

CHAPTER 2: LEGISLATIVE & POLICY CONTEXT

INTRODUCTION

- 2.1 A variation of consent can be granted under section 36C of the Electricity Act 1989 where it is considered appropriate by the Secretary of State to do so. This chapter outlines the legislative context for applying for a variation of consent.
- 2.2 The policy context for the variation of consent reviews the relevant planning and energy policies that has been published, amended or revoked since the consent and deemed permission was granted (February 2013).

LEGISLATIVE CONTEXT

Section 36 consents

- 2.3 Section 36 of the Electricity Act 1989 (“the 1989 Act”) applies to proposals for the construction, extension or operation of an onshore electricity generating station whose capacity exceeds (or, when extended, will exceed) 50 Megawatts electrical (MW).
- 2.4 On 1 March 2010, a new regime for consenting major energy infrastructure projects in England and Wales came into force in the form of the Planning Act 2008 (“the 2008 Act”). Projects which would previously have been the subject of section 36 consents and section 90 directions, but for which applications for section 36 consent were not submitted before that date now need development consent under the 2008 Act, which is granted by means of a development consent order.
- 2.5 Since the 2008 Act regime came into force, it has not been possible or necessary to apply for section 36 consent in respect of an onshore generating station in England and Wales. However, as at 1 March 2010 significant numbers of section 36 consent applications either remained to be determined by the Secretary of State; had been granted but not yet implemented; or had been implemented and remained part of the regulatory framework governing operating generating stations.
- 2.6 The Heckington Fen Wind Park proposal falls into the second of the three categories described above, namely a section 36 consent application that has been granted but not yet implemented.

Varying section 36 consents

- 2.7 The Department of Energy and Climate Change (the DECC) provides guidance on varying consents granted under section 36 of the Electricity Act 1989. At paragraph 12 of the guidance it states:

“Generating station development consents are often not implemented until some years after they are granted. Each consent reflects technology and industry practice at the time it was applied for, but such practices do not stand still, even in relatively mature sectors. This means that when a developer comes to construct a generating station, it will sometimes be uneconomic or have more detrimental effects on the environment to do so according to all of the details specified in the consent. In practice, this means changes to the original proposals to make the project feasible. The changes concerned may not be

very great, but they may nevertheless involve work which would not be consistent with the terms of the existing consent, for example installing more efficient technology generating more power without radically changing the physical dimensions of the buildings and/or structures.”

- 2.8 The 2008 Act recognised this potential problem and provided a mechanism for developers to apply to have changes to the development consent order. However, the 1989 Act made no such provision. Accordingly, if a developer found that what it wanted to construct was not consistent with the terms of the section 36 consent, the only option (prior to legislation on varying section 36 consents) was generally to apply to the DECC for a new s.36 consent or, since the 2008 Act came into force, to the Planning Inspectorate for a development consent order for the revised scheme – a process which the Government considers disproportionate for minor changes to an already consented proposal.

The Growth and Infrastructure Act 2013

- 2.9 The Growth and Infrastructure Act 2013 (“the 2013 Act”) received Royal Assent on 25 April 2013, and provides amongst other things:

“for the Secretary of State or the MMO, where they consider it appropriate, to be able to vary section 36 consents which they have granted (section 20, inserting a new section 36C into the 1989 Act); and

for the Secretary of State, when granting such a variation, to be able to make or vary a section 90 direction under the 1990 Act that planning permission be deemed to be granted (section 21, amending section 90 of the 1990 Act)”¹

- 2.10 The main aim of new section 36C of the 1989 Act is to make it possible for the designs of generating stations, already consented but not constructed or completed, to be modified in ways which the relevant section 36 consents would not otherwise permit and without the developer having to apply for a development consent order under the 2008 Act.
- 2.11 The purpose of the amendment to section 90 of the 1990 Act is to make it possible for those who are granted variations to their existing section 36 consents under section 36C of the 1989 Act, to obtain any necessary changes to planning permission from the Secretary of State in a “one-stop shop” process.

Appropriateness Test

- 2.12 The variation process is designed to apply to projects that have been consented under section 36, where the operator wishes to carry out development that is inconsistent with the existing section 36 consent. There are two broad categories of case in which it is likely that the Secretary of State may consider it appropriate to exercise the power in section 36C. One of which is to enable

(a) The construction or extension of a generating station (whose construction or extension has either not yet commenced or has not yet been completed) along different lines from those set out in the existing consent.¹

¹ ‘Varying consents granted under section 36 of the Electricity Act 1989 for generating stations in England and Wales’, Department of Energy & Climate Change (July 2013)

- 2.13 Section 36C of the 1989 Act confers on the Secretary of State a power to make “such variations to the consent as appear to the authority to be appropriate” to a section 36 consent, following an application from the person for the time being entitled to the benefit of that consent.
- 2.14 Determining that any given proposed variation is “appropriate” requires the Secretary of State to exercise judgment on whether the change proposed to the consented generating station concerned is of a kind that it would be reasonable to authorize by means of the variation procedure. Only if the answer to this is positive, should the proposals then be examined from a planning and energy policy point of view to determine whether the variation sought should in fact be made.
- 2.15 The key point to note from DECC’s guidance is that “the variation procedure is not intended as a way of authorising any change in a developer’s plans that would result in development that would be fundamentally different in character or scale from what is authorised by the existing consent.”²
- 2.16 The appropriateness or otherwise of granting a variation has to be considered by reference to what has been consented already. **Chapter 3: Details of the Variation** provides specific detail on the nature of the amendments sought and the appropriateness of the section 36C variation procedure to the Heckington Fen Wind Park scheme.
- 2.17 The DECC guidance provides four broad assumptions as regards what is and what is not appropriate to authorise under the section 36C variation procedure. **Table 2.1** evaluates these four broad assumptions in relation the amendments proposed in this Variation of Consent application.

Table 2.1: DECC’s broad assumptions on ‘appropriateness’

DECC assumption	Consideration against Heckington Fen scheme
Changes in the plant’s main fuel or other power source are unlikely to be considered suitable subject-matter for a variation.	Up to 22 wind turbines is consented. There will be no change to the plant’s main fuel (wind turbines).
Some less significant changes to the particular type and/or operation of technology used may, however, be suitable for consideration under the variation procedure.	A further three candidate wind turbines are considered; thereby potentially increasing the rotor diameter from those consented. An increase in the size of the on-site sub-station is also sought in order to facilitate the transmission of the wind-generated energy to the national grid system.
Changes in the design of generating stations which have been consented but not constructed which would allow them to generate an amount of power that would be inconsistent with the original consent are likely to be appropriate subject matter for a variation application, provided there are no major changes in the environmental impact of the plant.	The maximum number of wind turbines (22) remains unchanged, however an amendment is sought to increase the rotor diameter of the candidate turbines thereby increasing the renewable energy generation from the scheme. This revised scheme would generate approximately 13% - 24% more electricity from the wind park than the original scheme (see paragraphs 2.49 – 2.51). This application would maximise the renewable energy potential without increasing the overall tip height of the turbines or proposing a larger number of turbines.

² Varying consents granted under section 36 of the Electricity Act 1989 for generating stations in England and Wales’, Department of Energy & Climate Change (July 2013)

It should generally be possible to consider authorising changes which only affect the operation of an existing station (and do not involve construction of a new generating station or extension of an existing one) under the section 36 consent variation procedure.	Not applicable as the generating station is consented but not yet operational.
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Alternatives

- 2.18 Existing section 36 consents cover a number of different kinds of generating station projects. As noted above, the variation power conferred by section 36C of the 1989 Act was conceived primarily as a way of dealing with issues arising in relation to a project that had been granted section 36 consent, but had not yet been constructed or completed.
- 2.19 Alternatives available to a variation of a section 36 consent will depend on the type of project concerned and other relevant factors. Whilst in some cases the proposed changes may go further than the Secretary of State would consider to be appropriate for a section 36 variation, in other cases it may be possible to carry out works that are different from those envisaged at the time the existing section 36 consent was applied for without obtaining a variation or applying for development consent under the 2008 Act.
- 2.20 **Table 2.2** provides the DECC guidance on points to consider for onshore projects, not yet constructed (permission sought to construct along different lines), and considers them in relation to the Heckington Fen scheme:

Table 2.2: Alternatives for onshore projects yet to be constructed

Points to consider before applying for section 36	Consideration against Heckington Fen scheme
Is change consistent with existing consent?	Whilst the original s36 consent provides for an overall maximum height of the turbines (which will remain unchanged), the proposed rotor blade diameter will increase from that consented. Additionally, the amended site of the substation and the amended onsite access track are outside the current red line plan (4038_A0085_03). Therefore the change is not consistent with the existing consent.
Would “variation” of the existing deemed planning permission under section 73 of the 1990 Act suffice?	No, because the red line plan (4038_A0085_03) is referred to in the s36 permission.
Possibilities to consider if section 36 variation inappropriate	Consideration against Heckington Fen scheme
Application for development consent under the 2008 Act	Following the broad assumptions set out by DECC in Table 2.1 , it is proposed that a section 36 variation would be appropriate. Given the plant’s main fuel has not changed, nor have the number of turbines, maximum tip height or their locations; it is proposed that an application under the 2008 Act would be disproportionate.

POLICY CONTEXT

National Policy Statement

- 2.21 Although the original consent was granted under section 36 of the Electricity Act 1989; had it been submitted after the Planning Act 2008 came into force, the development would have been considered to be 'nationally significant'. As a result, the Overarching National Policy Statement for Energy (EN-1), and National Planning Statement for Renewable Energy Infrastructure (EN-3)) should be taken into consideration.
- 2.22 As EN-1 and EN-3 were both in force at the time of the inquiry, and were considered in detail by the Inspector in his report to the DECC, only a brief overview is provided below:
- 2.23 Paragraph 3.3.10 of EN-1 states:
- “As part of the UK’s need to diversify and decarbonise electricity generation, the Government is committed to increasing dramatically the amount of renewable generation capacity In the short to medium term, much of this new capacity is likely to be onshore and offshore wind....”*
- 2.24 Paragraph 3.3.15 continues:
- “In order to secure energy supplies that enable us to meet our obligations for 2050, there is an urgent need for new (and particularly low carbon) energy NSIPs to be brought forward as soon as possible, and certainly in the next 10 to 15 years, given the crucial role of electricity as the UK decarbonises its energy sector”*
- 2.25 Paragraph 4.1.2 of EN-1 also states that given this level of urgency, there should be:
- “...a presumption in favour of granting consent to applications for energy NSIPs. That presumption applies unless any more specific and relevant policies set out in the relevant NPSs clearly indicate that consent should be refused”*
- 2.26 Paragraph 4.1.4 advises that, when considering a proposed development, the decision maker should:
- “...take into account environmental, social and economic benefits and adverse impacts, at national, regional and local levels.”*
- 2.27 Paragraph 3.2.3 also recognises that:
- “...it will not be possible to develop the necessary amounts of such infrastructure without some significant residual adverse impacts.”*
- 2.28 EN-3 provides detail on technology specific considerations. Onshore wind is considered in section 2.7, with guidance provided on noise, landscape, cultural heritage and other considerations when determining such applications.

National Planning Policy Framework (NPPF)

- 2.29 The NPPF was published in March 2012, prior to the public inquiry for the section 36 application, and was considered by all parties and included in the Inspector’s report to the DECC.
- 2.30 Paragraph 14 of the NPPF states:
- “At the heart of the National Planning Policy Framework is a presumption in favour of sustainable development, which should be seen as a golden thread running through both plan-making and decision-taking.*
- For decision-taking this means:*
- *approving development proposals that accord with the development plan without delay; and,*
 - *where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:*
 - *any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or specific policies in this Framework indicate development should be restricted”*
- 2.31 The NPPF (at footnote 17) confirms reliance upon NPS EN-1 and EN-3 as the primary sources of guidance to planning decision makers addressing wind energy proposals:
- “In assessing the likely impacts of potential wind energy development when identifying suitable areas, and in determining planning applications for such development, planning authorities should follow the approach set out in the National Policy Statement for Renewable Energy Infrastructure (read with the relevant sections of the Overarching National Policy Statement for Energy Infrastructure...)”*

The Development Plan

- 2.32 The primacy of the development plan, pursuant to section 38(6) of the Planning and Compulsory Purchase Act 2004 does not apply when the application is made under section 36 of the Electricity Act 1989. This same principle will apply when the application to vary the consent and deemed permission is made under section 36C of the 1989 Act. The policies of the development plan are however a material consideration in the determination of the application.
- 2.33 Since the Heckington Fen s.36 consent was granted, the Regional Spatial Strategy for the East Midlands has been revoked by the Regional Strategy for the East Midlands (Revocation) Order 2013 (which came into force on 12 April 2013). The development plan for the area is therefore now only comprised of the North Kesteven Adopted Local Plan 2007 (the Local Plan).

Other Material Considerations

Emerging Local Plan

2.34 The Central Lincolnshire Local Plan is a new, single Local Plan that will replace the current Local Plans of the City of Lincoln, West Lindsey and North Kesteven District Councils. This Local Plan is currently under preparation and is scheduled to be adopted in November 2016. A preliminary draft of the Local Plan has been subject to public consultation but is still at a very early stage of preparation.

Online Planning Practice Guidance for Renewable and Low Carbon Energy (the PPG)

2.35 In July 2013, the Planning Practice Guidance for Renewable and Low Carbon Energy was issued by the Coalition Government. This PPG was later replaced by the Online Planning Practice Guidance for Renewable and Low Carbon Energy.

2.36 This PPG replaced the Companion Guide to PPS22.

2.37 Paragraphs 14 – 24 of the PPG set out particular planning considerations for onshore wind developments including, for instance, landscape, noise, cultural heritage and residential amenity.

Energy Policy

2.38 The **Climate Change Act 2008** established a framework to develop an emissions reduction path, committing the UK to reducing greenhouse gas emissions by at least 89% by 2050 relative to 1990 levels. Following on from the introduction of this Act, the **UK Renewable Energy Strategy 2009** set out the UK Government's plan and vision for achieving the 15% renewable energy EU target. In order to meet these challenges, the Strategy suggests that renewable could provide more than 30% of our electricity consumption by 2020 and that more than two-thirds of that could come from on and offshore wind.

2.39 Since the original Heckington Fen application the UK has published the **UK Renewable Energy Roadmap**, published in July 2011, setting out a comprehensive action plan on the acceleration of the UK's deployment and use of renewable energy in order to meet the EU's legally binding target of 15% of all energy from renewable sources by 2020. The Roadmap is published annually, providing a yearly update on progress. The **2013 Update**, published in November 2013, described the good progress being made by the UK against the 15% target, and reconfirmed the UK's "*strong ambitions for renewable deployment to 2020 and beyond*".

2.40 In terms of the current pipeline for renewable energy, the Roadmap states at paragraph 2.21 that the government cannot be certain that all the projects in the pipeline will be progressed quickly enough and that:

"This is why the Overarching National Policy Statement for Energy states that there is an urgent need for new large scale renewable energy projects to come forward to ensure that we meet the 2020 target and wider decarbonisation aspirations."

2.41 Paragraph 2.22 states that onshore wind is the biggest single contributor to the pipeline.

2.42 The Roadmap concludes at paragraph 2.28 that:

"The pipeline of renewable electricity projects is healthy. Although, allowing for historic dropout rates, it puts us on track to deliver approximately 29GW of capacity by 2020, significant uncertainties remain and we still urgently need new renewable projects to come forward to ensure we meet the 15% target and longer term carbon reduction targets."

2.43 Alongside the Roadmap report, the Government also published: '**Planning Our Electric Future: a White Paper for secure affordable and low-carbon electricity**'. The White Paper sets out the Government's commitment to transform the UK's electricity system to ensure that future electricity supply is secure, low-carbon and affordable.

2.44 In December 2011, the Government published **The Carbon Plan: Delivering our low carbon future**. This report confirmed the Government's commitment to the decarbonisation of electricity generation and security of supply, setting out the UK's plan to reduce the UK's greenhouse gas emissions by at least 80% by 2050. It sets out the proposals and policies for meeting the UK's first four carbon budgets up to 2027. It notes that:

*"the power sector accounts for 27% of UK total emissions by source. By 2050, emissions from the power sector need to be close to zero."*³

2.45 Electricity is likely to be produced from three main low carbon sources, including "*renewable energy, particularly onshore and offshore wind farms*".³

2.46 The **UK Progress Report 2013**, issued by the Committee on Climate Change, described progress on meeting the Carbon budgets set out in the Climate Change Act 2008. The 2013 Progress Report confirmed that, in 2012, greenhouse gas emissions (economy wide) rose by 3.5%.

2.47 The **Annual Energy Strategy (AES)** fulfils the Coalition Government's commitment to present an annual statement of energy policy to Parliament. The Government's AES 2013, at paragraph 1.27, stated:

"Warming of the climate system is unequivocal and the latest assessment report from the Intergovernmental Panel on Climate Change provides an overwhelming and strengthened body of evidence that man-made greenhouse gas emissions are the dominant cause of recent warming."

2.48 In the Inspector's Report (November 2012) to the DECC it stated at paragraph 65 the following:

*"The proposed development would make a direct contribution to achieving renewable energy generation targets in the UK (such as the Renewable Energy Strategy objective of 30% of electricity from renewable sources by 2020) and would support Government policy to encourage more electricity generation from renewable sources. These targets have been confirmed by the Renewable Energy Roadmap of 2011. The Carbon Plan also confirms the commitment to decarbonisation of electricity generation and the security of supply. The proposal would be consistent with these objectives of Government policy."*⁴

³ *The Carbon Plan: Delivering our low carbon future, HM Government (December 2011): Executive Summary, Page 9.*

⁴ *Report to the Secretary of State for Energy and Climate Change (DPI/R2520/12/8), Philip Major (1 November 2012) (<https://www.oq.decc.gov.uk/EIP/pages/projects/EastHeckingtonInspectorsReport.pdf>)*

- 2.49 The original Heckington Fen scheme considered a 3MW candidate turbine with maximum dimensions of 80m to hub and 125m to blade tip and a rated capacity of up to 3.0MW. Calculations of the potential energy generation were based on a 90m rotor diameter and assumed an average UK wind farm performance. It was estimated that the original scheme would generate approximately 131 GWh per annum. Enough to meet the annual electricity needs of approximately 39,700 typical UK households and preventing the emission of 56,382 tonnes of CO₂ each year.⁵
- 2.50 The revised Heckington Fen scheme considers a range of turbines with a maximum 3.05MW candidate turbine with the same maximum blade tip height of 125m. Calculations of the potential energy generation are based on a 100m-103m rotor diameter and assume the site specific performance of each of the three candidate turbines. It is estimated that the revised scheme would generate between approximately 148GWh – 162GWh⁶. Enough to meet the annual electricity needs of between approximately 45,000 – 49,000 typical UK households⁷ under the old calculation (35,300 - 38,650 typical UK households) and preventing the emission of between approximately 63,650 – 69,650 tonnes of CO₂ each year.⁸
- 2.51 The revised scheme would therefore generate approximately 13% - 24% more electricity from the wind park than the original scheme. This application would maximise the renewable energy potential without increasing the overall tip height of the turbines or proposing a larger number of turbines.

⁵ 'Chapter 1: Introduction', Heckington Fen Wind Park Environmental Statement, 2011. Note that the homes equivalent figure was based on Ofgem's 'medium' UK domestic electricity consumption of 3,300kWh/pa.

⁶ Based on site specific wind data and taking into account expected transmission losses.

⁷ Old calculation is based on 'medium' UK domestic electricity consumption of 3,300kWh/pa as used by Ofgem. New calculation is based on the DECC's average unadjusted electricity consumption per UK household in 2013 of 4,192 kWh/year (Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/389227/Sub-national_electricity_consumption_statistics_2005_-_2013.xlsx)

⁸ This figure is derived using a carbon dioxide offset ratio of 430g carbon dioxide per kWh of wind generation. It should be noted that future changes in the power generating mix and fuel costs in the UK over the life of the wind park means this figure may change over time.