

Boston Alternative Energy Facility – EN010095

Section 51 Advice regarding draft Application documents submitted by Alternative Use Boston Projects Limited

This advice relates solely to matters raised upon the Planning Inspectorate’s review of the draft application documents submitted by Alternative Use Boston Projects Limited (“the Applicant”), and not the merits of the proposal. The advice is limited by the time available for consideration and raised without prejudice to the acceptance or otherwise of the eventual application. It is provided to assist the preparation of the next iteration.

Abbreviations used

1961 Act	Land Compensation Act	dDCO	draft Development Consent Order	ExA	Examining Authority
ANxx	Advice Note number	dEM	Explanatory Memorandum	PA2008	Planning Act 2008
Axx	Article and number			SoS	Secretary of State

General drafting points

1. The Applicant should ensure that when the draft development consent order (dDCO) is finalised for submission all internal references and legal footnotes are checked and that the drafting follows best practice in AN13 and AN15 and any guidance on statutory instrument drafting.
2. A thorough justification should be provided in the Explanatory Memorandum (EM) for every Article and Requirement, explaining why the inclusion of the power is appropriate in the specific case. The extent of justification should be proportionate to the degree of novelty and/ or controversy in relation to the inclusion of that particular power.
3. Notwithstanding that drafting precedent has been set by previous DCOs, whether or not a particular provision in this DCO application is appropriate will be for the ExA to consider and examine taking account of the facts of this particular DCO application and having regard to any views expressed by the relevant authorities and interested parties.

Development Consent Order

Ref No.	Article/Requirements (A/R)	Comment/Question
1.	General	The Applicant should ensure that all cross references within the dDCO are checked and corrected where necessary/relevant, this includes references to any plans.
2.	General	The Applicant will be asked to maintain a list of all plans and other documents that will require SoS certification (including plan/document references). These should be updated throughout the examination process, and supplied to the ExA before the close of the examination
3.	General	The DCO is proposed to be a SI and so should follow the statutory drafting conventions. The dDCO (and any subsequent revisions) should be in the form required by the statutory instrument template (see AN15) and validated as such using the current SI template, including detailed footnotes to all statutory references.
4.	General	<p>The application DCO and any subsequent versions of the submitted to the examination:</p> <ul style="list-style-type: none"> • should be supplied in both .pdf and Word formats, the latter showing any changes from the previous version by way of tracked changes. • should be accompanied by a document explaining the changes made– see e.g. Document explaining changes made to dDCO for Deadline 5 in the A19 (Testo's Junction) DCO examination <p>The examination timetable will usually provide a deadline for receipt of the applicant's final or preferred version of the DCO. That version should be supported by a report of the outcome of validating it through the Publishing section of the legislation.gov.uk website.</p>
5.	General	The DCO should follow guidance and best practice for SI drafting (for example avoiding "shall/should") in accordance with the latest version of guidance from the Office of the Parliamentary Counsel
6.	General	The DCO should be fully audited to ensure that that there are no inconsistencies within the DCO and its constituent parts such as definitions or expressions in the articles, requirements, protective provisions, other schedules and any book of reference and/or any deemed marine licence, that all legislative references in the DCO are to extant provisions and all schedules refer to the correct articles. Also, definitions should be precise, accurate and relatively easily understandable. (e.g. if a definition is drafted in a way that obliges the reader to cross refer to wording in multiple other documents in order to understand the definition, then it is not easily understandable).

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7.	General	Some definitions may need to be kept under constant review by the applicant throughout any examination so that they are kept up to date as matters evolve – e.g. any definition of 'environmental statement' in the context of how/the purposes for which it is referred to in the DCO.
8.	Precedents	Notwithstanding that drafting precedent has been set by previous DCOs or similar orders full justification should be provided for each power/provision taking account of the facts of this particular DCO application.
9.	General references to Part 1 of the 1961 Act	Some Articles make provision for "compensation to be determined, in case of dispute, under Part 1 of the 1961 Act". It is acknowledged that a provision in this form was in the various MPs and was commonplace in DCOs and other Orders. However, Part 1 of the 1961 Act only relates to compensation for compulsory acquisition. In order for there to be certainty that it would apply in other situations (e.g. the temporary use of land under A34), please consider whether the modification should be included as with the other compensation provisions in Schedule 8.
10.	Flexibility	<p>The extent of any flexibility provided by the DCO should be fully explained, such as the scope of maintenance works and ancillary works, limits of deviation and any proposed ability (through tailpieces) of discharging authorities to authorise subsequent amendments.</p> <p>The preferred approach to limiting this flexibility is to limit the works (or amendments) to those that would not give rise to any materially new or materially different environmental effects to those identified in the environmental statement. Also, further as to tailpieces, see section 17 of Advice Note 15.</p> <p>The drafting which gives rise to an element of flexibility (or alternatives) should provide clearly for unforeseen circumstances and define the scope of what is being authorised with sufficient precision. For example, the Secretary of State had to amend article 6 (Benefit of Order) of the National Grid (Richborough Connection Project) Development Consent Order 2017 at decision stage to remove ambiguity (as later corrected by the National Grid (Richborough Connection Project) (Correction) Order 2018).</p> <p>In relation to the flexibility to carry out advance works, any "carve out" from the definition of "commencement" should be fully justified and it should be demonstrated that such works are de minimis and do not have environmental impacts which would need to be controlled by requirement. See section 21 of Advice Note 15.</p>
11.	Development Consent granted by the Order	The intent of this article is to avoid inconsistency with other relevant statutory provisions applying in the vicinity, but, notwithstanding other precedents, as much information as possible should be provided

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		about “any enactments” together with clarification about how far from the Order limits the provision might bite.
12.	Compulsory acquisition and extinguishment of rights	<p>These provisions (and any relevant plans) should be drafted in accordance with the guidance in Advice Note 15, in particular sections 23 (extinguishment of rights) and 24 (restrictive covenants)</p> <p>The Secretary of State decision (paragraph 62 of the M4 Motorway (Junctions 3 to 12) (Smart Motorway) DCO) should be noted: “<i>to remove the power to impose restrictive covenants and related provisions as he does not consider that it is appropriate to give such a general power over any of the Order land as defined in article 2(1) in the absence of a specific and clear justification for conferring such a wide-ranging power in the circumstances of the proposed development and without an indication of how the power would be used</i>”.</p> <p>Compulsory acquisition of an interest in land held <u>by</u> the Crown cannot not be authorised through this or any other article. This could be achieved, for example, by expressly excluding Crown interests in the book of reference land descriptions for relevant plots or by excepting them from the definition of the Order land. Where an applicant wishes to compulsorily acquire some other person’s interest in that same land, that can only be done if the appropriate Crown authority consents to it under s135(1) of the Planning Act 2008.</p> <p>Where an applicant wishes to create and compulsorily acquire new rights over land, those rights should be fully, accurately and precisely defined for each relevant plot.</p> <p>In all respects (including in relation to the book of reference), the applicant should follow <i>Planning Act 2008: Guidance related to procedures for the compulsory acquisition of land</i> published by DCLG (now MHCLG) in September 2013.</p>
13.	Statutory undertakers and apparatus	<p>Where a representation is made by a statutory undertaker (or some other person) that engages section 127(1) of the Planning Act 2008 and has not been withdrawn, the Secretary of State will be unable to authorise powers relating to that statutory undertaker land unless satisfied of specified matters set out in section 127. If the representation is not withdrawn by the end of the examination, confirmation will be needed that the relevant statutory test is met.</p> <p>The Secretary of State will also be unable to authorise removal or repositioning of apparatus (or extinguishment of a right for it) unless satisfied that the extinguishment or removal is necessary for the</p>

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		purpose of carrying out the development to which the order relates in accordance with section 138 of the Planning Act 2008. Justification will be needed to show that extinguishment or removal is necessary.
14.	Planning permission	This article is intended to allow development not authorised by the DCO to be carried out within the Order limits pursuant to planning permission. This would appear to obviate the need, in such circumstances, to apply to change the DCO (through section 153 of the Planning Act 2008). This article should be justified.
15.	Power to alter layout of streets	This is a wide power – authorising alteration etc. of <u>any</u> street within the Order limits. It should be clear why this power is necessary and consideration given to whether or not it should be limited to identified streets.
16.	Temporary stopping up and restriction of use of streets	Notwithstanding other precedents, justification should be provided as to why the power is appropriate and proportionate having regard to the impacts on pedestrians and others of authorising temporary working sites in these streets.
17.	Disapplication or amendment of legislation/statutory provisions	<p>The guidance in section 25 of Advice Note 15 should be followed and the following provided:</p> <ul style="list-style-type: none"> • the purpose of the legislation/statutory provision • the persons/body having the power being disapplied • an explanation as to the effect of disapplication and whether any protective provisions or requirements are required to prevent any adverse impact arising as a result of disapplying the legislative controls • (by reference to section 120 of and Schedule 5 to the Planning Act 2008) how each disappplied provision constitutes a matter for which provision may be made in the DCO. <p>Where the consent falls within a schedule to the Infrastructure Planning (Interested Parties and Miscellaneous Prescribed Provisions) Regulations 2015 evidence will be required that the regulator has consented to removing the need for the consent.</p>
18.	Benefit of the Order	If any part of this article is drafted so as to allow any transfer of benefit by the undertaker to any other person without the need for the Secretary of State's consent, then the applicant should provide full justification as to why that is appropriate.
19.	Discharge of water	The applicant should be aware of and mindful of section 146 of the Planning Act 2008.

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20.	Temporary possession	<p>Temporary possession is not itself compulsory acquisition.</p> <p>Articles giving temporary possession powers should be considered carefully to check whether or not they allow temporary possession of any land within the Order limits, regardless of whether or not it is listed in any Schedule to the DCO which details specific plots over which temporary possession may be taken for specific purposes listed in that Schedule. If they do, then the applicant should justify why those wider powers are necessary and appropriate and explain what steps they have taken to alert all landowners, occupiers, etc. within the Order limits to this possibility.</p> <p>If not already present, consideration should also be given to adding in a provision obliging the undertaker to remove from such land (on ceasing to occupy it temporarily) any equipment, vehicles or temporary works they carry out on it (save for rebuilding demolished buildings under powers given by the DCO), unless, before ceasing to occupy temporarily, they have implemented any separate power under the DCO to compulsorily acquire it.</p>

Explanatory Memorandum

Ref No.	Paragraph	Comment/Question
1.	General	<p>Explanation and evidence (including the outcomes of any consultation) should be provided to explain why the content of each article, schedule etc to the dDCO is relevant and required for this proposal. Please refer to AN15.</p> <p>The EM should provide explanation and justification where a provision departs from a precedent. (See AN13 and 15).</p> <p>This should include reference to the particular circumstances of this development and an explanation as to why this is necessary or desirable.</p>

Consultation Report

Ref No.	Paragraph/ Section	Comment/Question
1.	General	The inclusion of paragraph numbers would be helpful.
2.	General	It is advised that the document is checked for typographical errors and ensure appendix titles and numbers match.
3.	General	It is advised that the document is checked for consistency in the dates given for different phases of consultation and those marked on the consultation timeline.
4.	General	It is advised that letters included in the appendices do not include signatures.
5.	6.4	It is advised that full justification for not identifying any category 3 parties is provided in the Statement of Reasons.
6.	8.5	The Applicant should consider how to refer to the section 44 consultees to avoid the need for the Consultation Report to be redacted.
7.	8.7	It is advised that evidence of compliance with Regulation 13 of the Infrastructure (Environmental Impact Assessment) Regulations 2017 is provided.
8.	9.2	It is advised that the reasons for phase 4 consultation not being statutory are fully justified.
9.	Appendix 5.25	If any changes were made to the proposals as a result of consultation feedback these should be clearly set out here.

General

- Where references are provided to other Application documents it would be beneficial to provide the full title thereof inclusive of document reference number.
- [DCLG: Application form Guidance](#), paragraph 3 states: *"The application must be of a standard which the Secretary of State considers satisfactory: Section 37(3) of the Planning Act requires the application to specify the development to which it relates, be made in the prescribed form, be accompanied by the consultation report, and be accompanied by documents and information of a prescribed description. The Applications Regulations set out the prescribed form at Schedule 2, and prescribed documents and information at regulations 5 and 6."*