible environmental effects of the Development.

OTHER MATTERS

29. In light of her decision not to grant development consent for the reason set out in paragraph 28 above, the Secretary of State, whilst noting that there were various other issues considered during the Examination of the Application and covered in the ExA's Report, including in-combination impacts and Grid connection, Welsh Planning Policy, landscape and visual impact, cultural heritage and biodiversity, does not consider it necessary to give these matters further consideration in the context of this decision.

The Secretary of State's Consideration of Representations Received After the Close of the Examination

30. The Secretary of State consulted all Interested Parties on 1 July 2015 to seek comments on the following two documents that were brought to her attention following the close of the application:
- A clean version of the Habitats Regulation Assessment Screening Report (HRASR) version 6; and
 - A tracked changes version of the HRASR version 6.
31. The Secretary of State received the following:
- A response from NRW seeking clarification of the legal status of any representations made by any Interested Parties following the close of the Examination;
 - A response from Mr Roland Baskerville, a concerned individual, regarding landscape and visual impacts and impacts on birds; and

- A response from the Gas Transportation Company confirming that they had no comments.
32. Following receipt of the ExA's Report, the Secretary of State held a second consultation on 14 September 2015 to: 1) respond to the query raised by NRW in their response of 28 July 2015 to the Secretary of State's consultation of 1 July 2015 regarding the legal status of any representations made following the close of Examination; 2) seek further comments on the HRASR version 6 document; 3) request NRW advice on the maximum level of collision mortality and maximum level of displacement for red kites for there to be no adverse effect on the integrity of the Elenydd Mallaen SPA; 4) seek further information from any interested party, including the Applicant and NRW, on the in-combination mortality rates for red kite of the Elenydd Mallean SPA to inform an AA; and 5) seek information from the Applicant to inform an AA of the in-combination impact of the Development and necessary associated development of stage 2 and 3 of the grid connection.
33. The Secretary of State received the following representations which she has taken into consideration in reaching her decision set out in paragraph 28 above:
- A response from NRW confirming their position during and at the close of the Examination on both the Elenydd Mallaen SPA, and the various environmental plans.
 - A response from the Applicant confirming that they saw no barriers to the draft environmental plans in the Order and confirming the position they held during the Examination period on the Elenydd-Mallaen SPA, the Afon Gwy (River Wye) SAC and on the stage 2 and 3 grid connections.
 - A response from the Welsh Government confirming that they had no comment to make regarding the in-combination mortality rates for red kites.
34. The Secretary of State also received the following representations and notes the matters raised in them, but, in the light of her decision not to grant development consent for the reason set out elsewhere in this letter, she does not consider it necessary to give those matters further consideration in the context of this Application.
- A response from Utility Grid Installations to confirm that they had no comments to make on the Secretary of State's consultation dated 14 September 2015.
 - A response from Wales and West Utilities to the Secretary of State's consultation dated 14 September 2015 confirming they have no apparatus in the Development site. The response also highlighted the need for the investigation of any other gas pipelines in the Development site, the need to comply with safe digging practices and the need for updated plans before the commencement of any works.
 - A response to the Secretary of State's consultation of 14 September 2015 from Mr Peter Foulks on breeding ospreys on a site located 5km from the proposed Development site.

- A letter from the Campaign for the Protection of Rural Wales bringing to her attention the Road Safety Foundation's report 'How much do Road Crashes Cost where you live (2015)', and to raise concerns about construction traffic and Abnormal Indivisible Load (AIL) vehicles on the A44 Llangurig to Abrystwyth road.
- A submission from PCC regarding Requirement 8 in the proposed Order and its Unilateral Undertaking with the Applicant.

General Considerations

Equality Act 2010

35. The Equality Act 2010 includes a public sector "general equality duty" which requires public authorities to have due regard in the exercise of their functions to the need to eliminate unlawful discrimination, harassment and victimisation and any other conduct prohibited under the Act; advance equality of opportunity between people who share a protected characteristic and those who do not; and foster good relations between people who share a protected characteristic and those who do not in respect of the following "protected characteristics": age, gender; gender reassignment; disability; marriage and civil partnerships¹; pregnancy and maternity; religion and belief; and race. The Secretary of State does not consider that a decision to refuse would have significant differential impacts on any of the protected characteristics.

Human Rights Act 1998

36. The Secretary of State has considered the potential infringement of human rights in relation to the European Convention on Human Rights as enacted into UK law by the Human Rights Act 1998 in relation to the exercise of her functions when deciding this Application. The Secretary of State does not consider that refusing development consent would be incompatible with any Convention right.

Section 40(1) of the Natural Environment and Rural Communities Act 2006

37. The Secretary of State, in accordance with the duty in section 40(1) of the Natural Environment and Rural Communities Act 2006, has to have regard to the purpose of conserving biodiversity, and in particular to the United Nations Environmental Programme Convention on Biological Diversity of 1992, when making decisions on development consent. The Secretary of State is of the view that her decision to refuse this Application is in line with her duty to conserve biodiversity.

Secretary of State's Conclusion and Decision

38. The Secretary of State cannot grant development consent because she is not able to conclude that there is no adverse effect on the integrity of the red kite feature of the Elenydd – Mallaen SPA. She is therefore refusing the Application

¹ In respect of the first statutory objective (eliminating unlawful discrimination etc.) only.

in accordance with regulation 61(5) of the Conservation of Habitats and Species Regulations 2010.

Challenge to decision

39. The circumstances in which the Secretary of State's decision may be challenged are set out in the note attached at Annex to this letter.

Publicity for decision

40. The Secretary of State's decision on this application is being publicised as required by section 116 of the 2008 Act and regulation 23 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009.

Yours Sincerely,

A handwritten signature in black ink, appearing to read 'Giles Scott', with a stylized, cursive script.

Giles Scott

Head of National Infrastructure Consents and Coal Liabilities

LEGAL CHALLENGES RELATING TO APPLICATIONS FOR DEVELOPMENT CONSENT ORDERS

Under section 118 of the Planning Act 2008, an Order granting development consent, or anything done, or omitted to be done, by the former Infrastructure Planning Commission or the Secretary of State in relation to an application for such an Order, can be challenged only by means of a claim for judicial review. A claim for judicial review must be made to the Planning Court during the period of 6 weeks beginning with the day after the day on which the Secretary of State's Statement of Reasons (the decision letter) is published on the Planning Inspectorate's website at the following address:

<http://infrastructure.planninginspectorate.gov.uk/projects/wales/mynydd-y-gwynt-wind-farm/>

These notes are provided for guidance only. A person who thinks they may have grounds for challenging the decision to refuse the Order referred to in this letter is advised to seek legal advice before taking any action. If you require advice on the process for making any challenge you should contact the Administrative Court Office at the Royal Courts of Justice, Strand, London, WC2A 2LL (0207 947 6655)