

Your Ref :
Our Ref :
Contact : Mark Williets
Email : mark_williets@n-kesteven.gov.uk



Keith Welford
Offshore Decommissioning Case Manager
Department for Business, Energy & Industrial Strategy
1 Victoria Street
London
SW1H 0ET

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Dear Keith

NATIONAL PLANNING POLICY FRAMEWORK

I refer to your letter of 20th December 2018 regarding the relevance and application of the revised NPPF (July 2018), including footnote 49, to the Variation Application and the weight, if any, that the Secretary of State should afford to these matters when determining the Variation Application under section 36C of the Electricity Act 1989.

In his Report to the Planning Committee of 29th November 2018 (attached), the Planning Officer noted the fundamental differences in those applications considered under section 36 of the Electricity Act 1989 by virtue of their scale and date of submission, with those submitted to and considered by North Kesteven District Council under the Town and Country Planning Act 1990. The legal advice obtained from Counsel and set out within the Report to Committee reflected this.

However the Written Ministerial Statement (HCWS42) of 18th June 2015 ("the WMS") clearly represented a significant change in material circumstances in the approach of national planning policy to the consideration of wind energy developments and this is now formally incorporated within the revised NPPF. The WMS, which took immediate effect, contained arrangements for both future and pending applications, and sought to fulfil earlier political commitments of giving local people the final say in wind farm applications.

It is of relevance to note that the reason why both the previous and current applications are being determined under the provisions of the Electricity Act 1989 is a consequence of the original submission (North Kesteven ref: 09/1067/S36) being made at the end of 2009, just prior to the new regime for consenting major energy infrastructure projects in England and Wales coming into force through the Planning Act 2008 on 1st March 2010.

Projects which would previously have been the subject of section 36 (of the Electricity Act 1989) consents (and the associated deemed planning permission pursuant to section 90 of the Town and Country Planning Act 1990), but for which the applications were not submitted before 1st March 2010, became subject to a development consent order under the provisions of the Planning Act 2008 instead.

Furthermore it should be noted that in 2016 a further revision to the consenting regime was introduced whereby onshore wind farms of over 50MW were removed from the Nationally Significant Infrastructure Projects (NSIP) process introduced by the 2008 Planning Act. All new proposals for onshore wind farm developments are now exclusively and only subject to the need for planning permission granted under the Town and Country Planning Act 1990 from the relevant local planning authority.

The ES supporting the original 2009 application under s.36 was not submitted until 2011, and as a result the proposed development remains to be considered, notwithstanding the two amendments in the legislative process since this date mentioned above, under the Electricity Act 1989 (as amended).

If a fresh application were made today at Heckington Fen for a wind farm of over 50MW in power output, it would without question be determined under the planning provisions of the CLLP and revised NPPF (paragraph 154 and footnote 49), now incorporating the WMS. Whereas the National Policy Statements would be a material consideration only.

Paragraph 1.2.1 of the Overarching National Policy Statement for Energy (EN-1) states:

“This NPS, and in particular the policy and guidance on generic impacts in Part 5, may be helpful to local planning authorities (LPAs) in preparing their local impact reports. In England and Wales this NPS is likely to be a material consideration in decision making on applications that fall under the Town and Country Planning Act 1990 (as amended). Whether, and to what extent, this NPS is a material consideration will be judged on a case by case basis.”

Mindful that the CLLP post-dated the publication of the WMS, the wording of the relevant subsection of Policy LP19 ‘Renewable Energy Proposals’ (copy attached), reflects that of footnote 49 of the revised NPPF. The policy wording is almost identical save for the requirement for wind energy proposals to also be within an area identified suitable for wind energy development within an adopted Neighbourhood Plan.

Whilst it is at the decision maker’s absolute discretion on how to apply this, it is helpful to draw the Secretary of State’s attention to the following:

- The CLLP makes no provisions for identifying areas suitable for wind energy development.
- There is no adopted Neighbourhood Plan for the area.
- The applicant has not undertaken any consultation pursuant to the provisions of the WMS, footnote 49 of the NPPF (or Policy LP19 of the CLLP).
- The District Council is aware that there are a significant number of outstanding objections from the local community to the application, and as such in our opinion as a statutory consultee the current variation application does not benefit from their support.

The Council’s Report to the Planning Committee (29th November 2018) acknowledges the materiality and primacy of the relevant legislation, policy and guidance, recognising that whilst a section 36 application also results in the ‘deemed’ grant of planning permission, it is primarily an application considered under the Electricity Act 1989 and they are not governed by the Town and Country Planning Act 1990 or policies relevant to determination under this. Paragraph 1.10 of the Committee Report acknowledges the hierarchy of policy considerations, starting with the NPS’s, then cascading to the National Planning Policy Framework (NPPF), then the development plan (the CLLP) and any other material considerations. This remains the case.

However, it is our opinion that the NPPF’s provisions are brought more to the fore in consideration of the proposed four stage testing programme set out in the applicant’s Radar Position Statement.

The Council addresses this matter in paragraph 2.36 of the Committee Report noting that the Phase 2B test stage may require the erection of a single 'test' turbine on the application site to assess the effectiveness and impact of stealth blades.

It is a matter of fact that, should a test turbine be required, it would now be considered under the Town and Country Planning Act 1990 where the provisions of the local plan (here the CLLP) would take primacy in the determination of that application, followed by the NPPF. The near-identical wording of CLLP policy LP19 and NPPF footnote 49 mean that the NPPF would likely be afforded a very high degree of weight in the determination of any such application.

The site is not allocated in the CLLP for wind energy development, there is no Neighbourhood Plan and, mindful of the degree of local community objection attracted by the original and current s.36 applications, it would not be unreasonable to anticipate similar local resistance. Whilst the Council cannot predetermine any such planning outcome, it nevertheless appears wholly unlikely on the basis of current local and national policy and guidance that any such application would be considered favourably. Indeed, it would appear to require a fundamental shift in governmental policy on wind energy and an associated re-writing of the NPPF (and subsequently the CLLP) or alternatively a very significant other material consideration to the contrary to foresee any likelihood of success.

Therefore, the Secretary of State may decide to have particular regard to paragraph 154/footnote 49 of the NPPF in consideration of the Radar Position Statement ("the RPS") and Radar Mitigation Scheme ("the RMS") (specifically the likelihood of the applicant being able to satisfy each of the sub-phases within the timeframe proposed and the time extension period currently being sought).

As the decision maker, it is clearly at the Secretary of State's discretion to rationalise the weight given to each policy consideration, and the District Council notes that as the application has been submitted under the provisions of section 36 and 36C of the Electricity Act 1989, which would result in the grant of deemed planning permission, there are differences to those applications for wind energy which would now fall to be determined under the Town and Country Planning Act 1990. The circumstances of this, as yet to be implemented consent, arise principally as a consequence of the original submission being made in 2009.

However, there has been a significant material change in national planning policy through the 2015 WMS and revised NPPF (directly reflected at the local level through policy LP19 of the CLLP) which seeks to fulfil the government's previous commitment to giving local people the final say on wind energy developments.

Subject to the Secretary of State's on-going consideration and ultimate discretion to determine the Variation Application, it appears to the Council that where the NPPF may assume a position of elevated primacy is in relation to the RPS and RMS and the discharge of condition 5 of the original S36 Consent; ergo the likelihood of the condition being satisfied where it relies upon any on-site testing. This gives rise to an unusual and possibly unprecedented need for the applicant to have to rely on a different consenting regime to discharge the RMS. As noted, the Council believes that a planning application for a test turbine would have a limited prospect of success. Moreover the outstanding procedures and processes for the discharge of the RMS, including that referred to above in terms of planning permission for a test turbine, are all set against the applicant's fixed implementation deadline (as proposed and as yet undetermined) of 8 February 2023. It seems in the opinion of the Council that the deliverability of the project in this context is reasonably in doubt.

In summary, with the significant shift in both national and local planning policy in respect of wind energy developments and the inherent issues in discharging the RMS, the Council respectfully requests that the Secretary of State very carefully considers the weight afforded to planning policy against the provisions of the NPS in determining this case.

Yours sincerely

A handwritten signature in black ink, appearing to read 'M. Williets', written in a cursive style.

Mark Williets
Development Manager
Development Management