

Mr Donald Leaver  
Senior Environment and Consents Officer  
European Marine Energy Centre Ltd  
The Charles Clouston Building  
O.R.I.C.  
Back Road  
Stromness  
Orkney  
KW16 3AW

Our Reference: EMEC/FW/S36

14 March 2023

Dear Mr Leaver,

**APPLICATION UNDER SECTION 36C OF THE ELECTRICITY ACT 1989 TO VARY THE CONSENT GRANTED UNDER SECTION 36 OF THE ELECTRICITY ACT 1989 ON 22 MARCH 2016 TO CONSTRUCT AND OPERATE THE EUROPEAN MARINE ENERGY CENTRE FALL OF WARNESS TIDAL TEST SITE, ADJACENT TO THE ISLAND OF EDAY, ORKNEY**

I refer to the application to vary the consent for the European Marine Energy Centre, Fall of Warness tidal test site (“the Development”). This Application (“the Variation Application”) was made by European Marine Energy Centre Ltd (“the Company”) on 22 August 2022 for:

- a) a variation under section 36C of the Electricity Act 1989 (“the Electricity Act”) to the consent granted under section 36 (“s.36”) of the Electricity Act on 22 March 2016 (“the Existing Consent”) for the construction and operation of the Development, located adjacent to the Island of Eday, Orkney.

**This letter contains the Scottish Ministers’ decision to vary the Existing Consent.**

**1. Nature of the Variation Sought**

1.1 The Variation Application seeks to vary the Existing Consent granted on 22 March 2016 to allow the following:

- Vary Annex 2 to extend the Existing Consent for a period of 3 years.

## **2. Environmental Impacts**

- 2.1 The Scottish Ministers are satisfied that the Variation Application will not have significant effects on the environment.
- 2.2 The Scottish Ministers have considered the following:
- Regulation 63 of the Conservation of Habitats and Species Regulations 2017; and
  - the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017 (“the 2017 EW Regulations”).
- 2.3 The Scottish Ministers do not consider that the proposed changes within the Variation Application will alter the conclusions of the Environmental Statement supporting the application for s.36 consent in December 2014 (“the Original Application”).
- 2.4 In accordance with the 2017 EW Regulations, the Scottish Ministers did not deem it necessary for a new Environmental Impact Assessment report to be submitted in support of the Variation Application.
- 2.5 An appropriate assessment under the Conservation of Habitats and Species Regulations 2010 and the Conservation (Natural Habitats, &c.) Regulations 1994 was completed in 2015 in respect of the application for the Existing Consent (“the 2015 AA”). The Scottish Ministers have reviewed the 2015 AA and are content that the conclusions remain valid in respect of the Variation Application. Since the 2015 AA was completed, the North Orkney and Scapa Flow SPAs have been designated. The Scottish Ministers therefore completed an assessment for these sites and concluded that there would be no adverse effect on the integrity of the sites from the Variation Application alone or in combination with other plans and projects.

## **3. Consultation**

- 3.1 Regulation 4 of the Electricity Generating Stations (Applications for Variation of Consent) (Scotland) Regulations 2013 (“the Variation Regulations”) provides that an applicant must publish a variation application relating to an offshore generating station on a website, serve a copy of the variation application on the planning authority, and also advertise by public notices in specified publications.
- 3.2 In line with Regulation 4 the Company published the Variation Application documentation on its website and served notice of the Variation Application to the planning authorities consulted on the Original Application, in this case Orkney Islands Council. Public notices were placed in the Orcadian, Herald and Edinburgh Gazette for two weeks and the Lloyds List and Fishing News for one week.
- 3.3 Marine Scotland – Licensing Operations Team (“MS-LOT”), on behalf of the Scottish Ministers, consulted a wide range of relevant organisations on the Variation Application including: Orkney Islands Council (“OIC”), NatureScot,

Scottish Environment Protection Agency (“SEPA”), the Maritime and Coastguard Agency (“MCA”), Historic Environment Scotland (“HES”) and the Northern Lighthouse Board (“NLB”). Scottish Ministers also placed the Variation Application documentation on the [Marine Scotland Information](#) website alongside the Existing Consent.

- 3.4 A number of organisations did not provide a response. In the case of no response, MS-LOT notified the relevant consultees that a “nil response” would be assumed.
- 3.5 No objections to the Variation Application were raised by any consultees.
- 3.6 The following consultees provided comment on the Variation Application.
- 3.7 **British Telecom (“BT”)** confirmed that the Variation Application was studied with respect to BT point-to-point microwave radio links and advised that an existing point-to-point microwave radio link passes just inside the southern part of the site. BT advised that consideration of this should be made to any devices to be constructed in that area.
- 3.8 **HES** confirmed that no such designated features would be affected by the Variation Application and as such had no comment to make.
- 3.9 **MCA** confirmed it had no objection to the Variation Application on the basis of all maritime safety legislation and relevant MCA guidelines being adhered to and that a site-wide Navigational Risk Assessment is reviewed every 2 years, alongside an NRA for each individual project at the site.
- 3.10 **Ministry of Defence** had no objection to the Variation Application.
- 3.11 **NatureScot** commented that in the original Appropriate Assessment for the European Marine Energy Centre Fall of Warness tidal site in 2015, the then draft North Orkney and Scapa Flow Special Protection Areas (“SPAs”) were not included as they were not subject to policy protection at that time; however this protection did commence in 2016. NatureScot confirmed no likely significant effects with respect to either Scapa Flow or North Orkney SPAs arising from the proposed variation to the s.36 consent. NatureScot confirmed no other changes to designated sites, natural heritage interests or development projects in the vicinity of the Development which could affect the predicted potential impacts.
- 3.12 **NLB** had no objection to the Variation Application.
- 3.13 **OIC** confirmed that it had no comments to make on the Variation Application. Furthermore, no concerns were raised by the OIC archaeologist on Variation Application with regard to historic environment assets.
- 3.14 **OIC Harbour Authority** confirmed no issues with the Variation Application.
- 3.15 **Royal Yachting Association Scotland** confirmed it had no comment to make on the Variation Application.

- 3.16 **Scottish Fishermen's Federation ("SFF")** confirmed it had no concerns on the Variation Application.
- 3.17 **SEPA** had no site-specific comments to make on the Variation Application, highlighting its standing advice.
- 3.18 **Sport Scotland** confirmed a nil response following correspondence with the RYA Scotland.
- 3.19 **UK Chamber of Shipping** submitted a nil return to the Variation Application.

#### 4. **Public Representations**

- 4.1 No representations were received from members of the public in relation to the Variation Application.

#### 5. **Advice from Third Parties**

- 5.1 **Marine Scotland Science** provided advice in relation to commercial fisheries and advised that as the Variation Application will not involve a change in activities or change in footprint of the site, it would not alter the potential impacts to commercial fisheries previously identified in relation to the Original Application.
- 5.2 **Transport Scotland** noted that as there are no trunk roads in the vicinity of the site, it was satisfied that the Variation Application would have no impact on the trunk road network and therefore Transport Scotland had no objection.

#### 6. **The Scottish Ministers' Determination**

- 6.1 The Scottish Ministers have considered the Variation Application documentation, all responses from consultees and advice from Third Parties. Having granted consent for the Development on 22 March 2016 and provided their reasons for doing so in the decision letter associated with that consent, and being satisfied that the changes proposed in the Variation Application do not fundamentally alter the nature or scale of the Development, the Scottish Ministers are content to vary the Existing Consent.
- 6.2 The Scottish Ministers consider that the proposed variation is appropriate, having had regard to the variation proposed, the reasons for the variation, and the views of consultees.
- 6.3 Accordingly, the Scottish Ministers hereby vary the Existing Consent as set out in the table below.

Annex	Variation
<p>In Annex 2 of the European Marine Energy Centre, Fall of Warness Tidal Centre s.36 Consent</p>	<p>for:</p> <ol style="list-style-type: none"> <li>The consent is for a period from the date this consent is granted until the date occurring 7 years after the date of consent.</li> </ol> <p><u>Reason: To define the duration of the consent.</u></p> <p>Substitute:</p> <ol style="list-style-type: none"> <li>The consent is for a period from the date this consent is granted until the date occurring 10 years after the date of consent.</li> </ol> <p><u>Reason: To define the duration of the consent</u></p>
<p>In Annex 2 of the European Marine Energy Centre, Fall of Warness Tidal Centre s.36 Consent</p>	<p>insert:</p> <ol style="list-style-type: none"> <li>The Company must comply with the risk controls identified within the Navigational Risk Assessment (“NRA”) for the Development. The NRA must be reviewed every two years by the Company in consultation with the Maritime and Coastguard Agency (“MCA”).</li> </ol> <p><u>Reason: To mitigate navigational risks to sea users</u></p>
<p>In Annex 3 of the European Marine Energy Centre, Fall of Warness Tidal Centre s.36 Consent</p>	<p>for:</p> <p>“the Company” means The European Marine Energy Centre Limited, Old Academy Business Centre, Back Road, Stromness, ORKNEY, KW16 3AW Registration Number: SC249331.</p> <p>Substitute:</p> <p>“the Company” means The European Marine Energy Centre Limited, Old Academy Business Centre, Back Road, Stromness, ORKNEY, KW16 3AW Registration Number: SC249331, or such other person for the time being entitled to the benefit of the consent under section 36 of the Electricity Act 1989.</p>

6.3.1 Revised copies of Annexes 1, 2 and 3 of the s.36 consent for the Development are issued together with this decision letter.

- 6.3.2 Copies of this letter have been sent to the relevant onshore planning authority: Orkney Islands Council. This letter has also been published on the [Marine Scotland Information website](#).
- 6.3.3 The Scottish Ministers' decision is final, subject to the right of any aggrieved person to apply to the Court of Session for judicial review. Judicial review is the mechanism by which the Court of Session supervises the exercise of administrative functions, including how the Scottish Ministers exercise their statutory function to determine applications for variation of a s.36 consent.
- 6.3.4 Your local Citizens' Advice Bureau or your solicitor will be able to advise you about the applicable procedures.

Yours sincerely,

Gayle Holland  
Marine Scotland Licensing Operations Team  
A member of the staff of the Scottish Government

## **DEFINITIONS AND GLOSSARY OF TERMS - In the decision letter attached at Annex C**

“BT” means British Telecom;

“HES” means Historic Environment Scotland;

“MSS” means Marine Scotland Science;

“MCA” means Maritime and Coastguard Agency;

“MS-LOT” means Marine Scotland Licensing Operations Team;

“NLB” means Northern Lighthouse Board;

“OIC” means Orkney Islands Council;

SEPA” means The Scottish Environment Protection Agency;

“SFF” means Scottish Fishermen’s Federation;

“SPAs” means Special protection Areas;

“s.36” means section 36;

(“the 2015 AA”) means the appropriate assessment completed in 2015 in respect of the Existing Consent;

“the 2017 EW Regulations” means the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017;

“the Company” means The European Marine Energy Centre Ltd (The Charles Clouston Building, O.R.I.C., Back Road, Stromness, Orkney KW16 3AW)

“the Development” means the European Marine Energy Centre Fall of Warness tidal test site, adjacent to the Island of Eday, the Orkney Islands;

“the Electricity Act” means the Electricity Act 1989;

“the Existing Consent” means the s.36 consent granted by the Scottish Ministers in favour of the Company on 22 March 2016;

“the Original Application” means the application submitted to the Scottish Ministers on 19 December 2014 for a s.36 consent by the Company;

“the Variation Application” means the application to vary the Existing Consents submitted to the Scottish Ministers on 22 August 2022 by the Company;

“the Variation Regulations” means the Electricity Generating Stations (Applications for Variation of Consent (Scotland) Regulations 2013;

## **ANNEX 1 of the European Marine Energy Centre, Fall of Warness Tidal Test Centre Consent**

### **DESCRIPTION OF THE DEVELOPMENT**

The Development, located as shown on Figure 1 below, shall have a permitted generating capacity of up to 10 MW and shall comprise a tidal-powered electricity generator test station at the Fall of Warness, adjacent to the Island of Eday, Orkney, including a maximum potential of:

1. 18 rotors; on
2. 12 tidal energy devices; across
3. 9 berths
4. With an open rotor diameter of 25 m; or
5. an appropriately substituted annular blade diameter; and
6. a minimum depth of 2.5 m clearance from the sea surface.

all as specified in the Application imposed by the Scottish Ministers. References to “the Development” in this consent shall be construed accordingly.



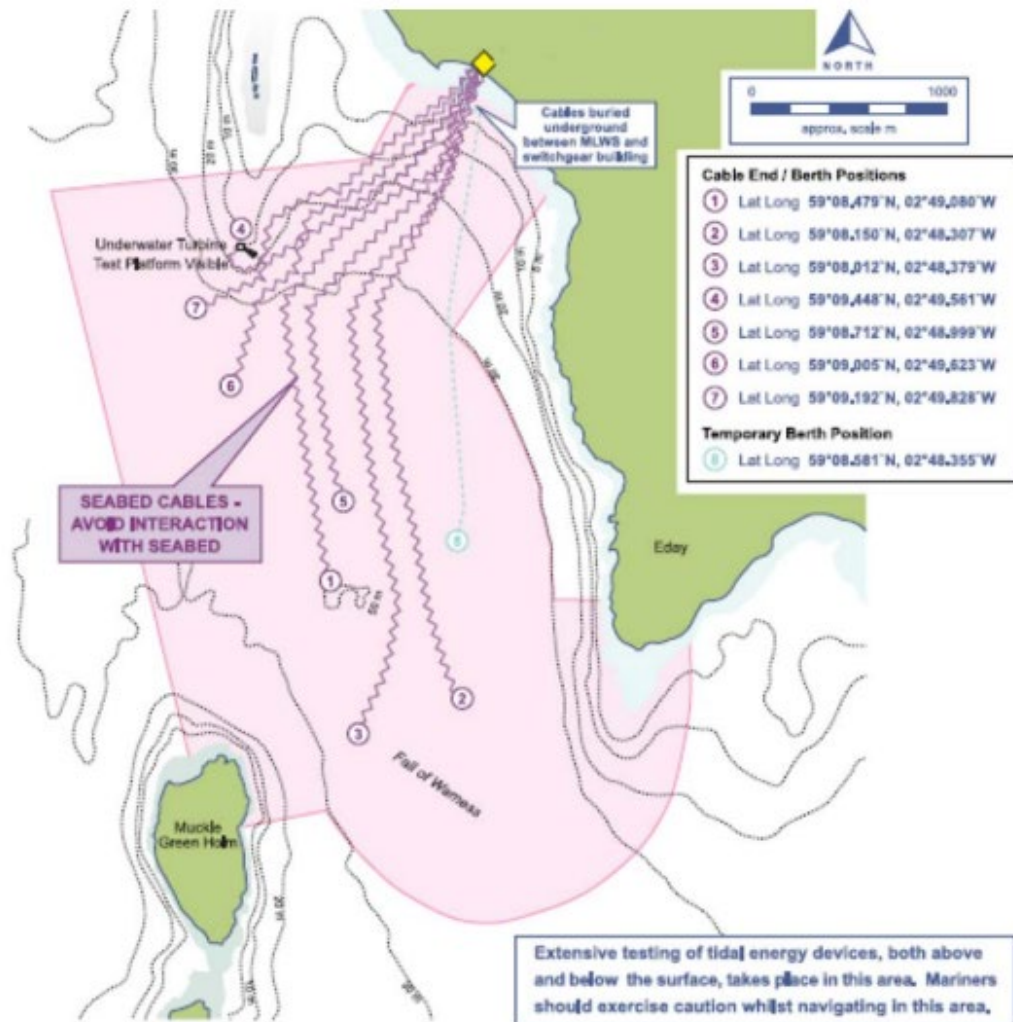


Figure 1. Development Location

## **ANNEX 2 of the European Marine Energy Centre, Fall of Warness Tidal Test Centre Consent**

### **PART 1 – CONDITIONS OF THE SECTION 36 CONSENT**

The consent granted in accordance with S36 of the Electricity Act 1989 is subject to the following conditions:

1. The consent is for a period from the date this consent is granted until the date occurring 10 years after the date of consent.

**Reason: To define the duration of the consent.**

2. Where the Secretary of State has, following consultation with the Scottish Ministers, given notice requiring the Company to submit to the Secretary of State a Decommissioning Programme, pursuant to section 105(2) and (5) of the Energy Act 2004, then within 6 months from the date of this consent, the Company must submit to the Secretary of State a Decommissioning Programme in compliance with that notice.

**Reason: To ensure that a decommissioning plan is submitted to the Secretary of State where the Secretary of State has, following consultation with the Scottish Ministers, so required.**

3. The Company is not permitted to assign this consent without the prior written authorisation of the Scottish Ministers. The Scottish Ministers may grant (with or without conditions) or refuse such authorisation as they, at their own discretion, see fit. The consent shall not be capable of being assigned, alienated or transferred otherwise than in accordance with the foregoing procedure. The Company must send the Scottish Ministers a certified copy of the assignation no later than 14 days of written confirmation from the Scottish Ministers of an assignation being granted.

**Reason: To safeguard the obligations of the consent if transferred to another company.**

4. If any serious health and safety incident occurs on the Site requiring the Company to report it to the Health and Safety Executive, then the Company must also notify the Scottish Ministers of the incident within 24 hours of the Company becoming aware of the incident occurring.

In the event of any breach of any health and safety or environmental obligations relating to the Development during the period of this consent, then the Company must provide written notification of the nature and timing of the incident to the Scottish Ministers, including confirmation of remedial measures taken and/or those which are proposed to be taken to rectify the breach, within 24 hours of the incident occurring.

**Reason: To keep the Scottish Ministers informed of any such incidents which may be in the public interest.**

5. The Development must be constructed and operated in accordance with the terms of the Application and related documents, including the accompanying ES and Annex 1 of this letter, except in so far as amended by the terms of this S36 consent.

**Reason: To ensure that the Development is carried out in accordance with the approved details.**

6. As far as reasonably practicable, the Company must, on being given reasonable notice by the Scottish Ministers (of at least 72 hours), provide transportation to, and from, the Site for any persons authorised by the Scottish Ministers to inspect the Site.

**Reason: To ensure access to the Site for the purpose of inspection.**

7. The Company must, prior to any alterations being made to the positions of any of the berths, provide notification of any such alterations to the United Kingdom Hydrographic Office ("UKHO") for nautical charting purposes.

**Reason: For navigational safety.**

8. The Company must comply with the risk controls identified within the Navigational Risk Assessment ("NRA") for the Development. The NRA must be reviewed every two years by the Company in consultation with the Maritime and Coastguard Agency ("MCA").

**Reason: To mitigate navigational risks to sea users**

## **Annex 3 of the European Marine Energy Centre, Fall of Warness Tidal Test Centre Consent**

### **DEFINITIONS AND GLOSSARY OF TERMS**

In this decision letter, to include in Annexes 1 and 2:

“AA” means Appropriate Assessment.

“the Application” means the Application letter and Environmental Statement submitted to the Scottish Ministers by The European Marine Energy Centre Ltd, on 19th December 2014.

“the Company” means The European Marine Energy Centre Limited, Old Academy Business Centre, Back Road, Stromness, ORKNEY, KW16 3AW Registration Number: SC249331, or such other person for the time being entitled to the benefit of the consent under section 36 of the Electricity Act 1989.

“Construction” means as defined at section 64(1) of the Electricity Act 1989, read with section 104 of the Energy Act 2004.

“CRM” means Collision Risk Modelling.

“Decommissioning Programme” means the programme for decommissioning the relevant object, to be submitted by the Company to the Secretary of State under section 105(2) of the Energy Act 2004 (as amended).

“the Development” means the European Marine Energy Centre at the Fall of Warness, adjacent to the Island of Eday, the Orkney Islands, as described in Annex 1.

“EIA” means Environmental Impact Assessment.

“EPS” means European Protected Species.

“EA” means the Environmental Appraisal submitted to the Scottish Ministers by The European Marine Energy Centre Ltd on 19th December 2014 as part of the Application as defined above.

“ES” means the Environmental Statement and supporting Environmental Appraisal document submitted to the Scottish Ministers by The European Marine Energy Centre Ltd on 19th December 2014 as part of the Application as defined above.

“HRA” means Habitats Regulations Appraisal.

“LAT” means Lowest Astronomical Tide.

“MHWS” means Mean High Water Springs.

“MLWS” means Mean Low Water Springs.

“MW” means megawatt.

“nm” means nautical mile.

“NRA” means Navigational Risk Assessment.

“the Planning Authority” means Orkney Islands Council.

“PLI” means Public Local Inquiry.

“PMF” means Priority Marine Features.

“REIF” means Renewable Energy Investment Fund.

“S36” means S36 under the Electricity Act 1989.

“SAC” means Special Area of Conservation.

“Scottish marine area” has the meaning given in section 1, as read with section 2, of the Marine (Scotland) Act 2010.

“the Site” means the area shown in Figure 1, attached to this consent at Annex 1.

“SPA” means Special Protection Area.

“TEC” means Tidal Energy Converter.

### **Organisations**

“EU” means European Union.

“MCA” means Maritime & Coastguard Agency.

“MS-LOT” means Marine Scotland Licensing Operations Team.

“MSS” means Marine Scotland Science.

“NERC” means Natural Environment Research Council.

“NLB” means The Northern Lighthouse Board.

“OIC” means Orkney Islands Council.

“RSPB Scotland” means The Royal Society for the Protection of Birds Scotland.

“RYA” means The Royal Yachting Association.

“SCOS” means Special Committee on Seals.

“SFF” means Scottish Fishermen’s Federation.

“SFO” means Scottish Fishermen’s Organisation.

“SEPA” means The Scottish Environment Protection Agency.

“SNH” means Scottish Natural Heritage.

“UKHO” means United Kingdom Hydrographic Office.

“WDC” means Whale and Dolphin Conservation.

### **Plans, Programmes and Statements**

“EMMP” means Environmental Mitigation and Monitoring Plan.

“ICZM” means Integrated Coastal Zone Management.

“NPF3” means Scotland’s National Planning Framework 3.

“NSP” means Navigational Safety Plan.

“OLDP” Orkney Local Development Plan.

“PEMP” means Project Environmental Monitoring Programme.

“SPP” means Scottish Planning Policy.

“the Statement” means The UK Marine Policy Statement 2011.

“VMP” means Vessel Management Plan.

### **Legislation**

“Wild Birds Directive” means Council Directive 79/409/EEC of 2nd April 1979 on the conservation of wild birds, as amended and as codified by Directive 2009/147/EC of the European Parliament and of the Council of 30th November 2009.

“the Electricity Act” means the Electricity Act 1989 (as amended).

“Habitats Directive” means Council Directive 92/43/EEC of 21st May 1992 on the conservation of natural habitats and wild fauna and flora (as amended).

“the Habitats Regulations” means the Conservation (Natural Habitats, & c.) Regulations 1994 (as amended) and the Offshore Marine Conservation (Natural Habitats, & c.) Regulations 2007 (as amended).

“the 1990 Regulations” means the Electricity (Applications for Consent) Regulations 1990 (as amended).

“the 1994 Regulations” means the Conservation (Natural Habitats, & c.) Regulations 1994 (as amended).

“the 2000 Regulations” means the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2000 (as amended).

“the 2007 Regulations” means the Offshore Marine Conservation (Natural Habitats, & c.) Regulations 2007 (as amended).

“the 2010 Act” means Marine (Scotland) Act 2010.

“the 1999 Order” means The Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 (“the 1999 Order”).

“the 2010 Regulations” means the Conservation of Habitats and Species Regulations 2010 (as amended).

“the 2009 Act” means the Marine and Coastal Access Act 2009 (as amended).