

FIVE ESTUARIES OFFSHORE WIND FARM

10.45 LEGAL NOTE – EXCLUDING LAND FROM COMPULSORY POWERS

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A Feb 25 Deadline 6 Burges VEOWF VEOWF Salmon	Revision	Date	Status/Reason for Issue	Originator	Checked	Approved
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1. INTRODUCTION

1.1.1 This submission has been prepared in accordance with Action Point 1 from hearing CAH3. It was requested by the Examining Authority that Applicant to provide a legal note on the ability of the Secretary of State to exclude land from compulsory powers applied for.

2. SCOPE OF COMPULSORY POWERS

- 2.1.1 The Applicant wishes to preface this note by addressing the repeated submissions that part of the CA sought in the Application is 'for' North Falls and should not be included in this Application; this is a fundamental misunderstanding of the position.
- 2.1.2 As set out in previous submissions, and as supported the 10.46 Opinion of King's Counsel submitted at Deadline 6, and referred to below, the second set of ducts and preparatory works at the substation form part of the associated development for which consent is sought in this Application. As set out in the Planning Statement (APP-231) at section 3.3. the Co-ordination Document [APP-263], and in the legal submission on the CA case [REP4-037], the objective of including the second set of ducts is to provide a route to minimise impacts where possible.
- 2.1.3 The design keeps the potential impacts from the projects to a single swathe of land and enables coordination during construction, which has the potential to significantly reduce the impacts associated with the construction phase. Land needed for mitigation of impacts can be, and routinely is, subject to compulsory acquisition as it is necessary to facilitate the overall development. King's Counsel in the opinion submitted herewith that:
 - "the proposed shared works here are properly to be regarded as associated development, and that development consent can lawfully be granted for such works in any DCO made in respect of the VE scheme".
- 2.1.4 The inclusion of works to mitigate impacts as associated development is supported by the core principles of the associated development guidance¹: "Associated development should therefore either support the construction or operation of the principal development, or help address its impacts."
- 2.1.5 The Applicant notes that the requirement of s104 of the Planning Act 2008 that applications must be determined in accordance with the updated National Policy Statements. The NPSs for energy and electricity networks infrastructure (specifically EN-1 and EN-5) require collaboration and co-ordination between projects to be sought where practicable. Five Estuaries and North Falls have worked together to identify opportunities for collaboration to minimise or control cumulative impacts.

¹ Planning Act 2008 Guidance on associated development applications for major infrastructure projects, DCLG April 2013, paragraph 5(i)

- 2.1.6 The Applicant submits that its approach is demonstrative of the co-ordination that is being sought and the meaningful attempts being made to reduce overall impacts on landowners. The Applicant cannot deliver collaboration in accordance with the NPS, co-ordination as sought by landowners and minimise impacts if it does not have the necessary rights to deliver the works. In order to maintain the ability to minimise impacts by delivering the second set of ducts, the land take and powers sought by the Applicant are necessary. It is not excessive to include land for these works given that they properly form part of the associated development and are intended to allow mitigation to be delivered in the co-ordinated scenario.
- 2.1.7 The public interest is served by allowing the option to collaborate and minimise impacts. The Applicant notes the submission made by the agent on behalf one of the agricultural landowners at CAH3 that they strongly support co-ordinated delivery.
- 2.1.8 The inclusion of works for 'associated infrastructure development (such as a network connection) that is on a larger scale than is necessary to serve the principal development if that associated infrastructure provides capacity that is likely to be required for another proposed major infrastructure project' is explicitly provided for in the guidance². In Footnote 3 to paragraph 5 of that guidance deals with precisely the scenario before this Examination:
 - For example, in the case of an application for an offshore generating station, the Secretary of State may consider it appropriate for a degree of overcapacity to be provided in respect of the associated transmission infrastructure, so that the impacts of one or more other planned future projects which could make use of that infrastructure would be reduced by taking advantage of it. Applications that include elements designed for the basis of overcapacity would be expected to demonstrate the need for the overcapacity as well as fully assessing the environmental effects.
- 2.1.9 Government has concluded that there is a critical national priority ("CNP") for the provision of nationally significant low carbon infrastructure. Section 4.2 of NPS-EN1 (Overarching National Policy Statement for Energy) states that offshore renewable generating technologies are CNP infrastructure. S104 makes it clear that the SoS "must decide the application in accordance with any relevant national policy statement, except to the extent that one or more of the subsections" of specified exceptions apply. Therefore, the SoS should start with a presumption in favour of granting consent to applications for energy NSIPs, including both Five Estuaries and North Falls. For the purpose of demonstrating need for the onshore connection works as overcapacity, the NPS inarguably establishes that need.
- 2.1.10 As the Applicant set out in 10.20.7 Legal Note Compulsory Acquisition Case [REP4-037], The conclusion that the need for the development is established and that it complies with Government policy under s104 forms a core part of the compelling case and is indeed put forward as such in this Application by the Applicant.
- 2.1.11 The Applicant's position on this point is supported by the 10.46 Opinion of King's Counsel which is has been submitted at this deadline (Deadline 6).

² Ibid, paragraph 5(v)

2.2 THE ABILITY OF THE SECRETARY OF STATE TO EXCLUDE LAND FROM COMPULSORY POWERS

- 2.2.1 The ability to grant or refuse to grant compulsory acquisition powers is not an all or nothing decision, it is entirely within the powers of the SoS to grant powers over some areas of land but consider that they are not justified and withhold these over others. The decision must effectively be made for each plot of land, not a whole scheme. The guidance³ is clear that the SoS can make to "a decision to remove all or some of the proposed compulsory acquisition provisions from a development consent order"⁴, the inclusion of 'some' in that case demonstrating the ability of the SOS to 'carve out' any land where they consider inclusion is not merited.
- 2.2.2 The ability to exclude plots from powers of compulsory acquisition is clear in the examples given in the guidance, which provides for a scenario where the extent of land included for where landscaping has to be, is necessary for that purpose (landscaping). If it were found not to be, then CA could still be granted for the other elements of the development but not granted for any or all of the land sought for landscaping⁵.
- 2.2.3 The statutory tests may be satisfied in the case of one plot, but not another as that decision has to have regard to the facts and circumstances of each plot, what it will be used for and if the powers sought are necessary in that case. It would be-likely to be non-compliant with the necessity to consider human rights, not to have regard to a specific case made for any plot or part of a plot.
- 2.2.4 The need to consider plots separately is demonstrated in numerous DCO decision letters, but the following is given as an example where the ExA recommended exclusion of specified plots and the Secretary of State determined that powers should not be granted over some but not all recommended for exclusion by that ExA.

North Killingholme (Generating Station) Order, granted 2014

- 2.2.5 In the decision letter, the following excerpts from paragraphs 6, 23 and 27 demonstrate the exclusion of specific plots or part of plots of land or rights from compulsory powers:
 - "6...The Secretary of State has decided under section 114 of the 2008 Act to make, with modifications, an Order granting development consent for the proposals in the Application. The Order also grants compulsory acquisition powers in respect of some of the requested plots of land, but not those requested for the purposes of the grid and gas connectors.

³ Planning Act 2008; Guidance related to procedures for the compulsory acquisition of land, DCLG, September 2013

⁴ Ibid paragraph 16

⁵ Ibid Paragraph 11, which in considering . "land is required to facilitate or is incidental to the proposed development" states: "An example might be the acquisition of land for the purposes of landscaping the project. In such a case the Secretary of State will need to be satisfied that the development could only be landscaped to a satisfactory standard if the land in question were to be compulsorily acquired, and that the land to be taken is no more than is reasonably necessary for that purpose, and that is proportionate."

"23. The Secretary of State has carefully considered section 6 of the ExA's report on Compulsory Acquisition (CA) and agrees with most of the recommendations made in that section on which land and rights should be either included or excluded from the Order, for the reasons set out in that section and in this letter below. This includes agreeing with the recommendation to exclude from the Order land and rights for the Electrical Grid Connection and Gas Connection, which do not form part of the Development applied for by the Applicant, and certain plots of land requested for ecological mitigation. However, the Secretary of State has reached a different conclusion from the ExA in relation to land and rights held by Centrica and National Grid, for the reasons set out below.

27...the Secretary of State:

i. notes that the ExA recommended refusal of CA powers in respect of land and rights held by National Grid Property Holdings, National Grid Gas, Centrica KPS and Centrica Storage the Secretary of State has decided that compulsory acquisition powers should be granted in relation to these land and rights...;

ii. agrees with the ExA that in relation to plots 05/02 and 07/01 requested for the purposes of ecological mitigation, the test have not been met, and compulsory acquisition should be refused, for the reasons set out at paragraph 30;

iii. agrees with the ExA that in relation to the remaining rights and plots of land (except where the request for CA powers were found to be unnecessary or otherwise withdrawn during the Examination, see paragraph 31), the compulsory acquisition tests set out in guidance are met and is also satisfied with the ExA's overall and general conclusions on the test relating to consideration of reasonable alternative to CA are met.



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