

ANNEX A REGULATORY REQUIREMENTS: LEGISLATION AND POLICY

APPLICATIONS FOR CONSENTS UNDER SECTION 36 OF THE ELECTRICITY ACT 1989 (AS AMENDED) FOR THE CONSTRUCTION AND OPERATION OF TWO OFFSHORE GENERATING STATIONS, THE SEAGREEN ALPHA AND SEAGREEN BRAVO OFFSHORE WIND FARMS (“THE SEAGREEN DEVELOPMENTS”) LOCATED APPROXIMATELY 27 KILOMETRES EAST OF THE ANGUS COASTLINE

1 LEGISLATION

1.1 The Scotland Act 1998, The Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 (“the 1999 Order”) and The Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) (No. 2) Order 2006.

1.1.1 The generation, transmission, distribution and supply of electricity are reserved matters under Schedule 5, Part II, section D1 of the Scotland Act 1998. The Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 (“the 1999 Order”) executively devolved section 36 (“s.36”) consent functions under the Electricity Act 1989 (as amended) (with related Schedules) to the Scottish Ministers. The Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) (No. 2) Order 2006 revoked the transfer of s.36 consent functions as provided under the 1999 Order and then, one day later, re-transferred those functions, as amended by the Energy Act 2004, to the Scottish Ministers in respect of Scotland and the territorial waters adjacent to Scotland and extended those consent functions to a defined part of the Renewable Energy Zone beyond the Scottish territorial sea, as set out in the Renewable Energy Zone (Designation of Area) (Scottish Ministers) Order 2005.

1.2 The Electricity Act 1989 (as amended)

1.2.1 Any proposal to construct, extend or operate a generating station situated in the Scottish offshore region (12-200 nautical miles (“nm”) from the shore) with a generating capacity in excess of 50 megawatts requires consent under s.36 of the Electricity Act 1989 (as amended). Section 93 of the Energy Act 2004 extends the requirement for s.36 consent to the construction, extension or operation of a generating station situated in the Scottish offshore region. A consent under s.36 may include such conditions (including conditions as to the ownership or operation of the station) as appear to the Scottish Ministers to be appropriate. The s.36 consent shall continue in force for such period as may be specified in, or determined by or under, the s.36 consent.

1.2.2 Paragraph 3 of Schedule 9 to the Electricity Act 1989 (as amended) requires that regard be given to the desirability of preserving natural beauty, of conserving flora, fauna and geological or physiographical features of special interest and of protecting sites, buildings and objects of architectural, historic or archaeological interest. Reasonable steps must be taken to mitigate any

Annex A – Legislative Requirements

effect which the proposals would have on these features. Scottish Ministers must have regard to the extent to which the person, by whom the proposals were formulated, has complied with their duty to mitigate the effects of the proposals. When exercising any relevant functions, a licence holder, a person authorised by an exemption to generate or supply electricity, and the Scottish Ministers must also avoid, so far as possible, causing injury to fisheries or to the stock of fish in any waters.

- 1.2.3 Under s.36B of the Electricity Act 1989 (as amended), Scottish Ministers may not grant a consent in relation to any particular offshore generating station activities if they consider that interference with the use of recognised sea lanes essential to international navigation is likely to be caused by the carrying on of those activities or is likely to result from their having been carried on. The Scottish Ministers in their determination, must have regard to the extent and nature of any obstruction of, or danger to, navigation which, is likely to be caused by the carrying on of the activities, or is likely to result from these activities having been carried on. In determining this issue, the Scottish Ministers must have regard to the likely overall effect (both while being carried on and subsequently) of the activities in question and such other offshore generating activities which are either already subject to s.36 consent or are activities for which it appears likely that such consents will be granted.
- 1.2.4 Under Schedule 8 to the Electricity Act 1989 (as amended), the Electricity (Applications for Consent) Regulations 1990 (as amended) and the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017 (as amended) (“the 2017 EW Regulations”), an applicant must publish notice of its application for s.36 consent in one or more local newspapers, in one or more national newspapers, in the Edinburgh Gazette and on an application website to allow representations to be made concerning the EIA Report, HRA Report and supporting documents submitted by the Company on 14 September 2018 and the EIA Addendum Report submitted on 15 May 2018 (“the Applications”). The Scottish Ministers must also serve notice of any application for s.36 consent upon any relevant planning authority or planning authorities.
- 1.2.5 Paragraph 2(2) of Schedule 8 to the Electricity Act 1989 (as amended) provides that where a relevant planning authority notifies the Scottish Ministers that they object to an application for s.36 consent and where they do not withdraw their objection, then the Scottish Ministers must cause a Public Local Inquiry (“PLI”) to be held in respect of the application. In such circumstances, before determining whether to give their consent, the Scottish Ministers must consider the objections and the report of the person who held the PLI.
- 1.2.6 The location and extent of the Seagreen Developments, to which the Applications relate, are not within any local planning authority as they are wholly offshore. However, Marine Scotland Licensing Operations Team (“MS-LOT”), on behalf of the Scottish Ministers, consulted with the planning authorities most local to the Seagreen Developments; Angus Council,

Annex A – Legislative Requirements

Dundee City Council, East Lothian Council, Fife Council and Scottish Borders Council.

- 1.2.7 The Scottish Ministers are not obliged to require a PLI to be held in this case, but are required, under paragraph 3(2) of Schedule 8 to the Electricity Act 1989 (as amended) to consider all objections received, together with all other material considerations, with a view to determining whether a PLI should be held. Paragraph 3(2) of Schedule 8 provides that if the Scottish Ministers think it appropriate to do so, they shall cause a PLI to be held, either in addition to or instead of any other hearing or opportunity of stating objections to the Applications.
- 1.2.8 The Scottish Ministers can be satisfied that all the necessary tests set out within the Electricity Act 1989 (as amended) have been met through the assessment of the Applications and all procedural requirements have been complied with. Seagreen Wind Energy Ltd (Company Number 06873902) registered at 1 Forbury Place, 43 Forbury Road, Reading RG1 3JH (“The Company”) holds a generation licence. Your officials have approached matters on the basis that Schedule 9, paragraph 3(1) obligations as apply to licence holders and the specified exemption holders should also be applied to the Company.
- 1.3 The Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017 (as amended) and the Marine Works (Environmental Impact Assessment) Regulations 2007 (as amended) (“the 2007 MW Regulations”)**
- 1.3.1 The Environmental Impact Assessment Directive 2011/92/EU (as codified and amended) is targeted at projects which are likely to have significant effects on the environment and identifies projects which require an Environmental Impact Assessment (“EIA”) to be undertaken. The Company identified the proposed Seagreen Developments as one requiring an EIA Report in terms of the 2017 EW Regulations and the Marine Works (Environmental Impact Assessment) Regulations 2007 (as amended) (“the 2007 MW Regulations”). For the purposes of the 2007 MW Regulations, the EIA Report means the Environmental Statement.
- 1.3.2 In compliance with the 2017 EW Regulations and the 2007 MW Regulations, consultation has taken place with Scottish Natural Heritage (“SNH”), the Scottish Environment Protection Agency, Historic Environment Scotland, the relevant planning authorities, and such other persons likely to be concerned by the proposed Seagreen Developments by reason of their specific environmental responsibilities on the terms of the EIA Report.
- 1.3.3 The decision notices required under the 2017 EW Regulations are attached at Annex C and Annex D regarding the s.36 consents. Separate decision notices granted under the 2007 MW Regulations will be issued regarding any marine licences granted in respect of the generating stations.
- 1.3.4 You can be satisfied that the EIA regulatory requirements have been met and your officials have taken into consideration the environmental

Annex A – Legislative Requirements

information, including the EIA Report, the responses received from the consultative bodies and the representations received.

1.4 The Habitats Directive and the Birds Directive

- 1.4.1 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and wild fauna and flora (as amended) (“the Habitats Directive”), provides for the conservation of natural habitats and of wild flora and fauna in the Member States’ European territory, including offshore areas such as the proposed site of the Seagreen Developments. It promotes the maintenance of biodiversity by requiring Member States to take measures which include those which maintain or restore natural habitats and wild species listed in the Annexes to the Habitats Directive at a favourable conservation status and contributes to a coherent European ecological network of protected sites by designating Special Areas of Conservation (“SAC”) for those habitats listed in Annex I and for the species listed in Annex II, both Annexes to that Directive.
- 1.4.2 Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (as amended and codified) (“the Birds Directive”), applies to the conservation of all species of naturally occurring wild birds in the Member States’ European territory, including offshore areas such as the proposed site of the Seagreen Developments and it applies to birds, their eggs, nests and habitats. Under Article 2, Member States are obliged to “take the requisite measures to maintain the population of the species referred to in Article 1 at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level.” Article 3 further provides that “[i]n the light of the requirements referred to in Article 2, Member States shall take the requisite measures to preserve maintain or re-establish a sufficient diversity and area of habitats for all the species of birds referred to in Article 1”. Such measures are to include the creation of protected areas (Article 3.2).
- 1.4.3 The Habitats Directive and the Birds Directive have, in relation to the marine environment outside 12nm, been transposed into UK law by the Conservation of Offshore Marine Habitats and Species Regulations 2017. These regulations are referred to as “the Habitats Regulations”.
- 1.4.4 Developments in, or adjacent to, European protected sites, or in locations which have the potential to affect such sites, must undergo what is commonly referred to as a Habitats Regulations Appraisal (“HRA”). In line with advice from SNH, and to ensure compliance with European Union (“EU”) obligations under the Habitats Directive and the Birds Directive, MS-LOT, on behalf of the Scottish Ministers, undertook an appropriate assessment (“AA”) as part of this HRA.
- 1.4.5 You can be satisfied that the Habitats Regulations requirements have been met. The AA completed has concluded that the Seagreen Developments, alone and in-combination with other plans or projects, will not adversely affect the integrity of any SAC or Special Protection Area. Reasons for

Annex A – Legislative Requirements

diverging from the SNH advice have been provided in the AA and decision notices

1.5 Marine and Coastal Access Act 2009 (“the 2009 Act”)

1.5.1 The 2009 Act executively devolved marine planning, marine licensing and nature conservation powers in the offshore marine region (12-200nm) to the Scottish Ministers. The 2009 Act transferred certain functions in issuing consent under s.36 of the Electricity Act 1989 (as amended) from the Secretary of State to the Marine Management Organisation (“MMO”). The MMO does not exercise such functions in Scottish waters or in the Scottish part of the renewable energy zone, as that is where the Scottish Ministers perform such functions.

1.5.2 The 2009 Act states that, where applications are made for both a marine licence and consent under s.36 of the Electricity Act 1989 (as amended), in those cases where the Scottish Ministers are the determining authority, notice is given to the applicant that the two applications are to be considered together. Scottish Ministers have fulfilled the requirements stated under section 79(3) of the 2009 Act.

1.6 Marine (Scotland) Act 2010 (“the 2010 Act”)

1.6.1 The 2010 Act regulates activities in the territorial sea adjacent to Scotland in terms of marine environment issues. Subject to exemptions specified in subordinate legislation, under Part 4 of the 2010 Act, licensable marine activities may only be carried out in accordance with a marine licence granted by the Scottish Ministers.

1.6.2 Where an application for a marine licence and consent under s.36 of the Electricity Act 1989 (as amended) is to be made, the Scottish Ministers decide and give notice that both applications are to be considered together.

1.6.3 Under Part 2 of the 2010 Act, the Scottish Ministers have general duties to carry out their functions in a way best calculated to achieve sustainable development, including the protection and, where appropriate, the enhancement of the health of the area.

1.7 Climate Change (Scotland) Act 2009 (as amended)

1.7.1 Under Part 2 of the 2010 Act the Scottish Ministers must, when exercising any function that affects the Scottish marine area under the Climate Change (Scotland) Act 2009 (as amended), act in the way best calculated to mitigate, and adapt to, climate change so far as is consistent with the purpose of the function concerned. Under the Climate Change (Scotland) Act 2009 (as amended), annual targets have been agreed with relevant advisory bodies for the reduction in carbon emissions.

2 MARINE AND TERRESTRIAL POLICY

2.1 Scotland’s National Marine Plan

2.1.1 The National Marine Plan (“NMP”), formally adopted in 2015, provides a comprehensive statutory planning framework for all activities out to 200nm. Scottish Ministers must take authorisation and enforcement decisions, which affect the marine environment, in accordance with the NMP.

2.1.2 The NMP sets an objective to promote the sustainable development of offshore wind, wave and tidal renewable energy in the most suitable locations. In doing so, it sets a presumption in favour of sustainable development and use of the marine environment when consistent with the policies and objectives of the NMP. The NMP also contains specific policies relating to the mitigation of impacts on habitats and species, and in relation to the treatment of cables.

2.1.3 Of particular relevance to this proposal are:

- Chapter 4 policies ‘GEN 1-21’, which guide all development proposals;
- Chapter 6 Sea Fisheries, policies ‘FISHERIES 1-3’;
- Chapter 8 Wild Salmon and Diadromous Fish, policies ‘WILD FISH 1 and 3’;
- Chapter 11 Offshore Wind and Marine Renewable Energy, policies ‘RENEWABLES 1, 3-10’;
- Chapter 12 Recreation and Tourism, policies ‘REC & TOURISM 2 and 6’;
- Chapter 13 Shipping, Ports, Harbours and Ferries, policies ‘TRANSPORT 1 and 6’;
- Chapter 14 Submarine Cables, policies ‘CABLES 1, 2 and 5’; and
- Chapter 15 Defence, policy ‘DEFENCE 1’.

2.1.4 MS-LOT has had full regard to the NMP when assessing the Applications. It considers that the Seagreen Developments accords with the NMP.

2.2 Other Marine Policy

2.2.1 The Seagreen Developments will contribute to Scotland’s renewable energy targets and will provide wider benefits to the offshore wind industry which are reflected within Scotland’s Offshore Wind Route Map and the National Renewables Infrastructure Plan (“NRIP”). Offshore wind is seen as an integral element in Scotland’s contribution towards action on climate change. The Seagreen Developments of offshore wind also represents one of the biggest opportunities for sustainable economic growth in Scotland for a generation. Scotland’s ports and harbours present viable locations to service the associated construction and maintenance activities for offshore renewable energy. In addition, Scottish research institutions provide a base

Annex A – Legislative Requirements

of academic excellence for delivering technological advancements and technology transfer and are also well placed to benefit from the creation of this new industry around Scotland.

2.3 Scottish Planning Policy

2.3.1 Scottish Planning Policy 2014 (“SPP”) sets out Scottish Government’s planning policy on renewable energy development. Efficient supply of low carbon and low cost heat and generation of heat and electricity from renewable energy sources are vital to reducing greenhouse gas emissions and can create significant opportunities for communities. Renewable energy also presents a significant opportunity for associated development, investment and growth of the supply chain, particularly for ports and harbours identified in the NRIP. Communities can also gain new opportunities from increased local ownership and associated benefits.

2.3.2 Whilst SPP makes clear that the criteria against which applications should be assessed will vary depending upon the scale of the Seagreen Developments and its relationship to the characteristics of the surrounding area, the SPP states that these are likely to include impacts on landscapes and the historic environment, ecology (including birds, mammals and fish), biodiversity and nature conservation; the water environment; communities; aviation; telecommunications; noise; shadow flicker and any cumulative impacts that are likely to arise. SPP also makes clear that the scope for the Seagreen Developments to contribute to national or local economic development should be a material consideration when considering an application.

2.3.3 MS-LOT has had full regard to the SPP when assessing the Applications. MS-LOT considers that the Seagreen Developments accords with the SPP.

2.4 National Planning Framework 3

2.4.1 Scotland’s National Planning Framework 3 (“NPF3”), adopted in June 2014, sets out the ambition for Scotland to move towards becoming a low carbon country, placing emphasis on the Seagreen Developments of onshore and offshore renewable energy. It recognises the significant wind resource available in Scotland, and reflects targets to meet at least 30% of overall energy demand from renewable sources by 2020 including generating the equivalent of at least 100% of gross electricity consumption from renewables. It also identifies targets to source 11% of heat demand and 10% of transport fuels from renewable sources by 2020.

2.4.2 NPF3 aims for Scotland to be a world leader in offshore renewable energy and expects that, in time, the pace of onshore wind development will be overtaken by the Seagreen Developments of marine energy including wind, wave and tidal power.

2.4.3 MS-LOT has had full regard to the NPF3 when assessing the Applications. MS-LOT considers that the Seagreen Developments accords with the NPF3.

Annex A – Legislative Requirements

2.5 Terrestrial Policy

- 2.5.1 MS-LOT has had full regard to the terms of relevant terrestrial planning policy documents and plans. In addition to the high level policy documents regarding the Scottish Government’s policy on renewables outlined above, MS-LOT has had full regard to a number of national and local level planning documents and plans, including strategic and local development plans.
- 2.5.2 The Local Development Plans (“LDP”) and supporting policies for the relevant planning authorities have been considered by MS-LOT. The LDP for each of the planning authorities support the Seagreen Developments of renewable energy projects and sustainable development.

2.6 Summary

- 2.6.1 MS-LOT considers that the policy documents outlined above are broadly supportive of the Seagreen Developments.

Annex A – Legislative Requirements

DEFINITIONS AND GLOSSARY OF TERMS

- “AA” means appropriate assessment;
- “Applications” – means the EIA Report, HRA Report and supporting documents submitted by the Company on 14 September 2018 and the EIA Addendum Report submitted on 15 May 2018;
- “Company” – means Seagreen Wind Energy Ltd (Company Number 06873902) registered at 1 Forbury Place, 43 Forbury Road, Reading RG1 3JH;
- “EIA” means environmental impact assessment;
- “HRA” means Habitats Regulations Appraisal;
- “LDP” means Local Development Plans;
- “MMO” means Marine Management Organisation;
- “MS-LOT” means Marine Scotland Licensing Operations Team;
- “nm” means nautical miles;
- “NMP” means National Marine Plan;
- “NRIP” means National Renewables Infrastructure Plan;
- “PLI” means Public Local Inquiry;
- “s.36” means section 36;
- “SAC” means Special Areas of Conservation;
- “Seagreen Developments” means the Seagreen Alpha and Seagreen Bravo Offshore Wind Farms;
- “SNH” means Scottish Natural Heritage;
- “SPP” means Scottish Planning Policy 2014;
- “the Birds Directive” means Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (as amended and codified);
- “the Habitats Directive” means Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and wild fauna and flora (as amended);
- The Conservation (Natural Habitats, & c.) Regulations 1994 (as amended), the Conservation of Habitats and Species Regulations 2017 and the Conservation of Offshore Marine Habitats and Species Regulations 2017 are collectively referred to as “the Habitats Regulations”;
- “the 1999 Order” means the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999;
- “the 2007 MW Regulations” means the Marine Works (Environmental Impact Assessment) Regulations 2007 (as amended);
- “the 2009 Act” means the Marine and Coastal Access Act 2009;
- “the 2010 Act” means the Marine (Scotland) Act 2010; and
- “the 2017 EW Regulations” means the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017 (as amended).