

**Cabinet Secretary for Net Zero, Energy and Transport**

**APPLICATION UNDER SECTION 36C OF THE ELECTRICITY ACT 1989 TO VARY THE CONSENTS GRANTED UNDER SECTION 36 OF THE ELECTRICITY ACT 1989 TO CONSTRUCT AND OPERATE THE EUROPEAN MARINE ENERGY CENTRE, FALL OF WARNESS TIDAL TEST SITE**

**PRIORITY AND PURPOSE**

1. Routine priority; however the European Marine Energy Centre Ltd (“the Company”) requires a decision on the application prior to the expiry date of the current section 36 (“s.36”) consent on 22 March 2023.
2. To seek your approval to vary the s.36 consent granted on 22 March 2016 to construct and operate the European Marine Energy Centre (“EMEC”) Fall of Warness tidal test site (“the Development”).

**RECOMMENDATION**

3. Recommends that you: agree to vary the s.36 consent for the Development, in accordance with s.36C of the Electricity Act 1989 and the Electricity Generating Stations (Application for Variation of Consent) (Scotland) Regulations 2013 (“the Variation Regulations”).

**CONTEXT AND ISSUES**

4. Consent for the Development was granted on 22 March 2016 under s.36 of the Electricity Act 1989 (“the Existing Consent”). An application was made by the Company on 22 August 2022 to vary the Existing Consent as follows (“the Variation Application”):

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

5. Prior to receiving the Variation Application, the Scottish Ministers adopted a screening opinion on 20 July 2022 under the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017 (“the 2017 EW Regulations”), which concluded that the Variation Application does not require environmental impact assessment (“EIA”) (as defined in the 2017 EW Regulations).

**OPTIONS CONSIDERED AND ADVICE**

6. Under s.36C(4) of the Electricity Act 1989, the Scottish Ministers will exercise judgement as to whether any variation sought is appropriate, having regard (in particular) to:

- (a) the applicant's reasons for seeking the variation;

- (b) the variations proposed;
- (c) any objections made to the proposed variations, the views of consultees and the outcome of any public inquiry.

7. The Variation Application seeks to extend the Existing Consent for a period of 3 years.

8. The Company states the following rationale for the proposed variation:

*“To facilitate further technology development of this sector, EMEC are currently progressing work on developing a new EIA and s.36 consent application to expand their electrical capacity to 50 megawatts and expand the project envelope parameters. The extension to the end date of the Existing Consent will allow continued use of the Development for developers in the tidal sector in the interim period.”*

9. The variation proposed in the Variation Application does not fundamentally alter the character or scale of the Development, and there will be no changes to the boundary of the Development.

10. Officials consider that you can be satisfied that, in this circumstance, the changes proposed are appropriate to be authorised (having regard to the variation proposed, the reasons for the variation, and the views of consultees) by means of the variation procedure in line with the Electricity Act 1989, the Variation Regulations and the Scottish Government Applications for Variation of Section 36 Consents Guidance published in May 2019.

## **ASSESSMENT OF OPTIONS**

11. 16 representations concerning the Variation Application were received during the consultation period. No formal objections were raised and a full summary of the consultation responses and how they have been addressed is detailed in Annex A.

12. Before determining a variation application, per the Electricity Act 1989 and the Variation Regulations, Scottish Ministers may cause a public inquiry to be held if it is deemed appropriate to do so. Having considered the representations received and all other material considerations, officials recommend that it is appropriate not to cause a public inquiry.

## **BUTE HOUSE AGREEMENT IMPLICATIONS**

13. Approval of the Variation Application is related to the commitment in the Bute House Agreement to manage the potential impacts on marine biodiversity alongside the growth of the marine renewables and offshore wind sectors in a proportionate manner.

## **FINANCIAL AND LEGAL CONSIDERATIONS**

14. The Variation Application was made in accordance with the Electricity Act 1989 and the Variation Regulations. The legislative requirements of the Variation

Regulations regarding publication, notification and consultation have been met. A validation of the appropriate assessment undertaken in respect of the Existing Consent per the Conservation of Offshore Marine Habitats and Species Regulations 2017 has been undertaken which can be found at Annex D. Further information on the legislative requirements and how these have been satisfied can be found in Annex A.

15. This submission has been informed by appropriate advice from Scottish Government Legal Directorate. The legislative action falls within the competence of the Scottish Government and is a legally appropriate course of action to take.

## **QUALITY ASSURANCE**

16. This submission has been approved by Jo Blewett, Deputy Director, Marine Scotland

## **CONCLUSION AND NEXT STEPS**

17. Should the Cabinet Secretary choose to approve the Variation Application, a draft decision notice is attached at Annex C which Marine Scotland – Licensing Operations Team (“MS-LOT”) will finalise and issue to the Company on the Cabinet Secretary’s behalf.

18. In order for the determination process to be fully open and transparent, MS-LOT recommends that this submission is published on [Marine Scotland Information website](#), alongside the Existing Consent and the Variation Application documentation.

**Rebecca Bamlett**

Marine Scotland Licensing Operations Team

## **LIST OF ANNEXES**

- ANNEX A** Background and Consultation
- ANNEX B** Legislative Requirements
- ANNEX C** Draft Decision Notice
- ANNEX D** Validation of Appropriate Assessment

Copy List:	For action	For information		
		Portfolio interest	Constituency interest	General awareness
Cabinet Secretary for Net Zero, Energy and Transport	x			
Cabinet Secretary for Rural Affairs and Islands		x		
Minister for Environment, Biodiversity and Land Reform		x		

DG Economy  
 DG Net Zero  
 Director of Marine Scotland  
 Mike Palmer, Deputy Director Marine Scotland  
 David Pratt, Marine Scotland  
 Zoe Crutchfield, Marine Scotland  
 Gayle Holland, Marine Scotland  
 John Mckay, Marine Scotland  
 Emma Lees, Marine Scotland  
 Mark Christie, Marine Scotland  
 Paul Smith, Marine Scotland  
 Jared Wilson, Marine Scotland  
 Allan Gibb, Marine Scotland  
 Kersti Berge, Energy Directorate  
 Andrew Hogg, Energy Directorate  
 David Stevenson, Energy Directorate  
 Stewart Cunningham, Legal Directorate  
 Joanna Dingwall, Legal Directorate  
 Alison Presly, Legal Directorate  
 Angela Lawson, Legal Directorate  
 Joan McHutchison, Legal Directorate  
 David Moffat, Legal Directorate  
 Hannah Matthew, Legal Directorate  
 John McFarlane, Special Advisor  
 Communications – Net Zero and Rural Affairs  
 Gillian Provan – Communications

## 1. **ANNEX A Background and Consultation**

### 1.1 **Background Information**

1.1.1 On 22 March 2016, the Scottish Ministers granted consent under section 36 (“s.36”) of the Electricity Act 1989 (“the Electricity Act”) to construct and operate the European Marine Energy Centre Fall of Warness tidal test site (“the Development”) located in Orkney (“the Existing Consent”).

1.1.2 On 22 August 2022, the Scottish Ministers received an application from the European Marine Energy Centre Ltd (“the Company”), under section 36C(1) of the Electricity Act in accordance with the Electricity Generating Stations (Applications for Variation of Consent) (Scotland) Regulations 2013 (“the Variation Regulations”), to vary its Existing Consent (“the Variation Application”). The Variation Application seeks to extend the expiry date of the Existing Consent by a period of 3 years.

1.1.3 The Company stated that the proposed extension will allow the continued development of a new s.36 consent application to expand their electrical capacity to 50 megawatts (“MW”) and furthermore, expand the project envelope parameters. The extension to the expiry date of the Existing Consent will allow continued use of the Development for developers in the tidal sector in the interim period.

### 1.2 **Application Documentation**

1.2.1 The Company submitted the following Variation Application documentation, which was issued for consultation on 31 October 2022:

- An application to vary the Existing Consent.

1.2.2 Full details of the consultation undertaken as part of the process are set out below.

### 1.3 **Application publication, notification and consultation**

1.3.1 In accordance with Regulation 4 of the Variation Regulations, the Company:

- Placed the Variation Application documentation on the [application website](#) alongside a link to the Existing Consent;
- Served copies of the Variation Application to Orkney Islands Council; and
- Placed public notices relating to the Variation Application in the Orcadian, Herald and Edinburgh Gazette for two weeks and in Lloyds List and Fishing News for one week.

1.3.2 Marine Scotland - Licensing Operations Team (“MS-LOT”) consulted a wide range of interested parties on the Variation Application including the relevant

## ANNEX A Background and Consultation

local authority (in this case Orkney Islands Council (“OIC”)), NatureScot, Scottish Environment Protection Agency (“SEPA”), and the Historic Environment Scotland (“HES”), and placed the Variation Application documentation on the [Marine Scotland Information](#) website alongside the Existing Consent.

### 1.4 Summary of consultation process

1.4.1 Several consultees had no comments to make, or did not provide a response to the consultation. In the case of no response, MS-LOT notified the relevant consultees that a “nil response” would be assumed.

1.4.2 Consultees and the local authority did not raise any formal objections, however, comments were submitted. Summaries of the comments received from the consultees are presented in section [1.5](#). Section [1.7](#) lists all consultees who did not respond to the consultation.

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

1.4.4 Copies of the full consultation responses received have been made available on the EMEC page of the [Marine Scotland Information website](#).

### 1.5 Summary of consultation responses

1.5.1 No objections to the Variation Application were raised by any consultees.

#### 1.5.2 British Telecom (“BT”)

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.

#### 1.5.3 Historic Environment Scotland (“HES”)

HES confirmed that no such designated features would be affected by the Variation Application and as such had no comment to make.

#### 1.5.4 Maritime & Coastguard Agency (“MCA”)

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 (“NRA”) is reviewed every 2 years, alongside an NRA for each individual project at the site.

#### 1.5.5 Ministry of Defence (“MOD”)

The MOD had no objection to the Variation Application.

## ANNEX A Background and Consultation

### 1.5.6 NatureScot

NatureScot commented that in the original Appropriate Assessment for the EMEC 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.

### 1.5.7 Northern Lighthouse Board (“NLB”)

The NLB confirmed it had no objection to the Variation Application.

### 1.5.8 OIC

OIC confirmed that it had no comments to make on the Variation Application. Furthermore, no concerns were raised by the OIC archaeologist on the Variation Application with regard to historic environment assets.

### 1.5.9 OIC Harbour Authority

OIC Harbour Authority confirmed no issues with the Variation Application.

### 1.5.10 Royal Yachting Association Scotland (“RYA Scotland”)

RYA Scotland confirmed it had no comment to make on the Variation Application.

### 1.5.11 Scottish Fishermen’s Federation (“SFF”)

SFF confirmed it had no concerns with the Variation Application.

### 1.5.12 SEPA

SEPA had no site-specific comments to make on the Variation Application, highlighting its standing advice.

### 1.5.13 Sport Scotland

Sport Scotland confirmed a nil response following correspondence with the RYA Scotland.

### 1.5.14 UK Chamber of Shipping

The UK Chamber of Shipping submitted a nil return to the Variation Application.

## ANNEX A Background and Consultation

### 1.6 Advice from third parties

MS-LOT sought advice from Marine Scotland Science and Transport Scotland.

#### 1.6.1 Marine Scotland Science (“MSS”)

MSS 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 Existing Consent.

#### 1.6.2 Transport Scotland

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.

### 1.7 Nil responses

1.7.1 The following consultees did not respond to the consultation and therefore nil responses have been assumed:

Crown Estate	District Salmon Fishery Board
Inshore Fishery Group	Inshore Fishery Group – Orkney
Marine Safety Forum	Marine Scotland Compliance
North Link Ferries	Orkney Ferries
Orkney Marinas	Orkney Trout Fishing Association
Orkney Fisheries Association	Orkney Fisherman’s Society
Royal Society for the Protection of Birds (Scotland)	Scottish Canoe Association
Scottish Creel Fisherman’s Federation	Scottish Fisherman’s Organisation
Scottish Surfing Federation	Scottish Wildlife Trust
Surfers Against Sewage	Transport Scotland (Ports and Harbours)
Visit Scotland	Whale and Dolphin Conservation
North Ronaldsay Community Council	Sanday Community Council
Papa Westray Community Council	Westray Community Council
Eday Community Council	Stronsay Community Council



## ANNEX A Background and Consultation

Shapinsay Community Council	Rousay, Egilsay, Wyre and Gairsay Community Council
St Andrews and Deerness Community Council	Evie and Rendell Community Council
Kirkwall and St Ola Community Council	Holm Community Council
Birsay Community Council	Harray and Sandwick Community Council
Firth and Stenness Community Council	Orphir Community Council
Flotta Community Council	South Ronaldsay and Burray Community Council
Stromness Community Council	Graemsay, Hoy and Walls Community Council

## 2. ANNEX B Legislative Requirements

### 2.1 Electricity Act Consenting and Variations

- 2.1.1 Persons holding a section 36 consent (“s.36”) under the Electricity Act 1989 (“the Electricity Act”) may apply to the appropriate authority (in Scotland this is the Scottish Ministers) for a variation of their s.36 consent under section 36C of the Electricity Act.
- 2.1.2 The application procedure for varying a s.36 consent is set out in the Electricity Generating Stations (Applications for Variation of Consent) (Scotland) Regulations 2013 (“the Variation Regulations”).
- 2.1.3 The variation process is designed to apply to projects that have been consented under s.36, concerning the construction, extension or operation of electricity generating stations. This process is applied when the holder of a s.36 consent wishes to change aspects of their s.36 consent. The Scottish Government Applications for Variation of S.36 Consents Guidance (published in May 2019) (“the Variation Guidance”) considers that the process is not intended as a way of authorising any change in a developer’s plans that would result in a generating station that would be fundamentally or substantially different in terms of scale and/or nature from what is authorised by the existing consent.
- 2.1.4 Under section 36C(4) of the Electricity Act, the Scottish Ministers may make variations to consents as appear to them to be appropriate, having regard in particular to the company’s reasons for seeking the variation, the variation proposed, the views of consultees, any objections made to the proposed variation and the outcome of any public inquiry.
- 2.1.5 The European Marine Energy Centre Ltd (“the Company”) in its application to vary the s.36 consent for the construction and operation of the Fall of Warness Tidal Test Site (“the Variation Application”) states that the rationale behind the proposed amendments is to extend the end date of the current s.36 consent to allow continued use of the site for developers in the tidal sector in the interim period until a new s.36 consent for the site is determined to expand the electrical capacity to 50 megawatts.
- 2.1.6 The variations proposed in the Variation Application do not fundamentally alter the nature or scale of the European Marine Energy Centre Fall of Warness tidal test site (“the Development”) and there will be no changes to the Development boundary. Officials consider that you can be satisfied that, in this circumstance, the changes proposed are appropriate to be authorised by means of the variation procedure in line with the Variation Guidance
- 2.1.7 Officials advise that the views of consultees have been considered – further detail of which can be found in Annex A. No objections were made to the Variation Application and no public inquiry has been held.

## ANNEX B Legislative Requirements

### 2.2 Environmental Impact Assessment

2.2.1 The Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017 (“the 2017 EW Regulations”) provide that environmental impact assessment (“EIA”) is required in relation to variation applications where the proposed changes are likely to have significant effects on the environment.

2.2.2 Prior to receiving the Variation Application, the Scottish Ministers adopted a screening opinion on 20 July 2022 under the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017, which concluded that the Variation Application did not require environmental impact assessment (“EIA”).

### 2.3 Appropriate Assessment

2.3.1 Regulation 63(1) of the Conservation of Habitats and Species Regulations 2017 (“the Habitats Regulations”) requires that before deciding to undertake, or give any consent, permission or other authorisation for a plan or project which is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and is not directly connected with or necessary to the management of that site, a competent authority must make an appropriate assessment of the implications of the plan or project for the site in view of that site’s conservation objectives.

2.3.2 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 s.36 consent (“the 2015 AA”). Officials have reviewed and undertaken a validation exercise on the AA and are content that no consultation responses, advice, external reports or representations have been received which would invalidate the conclusions or alter the outcome of the 2015 AA in respect of the Development. NatureScot were consulted on the AA validation and agreed with the conclusions reached. The AA validation can be found at Annex D.

### 2.4 Summary and conclusions

2.4.1 MS-LOT considers that the legislative requirements set out above have been complied with throughout the process of determining the Variation Application.

**ANNEX C Draft Decision Notice and Proposed Variation**

[MS.MarineRenewables@gov.scot](mailto:MS.MarineRenewables@gov.scot)



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

**Insert date:**

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,

## Annex C Draft Decision Notice and Proposed Variation

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 ("MSS")

MSS 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 C Draft Decision Notice and Proposed Variation

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.



## Annex C Draft Decision Notice and Proposed Variation

- 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.

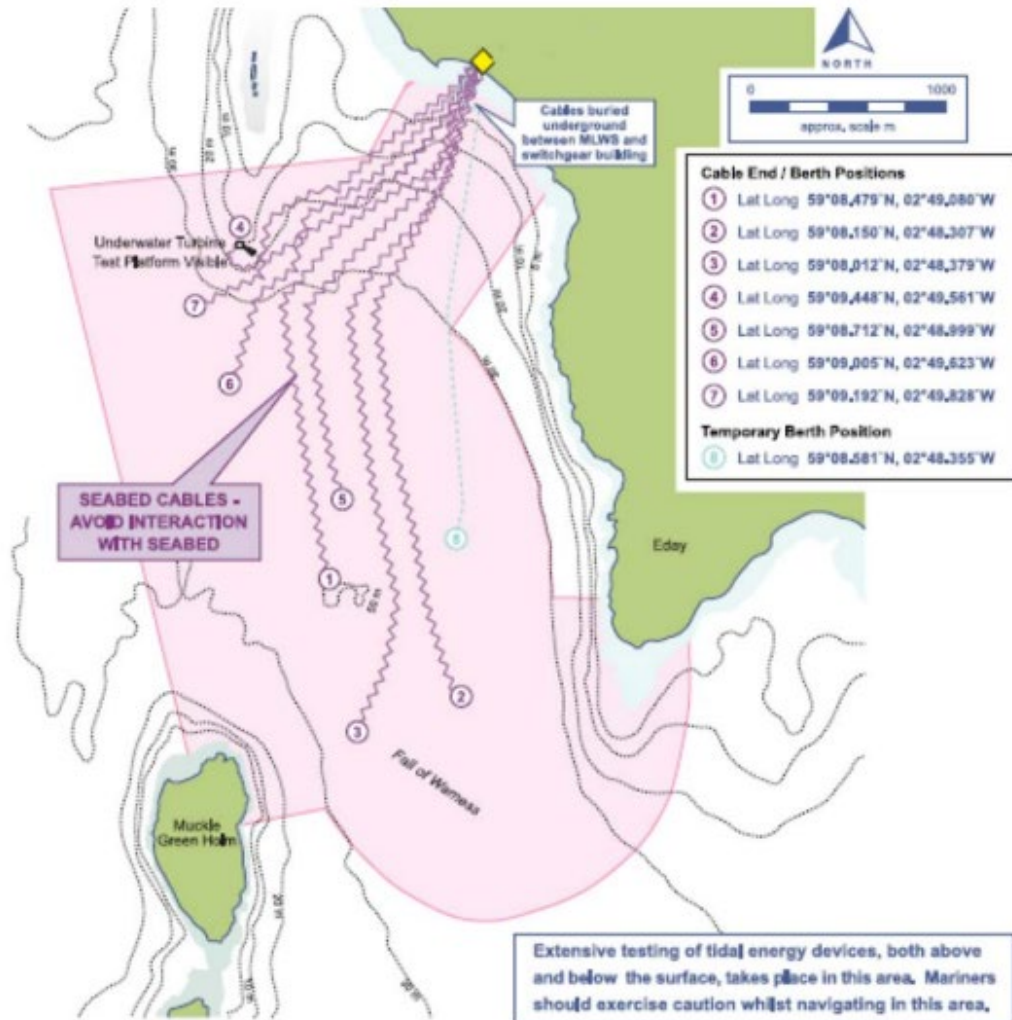


Figure 1. Development Location

**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.

## Annex C Draft Decision Notice and Proposed Variation

“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

## Annex C Draft Decision Notice and Proposed Variation

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)

## ANNEX D Validation of Appropriate Assessment

marinescotland



Scottish Government  
Riaghaltas na h-Alba  
gov.scot

E: ms.marinerenewables@gov.scot

### LICENCE/CONSENT VARIATION – VALIDATION OF APPROPRIATE ASSESSMENT

#### 1 Licence Details

<u>Licensee/Developer Name:</u>	European Marine Energy Centre Ltd (Company Number SC249331)
<u>Site Details:</u>	Fall of Warness tidal test site located in Orkney (“the Development”)
<u>Date Existing Licence/Consent Issued:</u>	Section 36 consents issued on 22 March 2016 (“the Existing Consent”);
<u>Date of Existing Appropriate Assessment (“AA”):</u>	01 December 2015 (“the 2015 AA”)

#### 2 Summary of proposed variation application:

Variation application to extend the duration of the Existing Consent by a period of 3 years (“the Variation Application”).

#### 3 Summary of consultation responses – in relation to European protected sites:

NatureScot (operational name of Scottish Natural Heritage) noted that in the 2015 AA, the then draft North Orkney and Scapa Flow Special Protection Areas (“SPAs”) were not assessed as they were not subject to policy protection at that time. Both sites were subsequently classified, but with amended boundary and reduced qualifying features lists on 16 February 2022. NatureScot noted that, as the Development was already consented when the North Orkney proposed SPA (“pSPA”) was consulted on and granted policy

protection, the consented activities associated with the Development are considered to form part of the baseline conditions of the pSPA, such that no additional management was deemed to be required. Furthermore, the North Orkney and Scapa Flow SPA boundaries do not overlap the Development and their designated features are not generally considered to have connectivity to developments operating outwith the SPA boundaries, with the exception of breeding red-throated divers which NatureScot advised would have been appropriately assessed in the 2015 AA as protected features of previously assessed SPAs. NatureScot therefore concluded no Likely Significant Effect (“LSE”) with respect to the Scapa Flow and North Orkney SPAs as a result of the Variation Application.

NatureScot also confirmed that there are 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, and the Variation Application comprises no change to the site activities or project envelope.

**4 Summary of other information in relation to European protected sites (MSS responses, external reports).**

No specific advice was sought from MSS.

**5 Conclusion - Consideration of whether AA completed for the original decision is still valid:**

No consultation responses, advice, external reports or representations have been received which would invalidate the conclusions or alter the outcome of the 2015 AA in respect of the Existing Consent.

The AA completed for the original decision is still valid in its conclusion that the proposal is not likely to have an adverse impact on the site integrity of any SPAs or SACs detailed in section 1a of the 2015 AA either alone or in combination with other projects providing the mitigation measures previously secured remain in place.

There is no LSE with respect to either the Scapa Flow or North Orkney SPAs arising from the Variation Application.

Name	Assessor or Approver	Date
Rebecca Bamlett	Assessor	20/01/2023
Gayle Holland	Approver	26/01/2023